

Beyond Ethics on the Sly

The Behavioral Sciences and National-Security Interrogation

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ABSTRACT

When behavioral-science professionals assist national-security interrogators, they enter upon an ethical "no man's land." The Hippocratic ideal of commitment to individuals' well-being fits uneasily with pursuit of national purposes at individuals' expense. Outrage over psychologists' and physicians' central role in America's post-9/11 torture program both underscores this tension and stands as a warning against disregarding it. Disregard it, many did—including CIA, Pentagon, and professional leaders—as psychologists and physicians helped to design, conduct, and legally "justify" torture. Drawing in part upon previously unreported documents, this chapter shows how the CIA, Pentagon, and professional bodies evaded ethical objections and hid their own rationalizations so as to permit psychologists and physicians to play these roles. This history of subterfuge—and the distrust it has inspired—poses a large obstacle to these professionals' assistance in lawful interrogation. Yet their science-based expertise can enhance the effectiveness of investigative

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interviewing that respects international human rights and the law of armed conflict. There is, moreover, no principled basis for drawing a sharp ethical distinction between national security and the myriad other non-therapeutic purposes that these professionals serve. But if behavioral-science professionals are to offer their expertise on behalf of national security without venturing into ethical peril, the bounds of this role must be openly negotiated, not set in secret. To this end, I propose some ethical guidelines as a starting point.

I. INTRODUCTION

When psychologists, psychiatrists, and other behavioral-science professionals advise national-security interrogators, they enter upon an ethical no man's land. Since the CIA and military turned to these professionals as interrogation planners in 9/11's wake, objections to their involvement have been passionate. It hardly helps the case of those who argue for such involvement that psychologists created the CIA's post-9/11 torture program—or that professional societies, called upon to enforce ethical lines as evidence of torture mounted, averted their gaze. But there is mounting reason to believe that evidence-based psychological insights about cognition and persuasion can contribute to the effectiveness of lawful national-security interviewing practice. Is there—should there be—ethical space for this contribution? And, if so, what should the parameters of this space be, and how should those parameters be set?

I argue here that there is ethical room for psychological consultation to national-security interviewers. Such consultation, I contend, does not differ in principle from other non-therapeutic services that psychologists and psychiatrists provide without widespread ethical objection. But the setting of ethical parameters for this national-security role needs to take its fraught history into account. Ethical governance of professional behavior emerges from experience, not pure reason; it is the product of social negotiation that draws from this experience as it takes account of competing concerns. When this process works well, it yields stable ethics norms that reflect an enduring social compact among those concerned about a profession's responsibilities. When it breaks down, as it did for psychologists, psychiatrists, and interrogation in the wake of 9/11, it yields chaos and a crossfire of recriminations, blocking the development of meaningful ethical guidance.

II. THE INTELLIGENCE COMMUNITY: CLANDESTINE ETHICS

A. The CIA

The breakdown in deliberation over the ethics of behavioral-science contributions to national-security interrogation began within months of the 9/11 attacks. In December 2001, as U.S. forces in Afghanistan advanced on the Taliban and began taking prisoners, a just-retired Air Force special forces psychologist, James Mitchell, won a CIA contract to assess Al Qaeda interrogation resistance-training methods. This quickly morphed into a CIA interrogation program that descended to torture.¹

1. Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (United States Senate, 113th Congress 2d Session, 9 December 2014).

Mitchell famously drew upon his experience as an overseer of U.S. military resistance training, remixing methods of abuse so as to break rather than build his subjects' resistance. He tapped an admixture of ideas, from Korean War-era thinking about how communist prison camps broke American POWs to Martin Seligman's learned-helplessness model to Albert Bandura's social-learning theory. And there is no record of his paying any heed to the question of whether the ethics of his profession permitted him to design, oversee, and participate in an interrogation program that brought prisoners to the point of despair.

Within the CIA, some did raise ethical concerns. Little about these expressions of concern has become public, but we know that sometime in late 2002, the chief of the agency's Office of Medical Services (OMS), psychologist Terrence DeMay, objected sufficiently to prompt the director of the CIA's Counterterrorism Center to seek an outside assessment of whether Mitchell's interrogation program comported with the ethics of psychology as a profession. By then, Mitchell and his lead collaborator, fellow former resistance-training psychologist Bruce Jessen, were personally waterboarding prisoners and overseeing abusive interrogations at an expanding archipelago of agency "Black Sites."

Had the Counterterrorism Center looked to independent outside ethics scholars for an evaluation of Mitchell's interrogation program and the role of psychologists in it, the profession's ensuing crisis of ethics and identity over national-security interrogation might have been averted. But instead, the Center turned secretly to an old CIA hand, George Washington University psychologist Mel Gravitz, who opined that (1) the American Psychological Association's ethics code obligated the profession to "protect . . . the national interest,"² and (2) a code provision permitting psychologists to provide "mental health services" outside the scope of their training in the event of *clinical* emergency³ authorized them to do *non-therapeutic* work in "national security emergenc(ies) where lives may be at stake." The code, Gravitz wrote, "must be flexible (sic) applied to the circumstances at hand." CIA behavioral sciences chief Kirk Hubbard, who played a lead role in engaging Mitchell to develop its interrogation program, was more forthright, contending that the APA's ethics code applied to clinical care, not national-security work.⁴

2. Gravitz offered no rationale for this broad assertion.

3. The provision stated in 2002 (as it does now): "In emergencies, when psychologists provide services to individuals for whom other mental health services are not available and for which psychologists have not obtained the necessary training, psychologists may provide such services in order to ensure that services are not denied." American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* (Section 2.02, American Psychological Association 2017) <www.apa.org/ethics/code/> accessed 13 November 2018.

4. David Hoffman and others, *Report to the Special Committee of the Board of Directors of The American Psychological Association: Independent Review Relating to APA Ethics Guidelines, National Security Interrogations, and Torture* (Sidley Austin LLP 2015) 29 [hereinafter, *Hoffman Report*]. Years later, in an unpublished commentary he shared with me, Hubbard would elaborate: "What does seem unethical is for psychologists/psychiatrists to not use our knowledge of human behavior to assist in preventing terrorist threats to innocent victims or to our Western democratic way of life. [...] I think each of us has an obligation to try to balance the law, our duty

The Counterterrorism Center accepted Gravitz's ethical sleight of hand⁵ as an all-clear for Mitchell and Jessen to continue with their program.⁶ The Justice Department's Office of Legal Counsel (OLC), in turn, made psychologists' participation a cornerstone of its defense⁷ of the lawfulness of an interrogation strategy that a near consensus of legal observers holds rose to the level of torture. The involvement of psychologists, along with physicians, ensured the strategy's safety, the OLC held, since these professionals understood human psychological and physiological limits and could be counted on to look out for prisoners' health.

By 2005, fragmentary accounts of the CIA's interrogation program had become public, and scholars of biomedical ethics were voicing alarm over health professionals' reported role. Over the next few years, ethical condemnation mounted as more details about this involvement came to light. But the agency's health professional leadership deemed this harsh judgment irrelevant except insofar as it posed political risk to the program or a threat to state licensure of CIA doctors.

A previously classified 2007 document released in August 2018, characterized as the OMS chief's "Summary and Reflections" on OMS's participation in the program, acknowledged the growing condemnation but dismissed it as "utopian," "formulaic," and otherwise not to be taken seriously as ethical criticism of psychologists' and physicians' "fulfil[ment]" of "a societal obligation" to "save lives."⁸ "The role assigned" to these professionals, the document stated, "combined the societal obligation with a responsibility for patient well-being."⁹ This document,

to our fellow citizens, and [the] ethical codes of our professional organizations. For me, this balance favors society over the so-called rights of terrorists." M Gregg Bloche, *The Hippocratic Myth: Why Doctors Are Under Pressure To Ration Care, Practice Politics, And Compromise Their Promise To Heal* (St Martin's Press 2011) 138–39.

5. Gravitz would later be more forthright about his view of the APA's ethics rules, opining publicly in 2009 that compliance with state authority "takes precedence over the rules and regulations of a private organization," including a professional society's ethics code. Melvin A Gravitz, 'Professional Ethics and National Security: Some Current Issues' (2009) 61 Consulting Psychology Journal: Practice and Research 33.

6. At around the same time (the dates remain undisclosed), unidentified OMS psychologists raised another ethical objection: it was a conflict of interest, they contended, for Mitchell and Jessen to both personally inflict abuse on the CIA's captives and to assess this abusive treatment's intelligence-gathering efficacy. Central Intelligence Agency Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities September 2001–October 2003* (Special Review, US Central Intelligence Agency, 7 May 2004). The CIA tried to finesse this objection in January 2003 by requiring that someone other than the psychologist "who administers the techniques" prepare "the psychological assessment of record": *ibid* 40. But OMS continued to object (without apparent success) on the ground that the same psychologists were permitted to perform both functions.

7. Memo from Jay S Bybee to Alberto R. Gonzales (1 August 2002) in Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005); Memo from John Yoo to Alberto R Gonzales (1 August 2002) in *ibid*.

8. Anonymous Author, "Summary and Reflections of Chief of Medical Services on OMS Participation in the RDI Program" (Approved for Release 10 June 2016) <www.cia.gov/library/readingroom/docs/0006541727.pdf> accessed 27 January 2019.

9. *ibid* 71.

moreover, put forth the astonishing proposition that neither the ethical rules governing these professions nor their means of enforcement (disciplinary procedures administered by professional societies and state licensing boards) applied to CIA operations. "The Office [OMS] believed ethical considerations were entirely personal," its still-anonymous author wrote, "so from the outset made participation in the [interrogation] program voluntary."¹⁰

Disciplinary sanctions by state licensing boards were "a potential risk,"¹¹ the "Summary and Reflections" document cautioned. But the interrogation program's secrecy, its approval by the Justice Department, and the "imprecise" phrasing of ethical prohibitions made licensing board action unlikely,¹² the author reassured readers. "A greater problem than licensing," the document warned, "may be the legal and professional harassment of activists hoping to end an unpopular program by driving away its medical support."¹³ The CIA, in short, told its psychologists and physicians that they could disregard professional ethics because they were unlikely to get caught.

B. The Armed Services

By the summer of 2002, Mitchell's vision of interrogation as the breaking of minds had spread beyond the CIA. At Guantánamo, abusive methods borrowed from the resistance training program Mitchell once oversaw made the leap to military interrogation centers.¹⁴ When, in June 2002, a young Army psychiatrist, Maj. Paul Burney, arrived at Guantánamo for a six-month tour, he expected to work in the camp clinic, treating soldiers with mental health problems.¹⁵ But within a week, he and Air Force psychologist John Leso were pulled aside in a cafeteria by the base's commander, Maj. Gen. Michael Dunlavey, and shown a laptop video—Al Qaeda's macabre mash-up of anti-Western rage and its beheading of *Wall Street Journal* reporter Daniel Pearl. "He told us the people in the Daniel Pearl video were in the

10. *ibid* 70.

11. *ibid* 76.

12. *ibid* 78. The author predicted that "advocacy groups" would probably "attack the licensure" of participating professionals but would likely fail because the Justice Department has given them "legal sanction," their responsibilities "likely would remain classified," and professional ethical guidance was "imprecise."

13. *ibid*.

14. The vectors of contagion are less than clear, but Jessen's evangelism for the methods, commanders' demands for intelligence breakthroughs, and unfounded rumors of the techniques' success all played roles. Senate Committee on Armed Services *Inquiry Into the Treatment of Detainees in U.S. Custody* (US Senate, 110th Congress 2nd Session, 20 November 2008) [hereinafter, *SASC Report*]; Bloche, *The Hippocratic Myth* (n 4). For a firsthand account of how the military's "SERE" (Survival, Evasion, Resistance, Escape) resistance-training methods made their way to Guantánamo, see Mark Fallon, *Unjustifiable Means* (Regan Arts. 2017).

15. The following account of Burney's early experience at Guantánamo, leading up to his commanding officers' insistence that he prepare a list of resistance-training techniques for use in interrogation, is based on a phone interview I conducted with him on 9 March 2011.

camp," Burney recalled to me in 2011. "He wanted us to know the people in the camp were evil."

Dunlavey asked the two whether it would be a "good thing" to show the video to Guantánamo's interrogators, Burney told me. "He was afraid that they were too young and naïve and they would lose focus on [detainees] being evil. . . . We said 'hell no.'" But Burney and Leso would ultimately accede to Dunlavey's main ask—a plan to "get rough."¹⁶ The two looked to the same resistance-training techniques that Mitchell proach wouldn't work. (Interrogators deployed to Guantánamo by the FBI and Naval Criminal Investigative Service (NCIS) were more adamantly opposed: through the summer and fall of 2002, they and their superiors tried without success to block Dunlavey from adopting these tactics.¹⁷) Burney and Leso set about preparing a memo arguing against use of the military's resistance-training methods as interrogation techniques. When their immediate superior, Lt. Col. Jerald Phifer, found out, he became enraged. "I remember John Leso got his butt chewed out by Col. Phifer—that wasn't what he wanted," Burney recalled. "John came back shaken."

Phifer demanded—and the two provided—a list of the abuses employed by resistance trainers.¹⁸ The list, with tweaks here and there, famously made its way up the chain of command, to the desk of Secretary of Defense Donald Rumsfeld, who signed it in December 2002, adopting torture as Pentagon policy and putting the U.S. military on course toward the scandal at Abu Ghraib.¹⁹ More than that, the Pentagon institutionalized the engagement of psychologists and psychiatrists as torture consultants, putting them on so-called Behavioral Science Consultation Teams (BSCTs),²⁰ charged with profiling detainees and custom-sequencing admixtures of rapport building and abuse for use by Guantánamo's military interrogators. All of this unfolded without any known deliberation within the Pentagon about the

16. Bloche, *The Hippocratic Myth* (n 4) 152.

17. For a personal account, by a senior NCIS official, of his and others' efforts to prevent Dunlavey and the Pentagon from adopting these tactics, see Mark Fallon, *Unjustifiable Means* (Regan Arts. 2017).

18. The two assembled this list based on input (including training sessions) with special-forces resistance-training psychologists, to whom Leso had reached out after Dunlavey's mandate to "get rough." *SASC Report*; Fallon (n 17).

19. This brief account leaves out details that are described in depth elsewhere, including Navy General Counsel Alberto Mora's threat, upon seeing the list with Rumsfeld's signature, to file a memo characterizing some of the techniques as torture unless Rumsfeld rescinded this list. Rumsfeld did so, but by April 2003 a Pentagon working group had come up with an only slightly softened version of this list, which he then approved. Bloche, *The Hippocratic Myth* (n 4); *SASC Report* (n 14); Philippe Sands, *Torture Team: Rumsfeld's Memo and the Betrayal of American Values* (St Martin's Press 2008); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (Anchor 2009); Fallon (n 17).

20. Fallon (n 17). The term appears to have been borrowed from law enforcement. Indeed, the Pentagon's Criminal Investigation Task Force (CITF), created in early 2002 to support prosecution of terror suspects, maintained its own BSCT at Guantánamo to support lawful, rapport-building interrogation practice; CITF personnel, including psychologists, objected to Dunlavey's and the Pentagon's repurposing of the BSCT concept to support abusive interrogation practices.

professional ethics of putting psychologists and psychiatrists in these roles. Within a year, in November 2003, a BSCT staffed by a psychiatrist would be established at Abu Ghraib.²¹ Five months later, photos of military police miming abuses in which this BSCT collaborated would trigger the scandal that forced the torture program into public view.

Burney insists he and Leso had ethical qualms. The armed forces, unlike the CIA, provide formal channels—consultation with military lawyers and recourse to a parallel, medical chain of command²²—for psychologists and physicians who believe that an order violates their professional ethics. But, Burney told me, at Guantánamo these channels were blocked. The on-site lawyer advised him that use of the resistance-training abuses on detainees was “ethical and lawful,” he recalled;²³ meanwhile, Burney’s commanders at Guantánamo barred him from telling his medical-command superiors about the planned use of these tactics on the grounds that this plan was outside the scope of medical-command authority.²⁴ This put him in an impossible bind. Phifer had given him an order. Disobedience could mean court-martial—unless he could prove that the order was “patently illegal,” an unlikely prospect since a lawyer had approved it.

Thus the military, like the CIA, enlisted psychologists and psychiatrists as designers and collaborators in an interrogation strategy meant to reduce prisoners to despair—and that thereby constituted torture²⁵—without known, serious consideration of the professional ethics precepts these duties challenged. Only after CBS News aired the infamous Abu Ghraib photos in April 2004²⁶ did the momentum of serial, shocking revelations begin to build toward exposure of

21. Bloche, *The Hippocratic Myth* (n 4); United States Army, *Article 15-6 Investigation of the 800th Military Police* (United States Army 2004) [hereinafter, *Taguba Report*].

22. Physicians and other health professionals (including clinical psychologists) who deploy with military units are subject to two parallel chains of command—the combatant commands under which they deploy, and separate medical lines of command, leading up to the Surgeons General for the Army, Navy, or Air Force. Deployed health professionals who are unable to work through disagreements over whether a combatant commander’s order requires them to violate professional ethics can turn to their medical chains of command to seek both advice and revision or rescission of the contested order. Within the command, challenges to such orders go up the line, to an officer of equal rank with the combatant commander who issued the order; the two officers are then supposed to work out a solution to the conflict.

23. The lawyer, Diane Beaver, Guantánamo’s Judge Advocate General (JAG) Corps legal advisor on detainee matters, prepared a memo to this effect, roughly paralleling the August 2002 OLC “Torture Memos” (to which she did not then have access). Memo from Diane Beaver to General James T Hill, Commander, Joint Task Force 170 (11 October 2002).

24. Email from Paul Burney to Gregg Bloche (23 March 2010).

25. For in-depth analysis of why this would constitute mental torture under U.S. law, see Chapter 2 in this volume by D Luban and KS Newell.

26. 60 Minutes II, ‘Abuse of Iraqi OWs by GIs Probed’ (CBS, 27 April 2004) <www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> accessed 17 November 2018; Seymour Hersh, ‘Torture at Abu Ghraib,’ *The New Yorker* <www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib> accessed 17 November 2018.

psychologists' and other health professionals' roles in the military's version of "enhanced interrogation."

The randomness of events led to my playing a role in this exposure—and in early discussions of the professional-ethics crisis it revealed. Six weeks after CBS aired the Abu Ghraib photos, I placed an op-ed in the *New York Times* contending that military physicians could and should have put a stop to torture and other abuse by reporting it.²⁷ Days after, I was invited to meet with advisors to the Surgeons General of all three service branches to share my thinking about the ethics quandaries that post-9/11 detention and interrogation programs presented for health professionals. Meetings over the summer led to plans for a September Grand Rounds at the military's medical school (the Uniformed Services University of the Health Sciences, or USUHS), during which clinicians previously deployed to detention settings would present ethical dilemmas, and I and a USUHS ethicist would comment.

For the armed services' medical commands, this was to be a first step toward an ethics dialogue that engaged people outside the military; prior to the Abu Ghraib scandal, military medicine's uniformed leaders struggled in secret with the fragmentary information that reached them concerning the interrogation program's professional-ethics dilemmas. But in the late summer, I was informed that plans for the Grand Rounds had been called off by military medicine's civilian overseer, Assistant Secretary of Defense for Health Affairs William Winkenwerder. More than that, I was told, there would be no further consultation with civilians outside the military. The Pentagon's civilian leadership had decided that any professional ethics questions posed by detention and interrogation of terror suspects would be dealt with confidentially, in-house.

Uniformed clinical leaders with whom I had been conferring voiced dismay. They objected to being cut off from the support and counsel of civilian peers, and they complained that their politically-appointed civilian overseers expected them to disregard their professions' ethical traditions. And they feared—with good reason, it would turn out—that psychiatrists and psychologists deployed to detention sites were being pressed to collude in conduct that breached transnational ethics and law.

With a Georgetown-Greenwall Fellow, Jonathan Marks, I followed up and found out more, from not-for-attribution interviews as well as documents obtained via the Freedom of Information Act and cooperative military sources. In a series of pieces that ran in the *New England Journal of Medicine* and *New York Times* over the next year,²⁸ we reported that physicians and psychologists collaborated in the

27. M Gregg Bloche, 'After Abu Ghraib; Physician, Turn Thyself In,' *New York Times* (10 June 2004) <www.nytimes.com/2004/06/10/opinion/after-abu-ghraib-physician-turn-thyself-in.html> accessed 11 November 2018.

28. Neil Lewis, 'Interrogators Cite Doctors Aid at Guantanamo,' *New York Times* (24 June 2005) <www.nytimes.com/2005/06/24/us/interrogators-cite-doctors-aid-at-guantanamo.html> accessed 11 November 2018; M Gregg Bloche and Jonathan H. Marks, 'Doctors and Interrogators at Guantanamo Bay' (2005) 353 *New England Journal of Medicine* 6; M Gregg Bloche and Jonathan H Marks, 'When Doctors Go to War' (2005) 352 *New England Journal of Medicine* 3; M Gregg Bloche and Jonathan H Marks, 'Doing Unto Others as They Did Unto US.'

development of interrogation protocols that likely descended to the level of torture²⁹ and employed detainees' health information to custom tailor abuse. We also reported on the Pentagon civilian leadership's purported ethical justification for this collaboration: Hippocratic ethics did not apply.

Health professionals assigned to interrogation teams, a deputy assistant secretary of defense told us, do not act as health professionals and are thus not bound by patient-oriented ethics. A medical degree, he said, is not a "sacramental vow"; it is a certification of skill. Ditto for psychologists—even those who had previously (and would again) work as clinical caregivers. Even current clinical caregivers, he insisted, have only a limited doctor-patient relationship with detainees and "make it very clear to [them] that their medical information will not be protected." "To the extent it is military-relevant," he added, "that information can be used."

That the Pentagon had adopted this stance without guidance from ethics or legal scholars, civilian professional institutions, or even the several uniformed medical commands didn't seem to trouble its politically appointed leaders. To the contrary, public criticism of this ethics stance³⁰ in the wake of our initial account of it, in January 2005, was followed by behind-the-scenes Department of Defense efforts³¹ to bring civilian professional societies into line. Efforts to enlist professional societies representing psychiatrists and other physicians met mixed success,³² but with psychologists, DoD prevailed. "Psychology is an important weapons system," Army Surgeon General Kevin Kiley told the APA annual meeting in 2006. By

New York Times (14 November 2005) <www.nytimes.com/2005/11/14/opinion/doing-onto-others-as-they-did-onto-us.html> accessed 11 November 2018.

29. These pieces included the first published accounts of use of "Behavioral Science Consultation Teams" to develop interrogation plans, reliance on a psychological model that employed uncontrollable stress to induce hopelessness and thus compliance, and remixing of abuses employed for resistance training purposes by the military's SERE ("Survival, Evasion, Resistance, Escape") schools.

30. See generally Lewis (n 28); Steven H Miles, 'Medical Ethics and the Interrogation of Guantanamo 063' (2007) 7 *American Journal of Bioethics* 1; Brad Olson, Stephen Soldz, and Martha Davis, 'The Ethics of Interrogation and the American Psychological Association: A Critique of Policy and Process' (2008) 3 *Philosophy, Ethics, and Humanities in Medicine* 1; Stephen Soldz, 'Healers or Interrogators: Psychology and the United States Torture Regime' (2008) 18 *Psychoanalytic Dialogues* 592.

31. The Navy and Air Force medical commands were conspicuously absent from these efforts, but Army Surgeon General Kevin C Kiley took on a high-profile role in DoD's bids for support from the American Psychiatric Association, American Medical Association, and American Psychological Association.

32. The two main targets of these efforts, the American Psychiatric Association and the American Medical Association, adopted positions in 2006 that permitted members to teach interviewing skills to interrogators but forbade then from consulting on particular interrogations or helping to develop interrogation plans, let alone personally conducting interrogations. American Psychiatric Association, 'Position Statement on Psychiatric Participation in Interrogation of Detainees' (May 2006, Reaffirmed 2014) [hereinafter, *Am. Psych. Position Statement*]; American Medical Association, *Code of Medical Ethics* (Opinion 2.068 Physician participation in interrogation 2006); see pp. 283–85.

then, DoD had succeeded in its backdoor efforts to obtain a statement that tacitly endorsed psychologists' roles in its full range of interrogation strategies, even those that descended to torture. Within the military as within the CIA, professional-ethics barriers to complicity in these strategies were dealt with on the down-low.

III. THE BEHAVIORAL-SCIENCE PROFESSIONS: SUBTERFUGE AND SCANDAL

A. The American Psychological Association Greenlights Torture

The APA, of course, didn't openly condone torture. To the contrary, the panel, dubbed "PENS" (for "Psychological Ethics & National Security"³³), that the Association's leaders assembled in 2005 to greenlight participation in CIA and military interrogation programs reiterated earlier APA rejections of complicity in torture. But the panel endorsed interrogation as a new "area of practice" for psychology, backed the Pentagon's proposition that psychologists in this "area of practice" have no duty to their prisoner-subjects' well-being, and proclaimed (with shameless circularity) that the only "ethical obligation" psychologists have to these subjects is to "ensure that their activities . . . are safe, legal, and ethical."

This, of course, begs the question of what is "legal." And here's where the PENS panel made and disguised its key move.³⁴ Rather than accepting long-standing international or even U.S. definitions of "torture," it said blandly: "Psychologists involved in national security-related activities follow all applicable rules and regulations," and "[o]ver the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba [Guantánamo], such rules and regulations have been significantly developed and refined."³⁵ Among the "rules" supposedly "developed and refined" was the definition of torture, reimagined by the OLC's "Torture Memos" (in disregard of both international and U.S. law³⁶) to permit "enhanced interrogation." Psychologists could thus collaborate in torture (as the world defined it) because it wasn't torture (as the Bush administration's legal interpreters defined it).

Indeed, military psychologists were *obligated* to collaborate if so ordered, since the statement rendered doing so "ethical." Had the APA made such collaboration *unethical* (by rejecting the Bush OLC's twisted definition of torture), psychologists in the armed services would have been *required by law* to disobey such an order, since

33. The panel was formally appointed by the APA president and called the "Presidential Task Force on Psychological Ethics & National Security."

34. See Bloche, *The Hippocratic Myth* (n 4) 163-64 for a more detailed discussion of the APA panel's subterfuge.

35. American Psychological Association, *Report of the American Psychological Association Presidential Task Force on Psychological Ethics and National Security* (American Psychological Association 2005) 5.

36. Sands, *Torture Team* (n 17); David Cole, *Torture Memos: Rationalizing the Unthinkable* (New Press 2009).

military law requires professionals to adhere to the ethics of their professions,³⁷ rendering an order to breach them patently illegal.³⁸ The APA's stamp of ethical approval (via its tacit endorsement of the OLC's redefinition of torture) rendered military psychologists' noncompliance with such an order into a crime.³⁹ Casual readers of the PENS statement saw its purported prohibition against participation in torture and missed the subterfuge. But the statement's architects would soon discover that their ethical permissiveness on the down-low was unsustainable.

Subterfuge was embedded from the beginning in the process that produced the PENS statement. Three months after the April 2004 revelations of debasement of prisoners at Abu Ghraib, APA ethics director Stephen Behnke invited CIA and military psychologists to a meeting to "explore" the "unique ethical issues" raised by "national security investigations."⁴⁰ Behnke committed to keeping the list of attendees, the substance of their discussions, and the very fact of the meeting confidential. He promised as well that the association would "neither assess nor investigate the behavior of any specific individual or group."⁴¹ Gravitz was among the invitees; there is no evidence that outside ethics or legal scholars (or psychologists without professional ties to the national-security sector) participated.⁴²

In the early weeks of 2005, as public accounts of psychologists' involvement in abusive interrogation first emerged, some national-security psychologists sought formal guidance from the association.⁴³ Whether they were merely looking for APA ethical cover, as critics have alleged,⁴⁴ or genuinely seeking counsel remains a matter

37. Defense Health Board, *Ethical Guidelines and Practices for U.S. Military Medical Professionals* (US Department of Defense, 3 March 2015).

38. Manual for Courts-Martial, United States pt. IV ¶14.b.(2)(a)(2016).

39. Members of the armed forces are required, on pain of criminal prosecution, to obey lawful orders, even when personal conscience dictates otherwise. Shane Reeves and David Wallace, 'Can US Service Members Disobey an Order to Waterboard a Terrorist?' *Lawfare* (6 April 2016) <www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist> accessed 15 November 2018. In this article, Reeves and Wallace state that "... the UCMJ articles make clear that obedience is only required for lawful orders. Patently or manifestly illegal orders impose no duty of obedience on the service member and instead mandate disobedience."

40. *Hoffman Report* (Exhibits, Binder 1) (n 4) 1180ff.

41. *ibid.*

42. *ibid* 577-78.

43. *ibid* (Preliminary Suggestions for Task Force Members) 230ff.

44. Stephen Soldz, Nathaniel Raymond, and Steven Reisner, *All The President's Psychologists: The American Psychological Association's Secret Complicity with the White House and US Intelligence Community in Support of the CIA's "Enhanced" Interrogation Program* (April 2015) <<https://s3.amazonaws.com/s3.documentcloud.org/documents/2069718/report.pdf>> accessed 18 November 2018; Letter from Roy Eidelson, Stephen Soldz, Steven Reisner, and others to Dr Younggren and Members of the APA Division 42 Board (31 October 2012) <www.ethicalpsychology.org/materials/Coalition-Response-to-Div42-Board.pdf> accessed 18 November 2018; Roy Eidelson, 'Dr. Frankenstein and the APA's Decade of Monstrosities' *Psychology Today* (28 August 2012) <www.psychologytoday.com/us/blog/dangerous-ideas/201208/dr-frankenstein-and-the-apas-decade-monstrosities> accessed 18 November 2018.

of controversy. APA leaders could have responded to these requests by reaching out widely—to ethics scholars, experts on international human rights and the laws of war, civilian and military practitioners, and others—to gather knowledge and perspectives on this new ethics challenge. They could have done so publicly, with an eye toward the high stakes for their profession and its clients as revelations seeped out and scandal brewed. Among the possibilities were high-profile fora with prominent speakers; special issues of professional journals; an interdisciplinary panel of ethicists, legal scholars, and others to draft guidance; and a call for a public investigation with subpoena power to clarify the facts.

But instead, the APA's leaders opted for the panel that produced the PENS statement—a 10-person “task force” that included 6 military psychologists, 5 of whom had overseen or advised interrogators at Guantánamo, Abu Ghraib, or elsewhere. The panel included no ethics or legal scholars; nor did it seek input from any⁴⁵—or seek outside review of its analysis and conclusions before presenting them to the media and prevailing on the association's board to adopt them on an “emergency” basis. Members were barred from discussing task force deliberations with outsiders and even from taking notes when the group met. Leaked task force listserv discussions, along with hundreds of internal APA emails later made available to an independent investigator, sketch a picture of disinterest in ethics expertise and disregard, indeed contempt, for international human rights norms. “I have zero interest,” APA President Gerald Koocher (an active participant in PENS task force deliberations) remarked on the listserv, “in entangling APA with the nebulous, toothless, contradictory, and obfuscatory treaties that comprise ‘international law.’”

The lone lawyer or ethicist in this mix, APA ethics director Behnke,⁴⁶ staffed the task force and drafted its statement but provided minimal direction as to what law or ethics might require. To the contrary, internal APA communications show,⁴⁷ he served mainly as a conduit for military psychologists' views, going along with their

45. Marks and I were asked to speak at the task force's lone meeting, in June 2005, then disinvited a day before we were to appear, after military members objected to our presence. Bloche, *The Hippocratic Myth* (n 4) 165. Notes kept surreptitiously by a civilian task force member, Jean Maria Arrigo, report that two military members, Larry James (who'd served on BSCTs at Guantánamo and Abu Ghraib) and Morgan Banks (the resistance-training psychologist who was consulted by Leso and Burney as they developed the list of abusive techniques Rumsfeld signed off on and who would later play the lead role in developing the Pentagon's BSCT policies and procedures) claimed our accounts in the *New England Journal of Medicine* put psychologists' lives at risk. “Big hullabaloo about Gregg Bloche,” Arrigo recorded. “The military people don't want him.” *Hoffman Report* (Exhibits, Binder 3) (n 4) 807. There is no evidence that the task force sought input from other scholars or commentators outside of the insular realm of national-security psychologists.

46. Behnke is both a psychologist and a law school graduate (though he didn't formally counsel the APA as an attorney).

47. The report compiled by David Hoffman and his group at Sidley & Austin provides a detailed account of how military psychologists who served on or advised BSCTs and helped to write Pentagon interrogation policy channeled their views on a variety of issues (including the relevance of international human rights law) through Behnke: *Hoffman Report*, (Executive Summary) (n 4) 37ff, 142ff.

insistence that international human rights law's standards weren't relevant to their ethical obligations to prisoners.⁴⁸ The task force's chair, a school psychologist, reinforced this stance, observing on the leaked listserv that "it seems that our colleagues from the military were clear that including such standards in the document [the task force's statement] would likely (perhaps definitely) put the document at odds with United States law and military regulations." "The effect of such a conflict," she added, "would be that the military would simply have ignored the document."⁴⁹

This was patently untrue. Military law requires professionals who wear the uniform to adhere to their professions' ethical obligations. It thereby renders arbiters of these obligations impossible to ignore. Gaining APA approval was thus critical for DoD's effort to incorporate psychologists into its interrogation program. DoD psychologists who pressed for the PENS panel's thumbs-up understood this—and expressed their gratitude. "Owe both of you, Steve and Russ, and the rest of your panel a HUGE THANKS!!" one of Behnke's two main DoD points of contact told Behnke and another senior APA official a month after the association adopted the PENS statement.⁵⁰ "Confidentially - The report of the PENS Task Force has enabled the Army Surgeon General to move forward with interim guidance and doctrine on functioning of the behavioral-science consultants to this process. [...] I wanted you to know what an important contribution your timely intervention has made."⁵¹ There is no evidence that Behnke corrected the task force chair—or acknowledged this critical, enabling role to the panel's civilian members.

B. "Collusion" and Cover-Up

An independent inquiry commissioned by the APA in response to allegations that its leaders wrongfully did the Pentagon's bidding would conclude a decade later that Behnke masterminded a scheme of "collusion" with military psychologists to shield them from legal consequence for complicity in torture and to permit their ongoing participation in interrogation.⁵² Whether or not the "collusion" shoe fits, it is clear that APA ethics leaders sought to keep military psychologists from being held to account. A PENS task force member told me in 2010 that both civilian and

48. Like Koocher (and, ultimately, the task force statement), they took the position that U.S. law (as construed by the Bush administration), not international law, defined torture and other concepts that set their ethical bounds. See eg email from Col. Morgan Banks to Stephen Behnke (25 November 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 770.

49. Email Messages from the Listserv of the American Psychological Association's Presidential Task Force on Psychological Ethics and National Security (22 April 2005-26 June 2006) <http://amazonaws.com/propublica/assets/docs/pens_listserv.pdf> accessed 18 November 2018.

50. Email from Lt Col Debra Dunivin to Stephen Behnke and Russ Newman (9 August 2005) in *Hoffman Report* (Exhibits, Binder 1) (n 4) 1298. That Newman (chief of the APA division that oversaw psychologists in clinical practice) and Dunivin were married hardly reassured those who believed that the APA should render an arm's-length judgment on the military's push for a permissive approach.

51. *ibid.*

52. *Hoffman Report* (Executive Summary) (n 4) 10-42.

military participants were swayed by concerns about psychologists' legal vulnerability. "People . . . said, look, psychologists are good guys, and you don't want them to be prosecuted," this member recounted.⁵³

For years after the PENS statement, APA officials persisted in their efforts to protect members who consulted to interrogators. As successive revelations of complicity in detainee abuse shook the profession and resistance from APA dissenters mounted,⁵⁴ Behnke and other association officials circled their wagons more tightly. Rather than taking the revelations seriously, Behnke and the others took military psychologists' denials at face value, dismissing these revelations as unsubstantiated allegations (while doing nothing to investigate them or to urge that others do so).⁵⁵ When, in 2011, APA Ethics Committee staff refined their draft responses to queries submitted for a planned textbook on the ethics of psychologists' national-security activities, Behnke told senior association officials that "[o]ur primary focus was to write responses that would not cause us any problems," since "many [submissions] were written in an attempt to get the Ethics Committee to make a statement that could then be used in an ethics complaint."⁵⁶

More generally, psychology's professional leaders went awry by developing, then defending their permissive stance in secretive, oft-disingenuous fashion. The thousands of pages of internal APA documents obtained by the independent inquiry show that APA headquarters relied almost exclusively, for guidance, on a small circle of military psychologists, most of whom themselves had roles in the interrogation of terror suspects. When a firestorm of public and professional ire immediately followed the PENS panel's statement, Behnke sought counsel and support from the same military psychologists. They praised him as a

53. Bloche, *Hippocratic Myth* (n 4) 165.

54. See eg Coalition for an Ethical Psychology, *A Call for Annulment of the APA's PENS Report* (2010) <www.ethicalpsychology.org/pens/> accessed 18 November 2018.

55. Anticipating my own appeal to him, during an August 2005 joint appearance on an NPR program, to support an independent inquiry into reports of detainee abuse, Behnke asked two Army psychologists (One, Col Morgan Banks, was responsible for developing DoD's BSCT policy; the other, Col Larry James, had served on BSCTs at both Guantánamo and Abu Ghraib) for counsel on "how best to handle." He told them he'd start by "say[ing] that the DoD has conducted an investigation," adding, "what more should/could I say?" Banks responded by citing DoD's several investigations of itself, including "the latest, by the Army Surgeon General, who found no evidence that psychologists or psychiatrists acted improperly." "Excellent, Morgan, thanks," Behnke replied, listing three DoD self-investigations, then inquiring, "are there others?" Email exchange between Stephen Behnke and Col. Morgan Banks (24-25 August 2005) in *Hoffman Report* (Exhibits, Binder 1) (n 4) 1135-38. Ignoring published accounts (by myself and others) of complicity by psychologists and physicians in detainee treatment that the International Committee of the Red Cross (ICRC) deemed "tantamount to torture" and that President Obama would later conclude constituted torture, Behnke claimed there was no "credible evidence" to this effect and said that "APA is proud of its members who serve their country and protect innocent life, and we're not going to cast aspersion on [them]": *ibid* at 1137-38.

56. Email from Stephen Behnke to Norman Anderson, Michael Honaker et al (24 January 2011) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 423.

"hero"⁵⁷ and "our Knight in Shining Armor,"⁵⁸ and they helped him to craft an aggressive response. As the firestorm around him grew—a campaign to rescind the PENS statement, charges of conflict of interest and collusion with the military, and calls for his firing—Behnke edged toward paranoia. "[I]t has become clear," he wrote in July 2006 to the association's current and immediate past presidents, "that there is, for lack of a better term, a 'left wing conspiracy' against APA on this issue, something I've suspected for a long while but have become entirely convinced of now."⁵⁹

To review the email chains that document APA officials' collaboration with their military counterparts is to encounter a central irony. DoD psychologists have put prevention of "behavioral drift" at the core of their case for involvement in interrogation.⁶⁰ They point to their professional understanding of how people working at close quarters, isolated from others, and under high stress can depart from rules they're expected to follow, then reinforce each other's deviancy to the point that the entire group takes leave from the larger society's norms.⁶¹ Psychologists, they contend⁶²—indeed Behnke himself has argued—can "observe and intervene to prevent behavioral drift" and resulting "deviation from professionally and ethically acceptable behavior," including improper treatment of detainees.⁶³ Yet Behnke and the DoD psychologists to whom he deferred ended up illustrating the process of behavioral drift. Isolated by their self-imposed secrecy, under stress from growing public and professional criticism, and reinforced by their mutual, embattled reassurances, they took leave from reality, bemoaning "left wing conspiracy,"

57. Email from Morgan Banks to Stephen Behnke (11 August 2005) in *Hoffman Report* (Exhibits, Binder 1) (n 4) 1098-99 ("You are my hero. Don't let the bastards get you down.").

58. Email from Jeffrey Stolrow to Stephen Behnke and Debra Dunivin (10 January 2008) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 885.

59. Email from Stephen Behnke to Gerald P Koocher and Ronald F Levant (9 July 2006) in *Hoffman Report* (Exhibits, Binder 3) (n 4) 28.

60. An October 2005 "Guidance" document, prepared by Army psychology leaders for "behavioral science consultants" (BSCs), cast prevention of behavioral drift as a central BSC function. Interim Guidance: U.S. Army Behavioral Science Consultation to Interrogation and Detention Operations (7 October 2005) 7, 12, 13, 15, in *Hoffman Report* (Exhibits, Binder 1) (n 4) 1253, 1258, 1259, 1261.

61. Philip Zimbardo's 1971 Stanford Prison Experiment is the touchstone for this argument. In the experiment, undergraduates were separated into "prisoners" and "guards" with complete control over their prisoners; within less than a week Zimbardo famously stopped the experiment prematurely because the "guards" had become abusive beyond all expectations. See generally 'The Stanford Prison Experiment: A Simulation Study on the Psychology of Imprisonment' <www.prisonexp.org/> accessed 18 November 2018.

62. See eg email from Rhea Farberman to Stephen Behnke and Morgan Banks (24 June 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 555.

63. Stephen Behnke, 'Ethics and interrogations: Comparing and contrasting the American Psychological, American Medical and American Psychiatric Association positions' (2006) 37 *Monitor on Psychology* 66.

stymying APA members' efforts to disavow their permissive approach, and crafting media strategies for striking back at their critics.

C. Exposure and Condemnation

Though Behnke and his former DoD and APA collaborators were, as this chapter went to press, pursuing multiple lawsuits against those who conducted the independent inquiry,⁶⁴ they'd not challenged the inquiry's core finding—that they worked together for years to shape and defend APA's permissive stance and to mislead association members and the public about the extent to which it condoned abusive practices. As the inquiry report notes, Behnke's main military collaborator, Col. Morgan Banks, and his colleague, Col. Debra Dunivin, came together on the meme that psychologists' mission was to make interrogation “legal, ethical, safe, and effective.”⁶⁵ They and Behnke pitched this antiphonal phrase to the PENS panel and DoD. By early autumn 2005, it was part of both APA policy and the Pentagon's confidential “Guidance” for “behavioral-science consultation to interrogation and detention operations.”⁶⁶

DoD's “Guidance” adopted the PENS statement as the measure of what was “ethical,”⁶⁷ while PENS, as I noted earlier, grounded its ethical boundaries on the Bush administration's human-rights-rejecting understanding of what was legal. The result was a circular, senseless rendering—an M. C. Escher print realized in words—that deferred to the Bush administration's contorted claims about what sorts of interrogation methods were acceptable.

As for what was “safe,” the DoD “Guidance” and the PENS statement said little, beyond boilerplate references to psychologists' expert judgment. But the chief drafter of the “Guidance,” Morgan Banks, made plain what he had in mind when he told Behnke “[t]here is nothing in the [PENS] statement that says the psychologist cannot assist in causing some level of distress, as long as it does not rise to the level of cruel, inhuman, or degrading treatment”⁶⁸—as defined by the Bush

64. Behnke and Morgan Banks (formerly Chief of the Psychological Applications Directorate for the U.S. Army Special Operations Command), Debra Dunivin (a former lead psychologist supporting Guantánamo Bay interrogation operations), Larry James (a now-retired Army Colonel deployed as lead psychologist supporting Guantánamo's interrogation operations prior to Dunivin), and Russ Newman (formerly chief of the APA's Practice Directorate) have filed suits in Ohio, the District of Columbia, and Massachusetts against the Sidley Austin law firm (which conducted the inquiry), David Hoffman (the Sidley partner who led it), and the APA (which commissioned it and fired Behnke hours after its release). Complaint at 1, *James et al v Hoffman et al*, —N.E.3d— (Ohio Ct App 2018); *Behnke et al v Hoffman et al* (DC Mun Ct 2017); *Behnke et al v Soldz et al* (Mass Dist Ct 2018). The Massachusetts complaint also names Stephen Soldz, an early PENS critic, as a defendant.

65. *Hoffman Report* (n 4) 253ff.

66. Interim Guidance: U.S. Army Behavioral Science Consultation to Interrogation and Detention Operations (7 October 2005) 6 in *Hoffman Report* (Exhibits, Binder 1) (n 4) 1247, 1252.

67. *Ibid* 17, 21-22.

68. Email from Col Morgan Banks to Stephen Behnke (5 July 2005) in *Hoffman Report* (Exhibits, Binder 1) (n 4) 983-84. Moreover, as noted earlier, Banks (and the Pentagon) deferred

administration, not international law.⁶⁹ Two years later, he was more blunt, in response to concern that U.S. law fell short of Geneva Convention prohibitions on psychological abuse of detainees: "Yes, I fully admit that I am very comfortable damaging the self-esteem of sociopaths who want to kill me. You bet."⁷⁰

Banks displayed wry wit when it came to the disconnect between the APA's acquiescence to its members' collaboration in abuse and the association's public messaging. Replying to an email from Behnke suggesting that PENS supporters "frame" dissent as disagreement "over the correct strategy to reach our common goal: ethical interrogations,"⁷¹ Banks remarked, "You are VERY correct in pointing out that how you frame the debate will determine the outcome. We help keep them safe. (All those against safety please stand up.)"⁷²

Repeatedly,⁷³ Behnke and others at APA coordinated with Banks and others at DoD on feints and misdirections. Insisting that "torture" didn't work was a recurring one.⁷⁴ That they meant torture *as defined by the Bush administration OLC* and rejected *even by Mitchell and Jessen* as likely to stiffen subjects' resistance⁷⁵ was a nuance that they counted on to drift past journalists and PENS dissenters.

to the Bush administration OLC's permissive redefinitions of this and other human-rights and law-of-armed-conflict terms.

69. Criticizing one international human rights proponent's "lack of faith in the US political system," Banks later wrote Behnke: "Perhaps there should be two psychological organizations, an American Psychological Association, one which believes in the US Constitution and the rule of law, and the International Psychological Association, one that supports dictatorships, communist societies, and democracies equally." Email from Col Morgan Banks to Stephen Behnke (25 November 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 770.

70. Marginal Comment by Col Morgan Banks, to Stephen Behnke, on 18 March 2007 letter from Neil Altman to Michael Gelles and Olivia Moorehead-Slaughte in *Hoffman Report* (Exhibits, Binder 2) (n 4) 801-02. That the lead author of DoD policies concerning psychologists' roles in interrogation and detention operations presumed all captives were "sociopaths" intent on killing him is another indicator of some military psychologists' "behavioral drift."

71. Email from Stephen Behnke to Gerald Koocher (23 September 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 677-78.

72. Email from Col Morgan Banks to Stephen Behnke (23 September 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 677 (all capitals and parentheses in original).

73. The independent inquiry report describes multiple instances of collaborative public messaging to the news media, dissenting psychologists, human-rights activists, and others: *Hoffman Report* (n 4).

74. For example, Behnke told a *Washington Monthly* writer that Banks "has been clear" that "TORTURE OR ABUSIVE TREATMENT WILL INCREASE RESISTANCE TO AN INTERROGATOR, AND THUS WILL HAVE PRECISELY THE OPPOSITE OF THE INTENDED EFFECT" (all capitals and underlining in original) Email from Stephen Behnke to Art Levine, undated and copied to Microsoft Word file attached to email from Stephen Behnke to Gerald Koocher and Ronald Levant (9 July 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 28, 39.

75. Mitchell, like Banks, warned that abusive treatment of detainees could inspire resistance. Critical, Mitchell held, was to avoid a "battle of wills" between detainee and interrogator. Rather, he argued, harsh methods were to be designed and sequenced so as to set the detainee's will

Pointing out that PENS *cited* international human rights instruments and the Geneva Conventions was another. The PENS statement announces that "certain [U.S.] rules and regulations incorporate texts that are fundamental to the treatment of individuals whose liberty has been curtailed,"⁷⁶ such as the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the Geneva Convention Relative to the Treatment of Prisoners of War.⁷⁷ But this verbal jumble obscures the fact that PENS *rejected* the definition of "torture" associated with these instruments in favor of the Bush OLC's infamous reinterpretation.⁷⁸ When pressed on this point by journalists who suggested that PENS thereby permitted collaboration in activities' international law views as torture, Behnke promised that the APA would someday "further take up" the role of international law in defining torture. "Our work," he said, "is not done."⁷⁹

But for DoD—and the CIA—the work *was* done, well enough to sanction psychologists' complicity in an interrogation program that included torture (as nearly all outside the Bush OLC defined it). Military psychologists would later contend that the conclusion that the APA allowed psychologists to torture ignores prohibitions that Congress and DoD eventually imposed.⁸⁰ But a central point of those who judged PENS an outrage was that prohibition of torture and other abuses of human rights should be a precept of professional ethics, not dependent on political or military authorities' actions—or susceptible to definitional contortions that shrink this prohibition's scope.

For nearly a decade, the PENS statement's defenders held off APA petition drives, member resolutions, and other efforts to rescind it. The independent review's revelations of behind-the-scenes APA backing for the Bush administration's justification of torture dramatically shifted the ground. Within days, Behnke had been fired and other senior APA officials terminated.⁸¹ A month after the review's July 2015 release, the association's main policy-making body voted 157-1 to approve a

against itself, dispiriting him to the point of despair and thereby inducing "compliance." M Gregg Bloche, 'Toward a Science of Torture?' (2017) 95 Texas Law Review 1329.

76. Was this strangely elliptical phrasing a way to seem to say lots while saying very little? The earlier-discussed contempt for international human rights law expressed privately by some PENS contributors suggests yes.

77. Presidential Task Force on Psychological Ethics and National Security (n 33) 6.

78. The Geneva Conventions, moreover, impose additional limits on interrogation practice, beyond international human rights instruments' prohibitions on torture and cruel and inhuman treatment: David Luban, 'Liberalism, Torture, and the Ticking Bomb' (2005) 91 Virginia Law Review 1425. Nowhere does the PENS statement acknowledge these limits' authority except insofar as U.S. "rules and regulations" incorporate them.

79. Email from Behnke to Levine (n 74) 33-34.

80. See Society for Military Psychology (APA Division 19) Presidential Task Force, *Response to the Hoffman Independent Review* (2015).

81. Spencer Ackerman, 'US Torture Doctors Could Face Charges After Report Alleges Post 9/11 "Collusion"' *The Guardian* (London, 11 July 2015) <www.theguardian.com/law/2015/jul/10/us-torture-doctors-psychologists-apa-prosecution> accessed 18 November 2018.

sweeping prohibition on involvement in national-security interrogation.⁸² The new policy decreed that “psychologists shall not conduct, supervise, be in the presence of, or otherwise assist any national security interrogations for any military or intelligence entities, [...] nor advise on conditions of confinement insofar as these might facilitate such an interrogation.”⁸³ The same resolution also mandated that torture be defined, for *ethical*-governance purposes, by reference to international human rights instruments, not U.S. law.

D. Psychiatry

Within the medical profession, subterfuge of a simpler sort played out. In May 2006, after multiple reports that psychiatrists had played advisory roles in abuse at Guantánamo and Abu Ghraib, the American Psychiatric Association (referred to henceforth as the psychiatry APA) announced a broad ban on participation in national-security interrogation—a ban similar in scope to the psychology APA’s 2015 prohibition. The association proscribed all “direct participation,” including “being present in the interrogation room, asking or suggesting questions, or advising authorities on the use of specific techniques of interrogation with particular detainees.”⁸⁴ Or so it seemed. The psychiatry APA issued this prohibition as a “Position Statement,” not enforceable, under the association’s rules, via its disciplinary process. The association’s president acknowledged this, telling a trade publication that the “Statement” wasn’t “an ethical rule” and that psychiatrists in the military therefore “wouldn’t get in trouble with the [psychiatry] APA” for violating it.⁸⁵

A senior Army psychiatrist who served on a BSCT after the “Statement” was issued called it “kind of brilliant in a way.” “Come out in a position statement so it looked in public like they’re against it,” he told me. “It allows them to maintain the sanctity of the doctor-patient relationship . . . and appease the far-left people who don’t distinguish between interrogation and torture.”⁸⁶ Meanwhile, he and his

82. American Psychological Association, ‘Resolution to Amend the 2006 and 2013 Council Resolutions to Clarify the Roles of Psychologists Related to Interrogation and Detainee Welfare in National Security Settings, to Further Implement the 2008 Petition Resolution, and to Safeguard Against Acts of Torture and Cruel, Inhuman, or Degrading Treatment or Punishment in All Settings’ (2015) <www.apa.org/independent-review/psychologists-interrogation.pdf> accessed 16 November 2018. The only vote against this prohibition was from Larry James, a retired Army colonel who served on the PENS Task Force and, before that, on BSCTs at both Guantánamo and Abu Ghraib.

83. *ibid* 5. The 2015 ban did include an ambiguous exception that *appears* to permit some advice-giving concerning “information gathering” in general: “Psychologists may provide consultation with regard to policy pertaining to information gathering methods which are human so long as they do not violate the prohibitions of this Resolution and are not related to any specific national security interrogation or detention conditions.” *ibid* 5, fn 6.

84. *Am. Psych. Position Statement* (n 32).

85. Michael Smith, ‘APA: Stay Out of Interrogations, Psychiatrists Urged,’ *Medpage Today* (22 May 2006) <www.medpagetoday.com/psychiatry/generalpsychiatry/3371> accessed 11 November 2018.

86. Bloche, *The Hippocratic Myth* (n 4) 169.

psychiatrist colleagues observed interrogations, offered feedback on interviewing, assessed prisoners' resistance, and suggested strategies for overcoming it.⁸⁷ Were the "Statement" an ethical requirement, he said, "I would have never come near it [BSCT service]."

IV. AN ETHICAL NO MAN'S LAND

Nearly two decades after American forces took their first post-9/11 prisoners, the struggle over mental health and behavioral-science professionals' participation in national-security interrogation continues. Though the psychiatry APA never formalized its 2006 "Statement" as an ethical ban,⁸⁸ DoD appears to have mostly deferred to it preferring psychologists over psychiatrists as behavioral-science consultants.⁸⁹ (The CIA's position on psychiatrists' role remains enshrouded in the mists of classification.) But the Pentagon, the intelligence community, and national-security psychologists have fought back against the psychology APA's 2015 ban. The association's military psychology section issued a report condemning the independent review as biased against the military and uncomprehending of the armed services' commitment to human rights.⁹⁰ Some national-security psychologists resigned from the association, or threatened to. And the Pentagon, under both Presidents Obama and Trump, has called upon the association to lift its 2015 ban and to permit the full range of collaboration with interrogators that the military endorsed in conjunction with the PENS statement.⁹¹

87. *ibid.*

88. The association's Assembly (its legislative body) and Board "reaffirmed" the 2006 "Statement" in 2014 but has not incorporated it as an ethical obligation (n 32).

89. DoD declined to explicitly accede to the 2006 "Statement"; to the contrary, it maintained that psychiatrists could continue to provide advice regarding interrogation of individual detainees. Jonathan H Marks and M Gregg Bloche, "The Ethics of Interrogation—The U.S. Military's Ongoing Use of Psychiatrists" (2008) 359 *New England Journal of Medicine* 1090. But multiple military medical sources have told me that DoD exercised a de facto preference for psychologists over psychiatrists, both to reduce tensions with the psychiatry APA and because it saw psychologists as better trained for interrogation-support duties.

90. Society for Military Psychology (APA Division 19) Presidential Task Force, *Response to the Hoffman Independent Review* (2015).

91. Letter from Acting Principal Deputy Secretary of Defense Brad Carson to APA President Barry Anton and CEO Norman Anderson (1 January 2016) <www.apa.org/news/press/releases/2016/01/dod-response-letter.pdf> accessed 16 November 2018; Letter from Acting Assistant Secretary of Defense for Health Affairs Tom McCaffery to APA's Board of Directors ("reaffirm[ing]" Department of Defense's 1 January 2016 Letter, 9 August 2018) <www.apa.org/news/press/statements/national-security-settings.pdf> accessed 16 November 2018. Formally, DoD didn't ask the association to rescind its 2015 resolution; rather, it asked that the APA's Ethics Committee "implement" the resolution in a manner that permits the participation called for by its post-PENS behavioral science consultation policies. But this, of course, would nullify the resolution's essence.

A. "Do No Harm?"

National-security psychologists, the armed services, and the intelligence community have a point. The bans on participation in interrogation adopted by both the psychology and psychiatry APAs, permit—and purport to distinguish—a broad range of professional activities at odds with the "Do No Harm" ideal the associations invoke. These include forensic evaluation, even when potential harm to individuals far outstrips that resulting from most military interrogation. (Consider, for example, assessments bearing on competency to stand trial, criminal insanity, and competency to be executed⁹² when the state seeks the death penalty.)⁹³ The psychology association's ban also expressly exempts "domestic law enforcement interrogations or domestic detention settings" (the psychiatry ban, by contrast, extends to these settings).

Both APAs justify forensic assessment in American criminal cases on the ground that prisoners are afforded U.S. constitutional safeguards; the psychology APA also justifies participation in U.S. law enforcement interrogation on this basis.⁹⁴ But as the DoD notes, law also limits what national-security interrogators can do for military intelligence purposes.⁹⁵ The "Do No Harm" ideal, so often honored in the breach in forensic and other contexts when physicians and psychologists serve non-therapeutic purposes,⁹⁶ doesn't by itself support a selective ban on consultation to national-security interrogation.

Perhaps the better answer is to apply the "Do No Harm" principle in more sweeping fashion. Alan Stone has argued that physicians lose their ethical moorings when they venture away from their professional commitment to helping patients, or at least not harming them.⁹⁷ One might make the same claim about psychologists—indeed those who invoke "Do No Harm" as reason enough for a categorical ban on consultation to interrogators implicitly do.⁹⁸ This claim's most

92. *Ford v Wainwright*, 477 US 399 (1986).

93. Both associations also permit organizational consultation that serves managerial, marketing, and other objectives not necessarily in the best interests of employees, customers, or other individuals.

94. The psychology association's August 2015 resolution prohibiting participation in national-security interrogation (n 82) invokes psychologists' obligation, under the APA's ethics code, to "take care to do no harm," but then announces: "This prohibition does not apply to domestic law enforcement interrogations or domestic detention settings where detainees are afforded all of the protections of the United States Constitution, including the 5th Amendment rights against self-incrimination [...] and 6th Amendment rights to 'effective assistance' of legal counsel".

95. Carson Letter (n 91).

96. M Gregg Bloche, 'Clinical Loyalties and the Social Purposes of Medicine' (1999) 281 *Journal of the American Medical Association* 268.

97. Alan A Stone, 'The Ethical Boundaries of Forensic Psychiatry: A View from the Ivory Tower' (1984) 12 *The Bulletin of the American Academy of Psychiatry and the Law* 209.

98. Benedict Carey, 'Psychologists Clash on Aiding Interrogations' *New York Times* (15 August 2008) <www.nytimes.com/2008/08/16/washington/16psych.html> accessed 28 January 2019; Brad Olson, Stephen Soldz, and Martha Davis, "The ethics of interrogation and the American Psychological Association: A critique of policy and process" (2008) 3 *Philosophy*,

natural implication is that physicians and psychologists should steer clear of forensic practice, national-security work, and all other endeavors aside from care for patients. In Stone's words: "The philosophers say life is a moral adventure; I would add that to choose a career in forensic psychiatry is to choose to increase the risks of that moral adventure."⁹⁹

The vacuity of "Do No Harm"—and of the bioethics "Principles" of "Beneficence" and "Non-maleficence" that derive from it¹⁰⁰—magnifies these risks for all mental health and behavioral-science professionals who venture beyond the therapeutic realm. As Stone observed 35 years ago, Soviet psychiatrists who diagnosed political dissidents¹⁰¹ and American medical researchers whose disregard for individual patients' well-being led to a series of horrific mid-20th-century scandals saw themselves as pursuing the greater good—the Revolution or the advancement of science.¹⁰² Yet Stone refrains from putting forensic practice—or other non-therapeutic practice that can harm individuals—categorically off limits. To do so would be radically disruptive: societies look to medicine, psychology, and the biomedical sciences to serve myriad legal and other public purposes.¹⁰³ "Do No Harm" proscribes too much—and thus, in practice, nothing at all.

B. Professional Self-Governance and Social Negotiation

This leaves behavioral-science-trained professionals who consult to national-security interrogators (and to investigative interviewers more generally) in an ethical no man's land. They're caught between the claim that *any* harm to interview subjects is unacceptable and the whitewashing proposition that such harm is ethically irrelevant because interrogation isn't a therapeutic endeavor. Were there a facile analytic exit from this no man's land, someone would have found it. There isn't: as I've argued elsewhere, the setting of limits on what professionals in the medical and behavioral sciences can do for state and social purposes when harm to individuals might ensue from their actions is a practical, not a purely logical task.¹⁰⁴

Ethics, and Humanities in Medicine <www.ncbi.nlm.nih.gov/pmc/articles/PMC2248202/> accessed 28 January 2019.

99. Stone, 'The Ethical Boundaries . . .' (n 97).

100. The "Four Principles" system of bioethics, introduced and refined by Tom Beauchamp and James Childress in successive editions of their text, *Principles of Biomedical Ethics*, has been incorporated into clinical ethics practice, professional societies' codes of ethics, and even federal regulations over the past several decades. "Beneficence" and "Nonmaleficence" are two of the four Beauchamp and Childress principles; the other two are "Respect for Autonomy" and "Justice" (understood in distributive terms).

101. Leading Soviet psychiatrists, I've argued, were not mere dupes of the KGB; they understood the dissidents they diagnosed, hospitalized, and "treated" against their will as genuinely ill. M Gregg Bloche, 'Law, Theory, and Politics: The Dilemma of Soviet Psychology' (1986) 2 *Yale Journal of International Law* 297.

102. Stone, 'The Ethical Boundaries . . .' (n 97).

103. See generally Bloche, *The Hippocratic Myth* (n 4).

104. *ibid.*

Professions, acting politically, forge such limits—that's one lesson from psychology's and psychiatry's misadventures in torture in 9/11's wake. These limits arise from negotiation among professional constituencies and interested sectors of lay society. The struggles among clinical caregivers, forensic practitioners, national-security psychologists, and others that unfolded over national-security interrogation are the norm, not the exception, when self-governing professions formulate ethical constraints in matters of fierce controversy. But ethical boundaries must, at the same time, be morally credible. They cannot be, to borrow a term from Ronald Dworkin, "checkerboard" solutions¹⁰⁵—deals done apart from any anchoring moral narrative.

Such narratives can balance competing concerns (e.g., public security versus loyalty to patients), but to win wide support, they and the ethical constraints to which they give rise must resonate with professional constituencies and lay society. Ethics developed and effected through subterfuge, sans public reckoning with difficult choices and alternative anchoring narratives, invite backlash and rejection. In psychology (and to a lesser degree, psychiatry), professional leaders ducked public reckoning with the interrogation challenge by opting for ethical governance on the down-low.

In such diverse realms as end-of-life decision-making, reproductive choice, and health insurers' influence on clinical care, public reckoning has been the norm. Scholars, journalists, political actors, clergy, and others often weigh in. Courts and regulators impose constraints; others object to their involvement. But the institutions of professional self-governance—associations, licensing bodies, training programs, and the like—typically have ultimate say. As I observed earlier, U.S. military law requires physicians, psychologists, and lawyers to abide by the ethics of their professional associations. Judges have tended to defer to professionally-imposed ethical constraints;¹⁰⁶ examples in health care include clinical confidentiality, professional norms governing informed consent, and bans on participation in state executions.

Some criticize such deference as a free pass for professionals to pursue their self-interest. The health law scholar Clark Havighurst has argued that much of what passes for ethical constraint is, in fact, collusion to suppress competition by limiting the services professionals can offer.¹⁰⁷ He points, for example, to ethical norms that prohibit physicians from offering lower-quality care that is cheaper than standard therapies: these norms diminish social welfare, he says, by forcing consumers to spend on care they don't want. By extension, one might argue, restraints on health professionals' abilities to sell their skills for non-therapeutic *public* purposes protect these professionals (by keeping their images "clean") at society's expense.¹⁰⁸

105. Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

106. Bloche, "Medical Ethics in the Courts" in Marion Danis, Carolyn M Clancy, and Larry R Churchill (eds), *Ethical Dimension of Health Policy* (OUP 2005).

107. Clark C Havighurst, *Health Care Choices: Private Contracts as Instruments of Health Reform* (American Enterprise Institute Press 1995).

108. Some of the national-security psychologists I interviewed in the course of my past work on this subject made exactly this argument, chastising their psychiatrist and psychologist-critics for wanting to look clean at the expense of their country's safety.

But finding self-interest behind an ethical constraint doesn't, by itself, rebut the case for its social value. More than 50 years ago, Nobel-winning economist Kenneth Arrow argued that the medical profession's Hippocratic commitment to patient well-being and disavowal of commercial exploitation is "part of the commodity the physician sells."¹⁰⁹ Patients' ignorance about medicine, Arrow contended, renders them unable to meaningfully assess its value; this, in turn, discourages them from purchasing health services.¹¹⁰ Nurturing trust by committing to altruistic restraint¹¹¹ diminishes this problem, he observed, improving physicians' economic prospects—and improving patients' welfare insofar as the additional care they purchase brings more benefit than cost.

Our public debates over professional ethics provide opportunities to challenge self-serving norms of conduct. Scholars, journalists, courts, and political figures expose hypocrisy, spot covert advantage-taking, and otherwise push back against the excesses of professional self-governance. But robust mechanisms of self-governance, tempered by these sources of pushback, are an important civil-society safeguard against overweening state power. Indeed, it's hardly surprising that when would-be authoritarian leaders assert control over their countries, seeking sway over professional associations is typically a high priority.

What went wrong when psychology's and psychiatry's professional associations confronted both torture and the broader question of involvement in national-security interrogation was that they surrendered this self-governing role. Both, moreover, did so in disingenuous fashion, arousing anger and distrust, with toxic consequences for future negotiation of limits on what members of these professions can do in the national-security realm.

The psychological association went furthest awry. It rejected input from ethics and legal scholars, civilian practitioners and researchers, and others outside the national security establishment. It schemed to deny dissenting members the chance to be heard,¹¹² and it assented to America's post-9/11 torture program in deceptive

109. Kenneth J Arrow, 'Uncertainty and the Welfare Economics of Medical Care' (1963) 53 *American Economic Review* 941.

110. Here, Arrow anticipated what would later come to be widely referred to as information asymmetry, a large problem in many different kinds of markets, including professional services. See eg George Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84 *Quarterly Journal of Economics* 488.

111. Arrow wrote in the early 1960s, at a high-water mark for such restraint. Health care provision is more commercial today, but Hippocratic commitment to patients' well-being remains a central professional value.

112. Internal APA documents released in conjunction with the independent review show that APA officials carefully planned events addressing the interrogation controversy at their annual meetings so as to present the case for psychologists' involvement, rather than to offer a platform and opportunities for input to people with diverse views. For example, APA officers and senior staff timed consideration of resolutions at the association's annual meetings and drafted and sequenced announcements of events (including a 2006 speech by the Army Surgeon General) so as to minimize dissenters' opportunities to pose questions and raise objections. See eg email from Stephen Behnke to Gerald P Koocher (10 July 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 43; Email from Stephen Behnke to Morgan Banks and Debra Dunivin, (18 July 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 103. Warning that announcement of the Army

fashion by deferring to the Bush OLC's contorted definition of torture. It also ignored mounting evidence of the profession's central role in the torture program until thousands of its members forced the issue with petition drives and ethics policy proposals. Thousands of pages of internal APA communications leaked by dissenters or disclosed by investigators show that the association's leaders worked vigorously to translate Pentagon practice into APA ethics policy, then to protect this policy as condemnations mounted.

Perhaps because so few psychiatrists specialize in national security, neither the military nor the CIA pressed the psychiatry association to endorse its members' participation in interrogations. Yet the psychiatry APA opted for a misdirection play of its own, announcing a ban on participation (thereby defusing ire over members' involvement) while reassuring military psychiatrists and their commanders that the ban wasn't an "ethical rule" and wouldn't be enforced.¹¹³ For psychiatrists in the armed services who wished to abide by the ban, this was hardly reassuring, since it meant that orders to serve as "behavioral-science consultants" weren't "unethical," were thus not patently unlawful, and therefore had to be obeyed. Possibly, the association's leaders figured they had a tacit agreement with the military to stop posting psychiatrists to interrogation teams and hoped to avoid open confrontation (the Pentagon adopted a policy of strong preference for psychologists over psychiatrists just after the association announced its ban). Or perhaps they simply feared seeming unpatriotic. Either way, this misadventure invited cynicism about the profession's commitment to ethics over optics.

An ethics for the no man's land of national-security interrogation cannot be formulated via misdirection. The credibility of rules of right professional conduct rests on widespread confidence that they are matters of serious and enduring commitment, not mere appearance. This is especially the case for ethical norms that apply in settings insulated from scrutiny, like places where people are held against their will. Prohibitions readily exposed as mere matters of appearance and commitments that are designed *not* to be kept corrode professional self-governance as both a safeguard for vulnerable individuals and a check on state power. This corrosion occurs at multiple levels: credibility to the public (including patients and clients), compliance by professionals (who quickly learn the intended loopholes), and cynicism about genuine efforts to respond to complex problems with ethical nuance.

Specifying boundaries between what those in the behavioral sciences and the health professions can and can't do for state and social purposes when harm to individuals might ensue demands such nuance. We permit such harm pervasively. As I will argue presently, there is a strong case for allowing those with relevant behavioral-science understanding to play a supportive role in legitimately-conducted investigative interviewing. But as a practical matter, development of the

Surgeon General's speech would spur the dissenters to action, ethics director Behnke urged that invitations to an associated lunch hosted by APA president Koocher be extended "as soon as possible after the announcement goes out, because that's when the organizing will begin and we want to nip that in the bud as best we can." Email from Stephen Behnke to Judy Strassburger (18 July 2006) in *Hoffman Report* (Exhibits, Binder 2) (n 4) 103.

113. See (n 30).

ethical contours of this role must take account of the post-9/11 legacy of disingenuousness, misdirection, and consequent distrust.

V. TOWARD A SAFE HARBOR?

A. A Science Base for Interviewing

The case for allowing psychologists, psychiatrists, and other behavioral-science professionals to advise investigative interviewers rests on the insights that these sciences can bring to efforts to win interview subjects' unforced cooperation and to encourage their accurate recall of relevant information. No scientific studies conclusively demonstrate the superiority of one interrogation method over another; nor could they.¹¹⁴ Interrogation methods cannot be standardized and reliably replicated, nor can results be measured in consistent fashion, across a variety of real-world interrogators and detainees, each with distinctive personal styles and (in the case of detainees) unique and uncertain mixes of knowledge and ignorance about the matters that interrogators seek to understand.¹¹⁵ Large samples of detainees with similar knowledge can't be identified pre-interrogation, then randomly assigned to alternative interrogation methods.¹¹⁶ And, of course, interrogation can't be conducted in blinded fashion—interrogators, unlike research physicians who don't know whether they're administering a drug or a placebo, know what methods or strategies they're using. Ethics, moreover, are an absolute bar: studies along such lines would constitute human-subjects research without consent. Even were researchers to ask for consent (and to inform prospective subjects about a study in detail), such studies would run afoul of the ethical ban on non-therapeutic research on prisoners.¹¹⁷

Yet a growing body of empirical work backs the judgment that some conversational strategies are more effective than others at encouraging cooperation and prompting accurate remembrance.¹¹⁸ Even during the height of America's post-9/11 frisson with torture, the CIA and Pentagon supported efforts to employ psychology's state of the art to "educate information" from national-security detainees in less dubious fashion.¹¹⁹ The Obama administration's interagency "High-Value Interrogation Group" (HIG) accelerated funding for research along these lines.¹²⁰

114. Bloche, *Toward a Science of Torture?* (n 75) 1337-40.

115. *ibid* 1338-40.

116. *ibid* 1339.

117. *ibid* 1340-44.

118. See also Part II of this volume.

119. R Fein (ed), *Educating Information: Interrogation: Science and Art—Foundations for the Future*, Intelligence Science Board Phase 1 Report (National Defense Intelligence College Press 2006).

120. High-Value Detainee Interrogation Group (FBI-administered) *Interrogation: A Review of the Science* (Sept 2016) <<https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-2016.pdf/view>> accessed 28 January 2019; see also High-Value Detainee Interrogation Group, HIG Research Program, 2017 Bibliography.

Among the promising approaches are so-called cognitive interviewing, designed to prompt recall of forgotten details; relationship building, with an eye toward leveraging feelings from empathy to shame to gain cooperation; and persuasion by invoking the actions of peers or authority figures.¹²¹

These approaches rest on research into the social and emotional bases of persuasion as well as the mechanisms by which we recall the things we remember. Most of this research has been conducted outside the realm of interrogation, yet it seems reasonable to infer that the psychology and neurobiology of persuasion and recall are similar across all settings in which these phenomena play out. Interviewing strategies rooted in this science can't be said to be "proven"—established beyond plausible doubt. But they are science based—much more so than James Mitchell's speculative inferences from U.S. government studies of communist "brainwashing" and Martin Seligman's research on induction of helplessness in dogs.

B. Manipulation and Coercion?

Some critics of *any* consultation to interrogators object that these approaches are manipulative, even coercive. They're most certainly the former in the sense that they aim to influence people's behavior through other than purely logical means.¹²² But the word "manipulative" gets its edge through the *connotation* of something untoward; its *denotative* meaning is neutral¹²³—here, effects on people's actions. These effects can have harsh consequences for people being interrogated, but these consequences are surely no more harsh (so long as interrogation and detention comply with domestic and international law)—than, say, those of forensic psychiatrists' efforts to coax telling details from examinees when criminal punishment is at stake. Characterization of an effort to influence behavior as "manipulative" *assumes*, without explanation, that the effort is untoward. But if forensic practice is ethically acceptable, why should efforts to influence detainees to share useful intelligence be treated per se as untoward?

"Coercive" is, likewise, a term we apply to influence efforts we deem improper on other grounds.¹²⁴ It conveys this adverse moral or legal judgment, but it doesn't communicate this judgment's rationale. The Geneva Conventions prohibit "coercion"—indeed they go beyond this, barring threats, insults, and "unpleasant

¹²¹ *ibid.*

¹²² Philosophical definitions of manipulation have traditionally emphasized end runs around pure reason. See eg Joseph Raz, *The Morality of Freedom* (OUP 1988). But a growing body of psychological evidence supports the conclusion that influence through pure reason rarely or never occurs and that, rather, intuitions powered by our emotional reactions and experiences of social connectedness drive our judgments. See eg Jonathan Haidt, "The Emotional Dog and Its Rational Tail" (2001) 108 *Psychological Review* 814. If so, the label "manipulative," understood denotatively as entailing influence through leverage other than pure logic, applies to most or all efforts to affect others' beliefs and behavior.

¹²³ Roland Barthes, *Elements of Semiology*, (Annette Lavers and Colin Smith trs, Editions du Seuil 1964) (discussing differences between denotative and connotative signification).

¹²⁴ Alan Wertheimer, *Coercion* (Princeton University Press 1988).

or disadvantageous treatment.¹²⁵ These constraints are hardly well-defined, but they've not been construed to bar interrogators from employing conversational guile.¹²⁶ And neither the Geneva Conventions nor other sources of international law ban use of behavioral-science insights to guide intelligence interviewers' employment of otherwise lawful linguistic wiles. Indeed, former UN Special Rapporteur on Torture Juan E. Méndez has urged that understandings drawn from the brain and behavioral sciences be incorporated into a Universal Protocol on non-coercive investigative interviewing.¹²⁷

C. The Caregiving Professions and the Ethics of Roles

But what of the separate proposition that health professionals—even those who don't currently treat patients—should refrain from assisting interrogators because doing so is contrary to the clinical caregiving role? In 1982, the UN General Assembly spoke to this question, adopting a statement of ethical precepts for health professionals who work with detainees. The statement, the UN Principles of Medical Ethics for protection of prisoners,¹²⁸ was the product of social negotiation along the lines I have discussed: national and transnational professional organizations from around the world collaborated with input from national governments to formulate it.¹²⁹ Governments gave their imprimatur (through General Assembly

125. Geneva Convention III Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art 17.

126. The U.S. Army Field Manual 34-52, Intelligence Interrogation, reflects this, incorporating conversational approaches that leverage prisoners' pride, shame, sympathy, and other feelings. Parts of the manual have been criticized for exceeding the Conventions' limits on physically and mentally taxing methods, but the conversational methods of influence that are the Manual's bread and butter have not been seriously challenged along these lines.

127. Juan Méndez, Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc A/71/298 (5 August 2016); see also Chapter 20 in this volume by J Méndez and A Nicolescu.

128. These Principles are formally known by a less wieldy name. See Office of the United Nations High Commissioner for Human Rights "Principles of Medical Ethics relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (Adopted by General Assembly resolution 37/194 of 18 December 1982) <www.ohchr.org/en/Professionalinterest/Pages/medicalethics.aspx> accessed 27 January 2019 [hereinafter, *UN Principles of Medical Ethics*].

129. The Council of International Organizations in the Medical Sciences (CIOMS), a non-governmental amalgam of national and international professional societies, drafted the Principles at the behest of the World Health Organization (WHO). The WHO's Executive Board endorsed the initial draft, then transmitted it to the UN Secretary General; the UN General Assembly, in turn, distributed the text to both governments and non-governmental organizations for comments and suggestions. After a two-year comment period, the General Assembly authorized circulation of a revised version for further input from governments only. A year later, on December 18, 1982, the General Assembly adopted the final version. Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, (3rd edn, OUP 2009) 512–13.

endorsement), but the Principles were largely the product of transnational professional self-governance.

The Principles, unfortunately, offer muddled guidance. Their most germane provision bars "health personnel, particularly physicians" from "apply[ing] their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees *and* which is not in accordance with the relevant international instruments."¹³⁰ This proscription would seem to allow "health personnel" to provide support for interrogation, even when (note the "*and*" I've italicized) "adverse" effects on health ensue. "[T]he relevant international instruments"—presumably, conventions on human rights and the law of armed conflict—set outer boundaries for allowable assistance; within these boundaries, ill effects on health appear acceptable.

But if one takes the "*and*" literally, this provision would *permit* health personnel to assist interrogators "in a manner . . . not in accordance with the relevant international instruments," absent a risk of adverse health effects. (By way of illustration, humiliations and insults barred by the Geneva Conventions would be permissible under this reading, so long as they don't undermine health.) This literalism is implausible on its face: surely this UN codification of clinical ethics wasn't meant as license to disregard international human rights and humanitarian law. So, conversely, one can't confidently construe the "*and*" to license "assist[ance]" that complies with "international instruments" but might "adversely affect" health.

Further confusion arises from another provision: the UN Principles bar "involve[ment] in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health."¹³¹ This language permits *evaluation* for other than therapeutic purposes, but it restricts the *subject* of this evaluation to detainees' *health*. It thus appears to bar assessment of detainees' personalities or psychological vulnerabilities for the purpose of crafting investigative-interviewing strategies.¹³² The upshot: the UN Principles offer up an ambiguous, self-contradicting jumble of permissiveness and prohibition

130. *UN Principles of Medical Ethics* (n 128) (emphasis added), Principle 4(a). Along similar lines, the WMA makes human rights law a binding constraint on *all* professional conduct. The association's *Declaration of Geneva*, which the organization calls the "Modern Hippocratic Oath" (and is meant to be sworn or affirmed by physicians) announces, "I WILL NOT USE my medical knowledge to violate human rights and civil liberties, even under threat" (capitals in original). World Medical Association, "Declaration of Geneva," Adopted by the 2nd General Assembly of the World Medical Association (September 1948; editorially revised by the 173rd WMA Council Session, May 2006) <www.wma.net/wp-content/uploads/2018/07/Decl-of-Geneva-v2006-1.pdf> accessed 27 January 2019.

131. *UN Principles of Medical Ethics* (n 128) Principle 3.

132. To be sure, one might argue that evaluation of "mental health" can be read to encompass identification of psychological vulnerabilities for interrogation purposes. This seems (to me, at least) contrary to the spirit of this provision. But it's not difficult to imagine an intelligence-community psychologist's or psychiatrist's pressing this argument to the point of persuading an ethics decision-maker that there is at least some uncertainty over whether this provision proscribes evaluation of interrogation subjects' vulnerabilities.

as regards health professionals' assistance to lawful investigative interviewing. The Principles, moreover, don't speak explicitly to the question of whether professionals steeped in the biomedical or behavioral sciences can set *aside* clinical ethics (stepping entirely outside the caregiving role) so as to justify participation in interrogation. Rather than offering a route map through this ethical no man's land, they render it even more fraught.¹³³

There is an urgent need for an international effort to develop such an ethical route map—as a sequel to the UN Principles or in some other form. Such an effort should engage military and intelligence community leaders as well as the psychology and medical professions. It should be open to input from governments, but they shouldn't superintend it. National and global professional organizations are better positioned to take the lead in crafting such a route map without undue influence from national-security actors unconcerned about safeguarding health professionals' caregiving role.

Recognition of this role's primacy over other uses of health professionals' expertise is an essential starting point for this effort. Patients' confidence in their caregivers' undivided loyalty is critical for sustaining this role. Uses of clinical skills and relationships for social purposes at odds with individual patients' well-being endanger this confidence. That's why forensic psychiatry and psychology are so fraught. We've accepted their courtroom role, for a few centuries, at least, but we should be wary of expanding the realm of clinical relationships that subordinate individuals' welfare to pursuit of some larger good. The American Psychiatric Association's "Position Statement" on interrogation, prohibiting engagement with individual detainees,¹³⁴ draws a sensible line—one that allows psychiatrists to advise the intelligence community on interrogation strategy in general while steering clear of personal contact with people being questioned.¹³⁵ Personal contact is essential in forensic evaluation (which is based on clinical interviews and judgment) but

133. Another transnational clinical ethics statement, the World Medical Association (WMA) *Declaration of Tokyo*, does speak clearly, putting all assistance to interrogators off limits, whether or not a relationship between doctor and detainee involved, even when interrogation complies with international human rights law and the law of armed conflict. "The physician," the Declaration states, "shall not use nor allow to be used, as far as he or she can, medical knowledge or skills, or health information specific to individuals, to facilitate or otherwise aid any interrogation, legal or illegal, of those individuals." World Medical Assembly, 'Declaration of Tokyo—Guidelines for Physicians Concerning Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment,' Adopted by the 29th WMA (October 1975; revised by the 67th WMA General Assembly, October 2016) <www.wma.net/policies-post/wma-declaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-in-relation-to-detention-and-imprisonment/> accessed 27 January 2019. But this statement achieves its clarity at the cost of realism about medicine's myriad non-therapeutic roles. It neither puts *all* of these roles off limits (intellectually coherent but sharply contrary to current practice, see pp. 299–300. P48, nor explains why aid to interrogators should be treated differently. Nor does it reflect public or social negotiation of the sort I've discussed. The WMA is an amalgam of national medical societies, and it developed the Declaration with minimal input from governmental or other social institutions that make use of medical knowledge or judgment for non-therapeutic purposes.

134. See n 32.

135. Indeed, the psychiatric association's *Position Statement* (n 32) arguably reaches too far in this regard, by prohibiting consultation on "use of specific techniques [...] with particular

interviewing. The other professionals' ethical ethics (step-
 ipation in interro-
 o man's land, they

less important to interrogation, in which the psychiatrist or psychologist is a mere adjunct to intelligence interviewers and analysts.

Some argue that rules should be different—less restrictive—for psychologists than psychiatrists since only the latter subscribe to the Hippocratic Oath and many of the former don't treat patients. But most psychologists *are* clinical caregivers,¹³⁶ and their profession's ethical code obligates them "to benefit . . . [and] establish relationships of trust with those with whom they work."¹³⁷ To be sure, this language is less pointed than the Hippocratic Oath's core promise, "[i]n every house I come, I will enter only for the good of my patients." But for clinicians, the gist is similar. The code's more general language encompasses psychology's broader range of career tracks, in management consulting, marketing, and other fields with no nexus to clinical caregiving. And surely, people who turn to clinical psychologists for care deserve no less of a commitment to undivided loyalty than do patients of psychiatrists.

One might object (as did the authors of the PENS statement) that face-to-face participation of *some* psychologists (or psychiatrists) in interrogation won't or shouldn't undermine patients' confidence in their doctors' loyalty so long as professionals clearly state their roles, then refrain from mixing these roles in their work with detainees. Were patient confidence a matter of crystalline logic, such separation would solve the problem. But confidence is just as much a matter of professional identity and ethos. The exploitation of human connectedness that lies at the heart of even rapport-building interrogation is sharply at odds with the ethos of standing by people who are vulnerable, afraid, and in need. Medical ethics recognizes such conflict in other contexts: for example, it bars doctors from administering lethal injections to condemned inmates, though the service of *some* physicians as executioners doesn't *logically* make clinical caregivers more wont to kill. For this reason, barring psychologists' and psychiatrists' face-to-face involvement in interrogation seems a sensible safeguard for the caregiving ethos and the patient confidence this ethos nurtures.

VI. RECOMMENDATIONS: ETHICAL BOUNDARIES FOR BEHAVIORAL-SCIENCE CONSULTATION TO INTERROGATORS

For the reasons I and others in this volume have put forth, there is more to be gained than lost by allowing psychologists, psychiatrists, and other behavioral-science professionals to contribute their expertise to national-security interrogation. But to effectively manage the hazards of this new, non-caregiving role, it must be tightly

detainees" (emphasis added) even absent personal contact between the psychiatrist and the individual under questioning.

136. Auntré Hamp and others, '2015 APA Survey of Psychology Health Service Providers,' APA Center for Workforce Studies (September 2016) <www.apa.org/workforce/publications/15-health-service-providers/index.aspx> accessed 27 January 2019.

137. American Psychological Association, 'Ethical Principles of Psychologists and Code of Conduct,' Principles A & B;(2017) <www.apa.org/ethics/code/> accessed 27 January 2019.

circumscribed. I've underscored here that ethical constraints on this role must be the product of public reckoning, not covert politics—and that professional self-governance must be preserved in the face of pressures from state authority. I'll end by laying down some ethical boundaries that I see as essential:

(1) *Behavioral-science consultation to interrogators should be science based.* For reasons I reviewed earlier, researchers cannot deliver final, conclusive proof of the superiority of any one approach to interrogation.¹³⁸ But some strategies are much better grounded in science than others. It ought to be clearly unethical for behavioral-science consultants to interrogators to counsel approaches without a strong science base. Reasonable, research-based expectations of efficacy should suffice; insistence on ultimate proof, when it isn't possible, asks too much.

To be sure, interpersonal savvy and intuition play large roles in investigative interviewing and aren't reducible to scientific systematization. Psychologists and psychiatrists, though, aren't professional interrogators, and their unscientific hunches shouldn't make their way into investigative interviewing through a back door, cloaked in a faux aura of expertise. Tactical judgments based on hunches informed by real-world experience should be left to investigative and intelligence professionals.

(2) *Behavioral-science professionals should refrain from consultation to any interrogation program that breaches international human rights law or the law of armed conflict.* They should neither recommend approaches that risk violating these bodies of law nor consult in any fashion to government agencies (or private contractors) not clearly committed to rigorous compliance with them.¹³⁹ The UN Principles affirm this position, albeit in muddled fashion;¹⁴⁰ it needs to be plainly and categorically stated in any protocol or set of principles governing the ethics of such consultation. For *ethics* purposes, moreover, commonly-understood global understandings of these rights and obligations should serve as benchmarks. Individual ratifying nations' reservations or shifting legal interpretations shouldn't be invoked, as they were by the authors of the PENS report, to allow one country's professionals to breach transnational ethical boundaries.

Clinical psychology and psychiatric expertise can play a role in formulating constraints to ensure that interrogation practice doesn't cross these international legal boundaries. Substantial bodies of clinical research speak to causal connections between the stresses of abusive confinement and ensuing distress, including anxiety, dysphoria, and other symptoms. Follow-up studies of detainees subjected to post-9/11 "enhanced interrogation," then years later released, have already demonstrated the falsity of CIA and Pentagon claims that this approach

138. See text accompanying (n 114–17).

139. Evidence and means of rigorous compliance include agency leaders' affirmations of commitment to these areas of law, a culture at the operational level that takes these realms of law seriously rather than giving them lip service, mechanisms by which even the most junior operatives can report breaches without risking career trouble, and effective means for adjudicating alleged violations and sanctioning offenders.

140. See text accompanying (n 128–33).

wouldn't inflict severe and lasting mental harm.¹⁴¹ Psychologists and psychiatrists go outside their lane by construing legal terms, but they can offer evidence-based judgments about the likelihood that various interrogation tactics and conditions of confinement will give rise to mental distress. Intelligence community leaders, their lawyers, and those responsible for oversight can, in turn, take these judgments into account when setting limits on what interrogators can do.

All of this presumes commitment to compliance with detainees' transnational legal rights. Where a culture of compliance is uncertain, where national leaders openly scorn these rights or give them lip service, or where involvement of behavioral-science professionals enables abuse by creating a faux appearance of clinical restraint, these professionals should stay away. International protocols and ethical codes should affirm their obligation to do so. Professional associations, ethics commentators, and indeed all with a public platform should call out such troublesome circumstances and insist on suspension of behavioral-science consultation.

Regrettably, as I write, such circumstances prevail in the United States. A president who urges torture,¹⁴² a CIA director who condoned it,¹⁴³ and the ouster of the secretary of defense who stood in the way of its resumption by the military¹⁴⁴ augur poorly for restraint. So does the 2007 CIA-OMS "Summary and Reflections" document,¹⁴⁵ which makes it plain that agency health professionals were encouraged to disregard outside professional ethics authorities. (There is no public evidence that this policy of ethical disregard has since changed.) Until such high-risk circumstances abate, those asked to serve as behavioral-science consultants should say no.

(3) *The boundaries of permissible behavioral-science-based manipulation need to be more clearly defined.* At what points might maneuvers counseled by psychologists

141. Matt Apuzzo, Sheri Fink, and James Risen, 'How US Torture Left a Legacy of Damaged Minds,' *New York Times* (8 October 2016) <www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html?mtrref=undefined&gwh=A9EDFB4E5ADFB33D1C57FF6BF3D084E7&gwt=pay&module=inline> accessed 28 January 2019; Carrie H Kennedy, Rosemary C Malone, and Michael J Franks, "Provision of Mental Health Services at the Detention Hospital in Guantanamo Bay" (2009) 6 *Psychological Services* 10; Vincent Iacopino and Stephen N Xenakis, "Neglect of Medical Evidence of Torture in Guantanamo Bay: A Case Series" (2011) 8(4) *PLOS Med.* <<https://journals.plos.org/plosmedicine/article/file?id=10.1371/journal.pmed.1001027&type=printable>> accessed 27 January 2019. Researchers tracked down former detainees and found high incidences of disabling depression, anxiety, and other post-traumatic stress symptoms.

142. James Risen and Sheri Fink, "Trump Said 'Torture Works.' An Echo Is Feared Worldwide," *New York Times* (6 January 2017) <www.nytimes.com/2017/01/05/us/politics/trump-torture-guantanamo.html?module=inline> accessed 27 January 2019.

143. Alberto Mora, "Gina Haspel Is a Torturer. What Else Does the Senate Need to Know?," *Politico* (15 March 2018) <www.politico.com/magazine/story/2018/03/15/gina-haspel-is-a-torturer-thats-all-the-senate-needs-to-know-217641> accessed 27 January 2019.

144. J Kael Weston, "Jim Mattis Kept His Country From the 'Dark Side'" *New York Times* (20 December 2018) <www.nytimes.com/2018/12/20/opinion/mattis-resignation-trump-torture.html?action=click&module=RelatedLinks&pgtype=Article> accessed 27 January 2019.

145. "Summary and Reflections of Chief of Medical Services" (n 8).

or psychiatrists breach the Geneva Conventions' prohibitions against "coercion," "unpleasant or disadvantageous treatment," "outrages upon personal dignity," and "humiliating and degrading treatment"—or human rights law's ban on "cruel, inhuman, and degrading treatment"? How these proscriptions apply to interviewers' conversational wiles is ill specified by relevant treaties or transnational jurisprudence. It would seem a reach too far to say that efforts to build rapport or evoke memory for the purpose of extracting information violate any of these prohibitions, but maneuvers that deceive or distress interview subjects enter gray zones.

To be sure, some limits are clear. Pharmacological means of reducing detainees' resistance or otherwise making them cooperative violate multiple Geneva Convention provisions, including those barring "coercion" and "outrages upon personal dignity." Environmental manipulations that terrify, debase, or degrade, and attempts to win trust based on false pretense (e.g. coaching interrogators to pose as clinical caregivers or clergy) likewise contravene the Conventions' letter and spirit. Yet neither the Conventions nor the principal international human rights instruments were drafted with behavioral and brain science manipulations in mind. The post-9/11 OLC's ill-conceived effort to portray "enhanced interrogation" as consonant with international and U.S. law's prohibitions against inflicting "severe mental pain or suffering" illustrates the mischief made possible by law's failure to clearly address the permissible scope of such manipulations.

Which behavioral-science-based stratagems cross into forbidden territory isn't a question I will try to answer here. But formal interpreters of transnational law's safeguards for people held in confinement ought to develop guidance as to whether the approaches that have been developed cross these lines. The Universal Protocol urged by Juan Méndez is a potential starting point. A protocol governing use of the behavioral and brain sciences in armed conflict more generally would help to refine the Geneva Conventions to take account of capabilities that have emerged in the 70 years since the Conventions took effect.

Specifying which methods cross law's lines is a matter of jurisprudence, not science, but mental health professionals can offer evidence-based insight into the psychological damage that might ensue from various rapport-building, cognitive, and other strategies. The prospect of upset needn't bar a strategy: rapport with an interrogator, for example, could sway a prisoner to betray his compatriots, leading to regret and enduring distress. Such distress is surely "unpleasant," but this shouldn't bar the building of rapport; otherwise, an interrogation's success could be construed as an indicator of impropriety.

(4) *A firewall between behavioral-science consultation and clinical engagement with interrogation subjects is vital.* As I discussed earlier, any arrangements that invite doubt about health professionals' undivided commitment to the well-being of their patients put these professions' core caring and therapeutic function at great risk. Not only is it essential, for this reason, that psychologists and psychiatrists who advise interrogators have no personal contact with those being questioned; to safeguard their professions' caregiving identity and ethos, they shouldn't at the same time serve in a therapeutic role.

This firewall, moreover, should extend to those who do provide clinical care to detainees. Early in the life of Guantánamo as a post-9/11 detention site, behavioral-science consultants were given access to detainees' medical records and allowed to

seek additional health information from their caregivers.¹⁴⁶ Health-care providers thereby became covert adjuncts to interrogators, able to obtain information about captives' intimate vulnerabilities that could be used for intelligence gathering. It's hard to imagine a more flagrant breach of clinical caregivers' Hippocratic obligations—and a more potent means for shattering patients' confidence in their health care. A near-absolute ban on revealing prisoners' health and other personal information to behavioral-science consultants (or other intelligence or security personnel) is crucial. Exceptions are merited only when health-care providers make the reasonable judgment that a patient poses an immediate danger to others or to himself or herself¹⁴⁷—or when a patient reveals that a third person poses such a danger.¹⁴⁸

VII. CONCLUSION

In the years ahead, the growing capabilities of the behavioral and brain sciences will make them ever more attractive as tools for intelligence gathering from enemy captives and for warfighting more generally. More sophisticated pharmacological and other neurobiological interventions loom, as do more potent environmental and other psychological manipulations.¹⁴⁹ The CIA's post-9/11 frisson with "truth serum"¹⁵⁰ was more the stuff of 1950s cinematic fantasy than difference-making possibility, but advances in the cellular biology of memory, stress, and interpersonal connectedness are opening up new chemical pathways for influencing remembrance, resistance,¹⁵¹ and rapport.¹⁵² Likewise, early claims for the abilities of functional MRI and computer-analyzed EEG scanning to detect both deception and guilty knowledge¹⁵³ were overblown, but some researchers in this field expect these capabilities to progress toward practical

146. Bloche and Marks, 'Doctors and Interrogators at Guantanamo Bay' (n 28).

147. This exception to medical confidentiality, dating back at least to *Tarasoff v Regents of the Univ of Cal*, 17 Cal 3d 425 (Cal 1976), is well-established in multiple codes and other statements of clinical ethics.

148. This exception, a corollary of the *Tarasoff* exception, see *ibid*, risks encouraging caregivers to stray into interrogation mode. This hazard can be reduced, albeit not eliminated, by instructing caregivers to be attentive but not proactive with regard to what their prisoner-patients say about actions that third parties might take.

149. Jonathan D Moreno, *Mind Wars: Brain Research and National Defense* (Dana Press 2006).

150. See n 8.

151. Bloche, *Hippocratic Myth* (n 4) 176-77.

152. TR Insel, "Toward a Neurobiology of Attachment" (2000) 4 *Review of General Psychology* 176; Jennifer A Bartz and Eric Hollander, "The neuroscience of affiliation: Forging links between basic and clinical research on neuropeptides and social behavior" (2006) 50 *Hormones and Behavior* 518.

153. No Lie MRI <www.noliemri.com/> accessed 27 January 2019; Lawrence A. Farwell, "Brain fingerprinting: A comprehensive tutorial review of detection of concealed information with event-related brain potentials" (2012) 6 *Cognitive Neurodynamics* 115.

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utility.¹⁵⁴ Moreover, personalized profiles of people's wishes, anxieties, affiliations, and enmities, drawn from their online behavior, create unprecedented possibilities for the custom tailoring of influence efforts.¹⁵⁵

Transnational professional ethics is ill prepared for the behavioral and brain sciences' current and emerging capabilities. A global effort to bring ethical governance up to date with these capabilities is urgently needed. America's post-9/11 torture scandal was a sentinel event in this regard. Not only did psychologists, psychiatrists, and other physicians play central roles; these roles were rationalized "ethically" through subterfuge—misdirection made possible by the lack of clear rules. This rationalization, in turn, was a critical link in the chain of "legal" justification: without the participation of psychologists and physicians, the lawyers who gave torture the OK would not have done so.

The recommendations I've set forth here are a start toward a scheme of ethical governance in the national-security realm that makes room for behavioral-science insights and capabilities while safeguarding mental health professionals' core, caregiving role. These recommendations incorporate the international law of armed conflict and human rights, which forms part of the ethical-governance framework when the health professions and their supporting science serve state purposes. But much needs to be done to adapt these bodies of law to what the behavioral and brain sciences can do.

The bitter controversy over application of these sciences to interrogation of terror suspects portends a larger challenge—ethical and legal governance of these sciences' capacities for influence in the national-security and geopolitical realms more widely. The prospect of pharmacological intervention to suppress soldiers' fear and guilt, motivating them to act with less restraint, is no longer science fiction, due to emerging understandings of the neurobiology of anxiety and memory. Use of behavioral-science-based strategies to shape attitudes, values, and culture within organizations¹⁵⁶ raises hard questions about whether these strategies infringe upon personal autonomy and conscience. And exploitation of individualized psychological profiles, assembled from people's online behavior, to craft potent political messaging¹⁵⁷ has led some to contend that this way of persuasion constitutes a new kind

154. See eg Daniel D Langleben and Jane Campbell Moriarty, 'Using Brain Imaging for Lie Detection: Where Science, Law and Research Policy Collide' (2013) 19 *Psychology Public Policy, and Law* 222. For a more cautious view of functional MRI, in recent years the more vigorously promoted of these two technologies, see Martha J Farah, J Benjamin Hutchinson, Elizabeth A Phelps, and Anthony D Wagner, 'Functional MRI-based Lie Detection: Scientific and Societal Challenges' (2014) 15 *Nature Reviews Neuroscience* 123.

155. CBI Insights, 'What Is Psychographics? Understanding The "Dark Arts" of Marketing That Brought Down Cambridge Analytica' (7 June 2018) <www.cbinsights.com/research/what-is-psychographics/> accessed 27 January 2019.

156. Neal M Ashkanasy and Alana D Dorris, 'Organizational Behavior,' *Oxford Research Encyclopedias* online publication (March 2017) <<http://oxfordre.com/psychology/view/10.1093/acrefore/9780190236557.001.0001/acrefore-9780190236557-e-23>> accessed 27 January 2019.

157. SC Matz and others, 'Psychological targeting as an effective approach to digital mass persuasion' (2017) 114 *Proceedings of the National Academy of Sciences* 1214; Olivia Goldhill,

of warfare.¹⁵⁸ The drawing of lines between acceptable and illegitimate uses of the sciences of mind to influence belief and action is one of the major ethical challenges of this century, in the national-security realm and beyond.

¹⁵⁷What Can Politicians Learn from Tracking Your Psychology? Pretty Much Everything,' *Quartz* (20 March 2018) <<https://qz.com/1232873/what-can-politicians-learn-from-tracking-your-psychology-pretty-much-everything/>> accessed 27 January 2019.

¹⁵⁸Brian Klass, "Stop Calling it 'Meddling.' It's Actually Information Warfare," *Washington Post* (17 July 2018) <www.washingtonpost.com/news/democracy-post/wp/2018/07/17/stop-calling-it-meddling-its-actually-information-warfare/?utm_term=.267ed00cb626> accessed 27 January 2019.