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Response

Torturing Without a Parachute: On the Science of Torture's Effectiveness

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Introduction

In his *Texas Law Review* article *Toward a Science of Torture?* Professor Bloche addresses an important question. Along the way he makes many valuable points about the nature, study, and effects of torture generally and the CIA's interrogational torture program in particular. In short, we agree on a great deal with the author. We disagree with only one of his claims, namely that there is not only no "scientific proof" that torture does not work, but also that it is impossible to obtain, and thus, that criticisms of the CIA program are weak "straw men." The author fails to appreciate the scientific value of a wide range of approaches that have grievously undermined claims that torture works, including some he himself discusses.

These errors stem from two erroneous idealizations. The first conflates how the CIA system was claimed to work on the one hand with how it actually worked in practice. The second equates science with a particular set of empirical methods from clinical trials. Accepting the author's narrow model of science would commit us to a randomized, controlled clinical trial testing parachute efficacy in preventing blunt physical trauma due to gravitational acceleration.¹

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1. See generally Gordon C.S. Smith & Jill P. Pell, *Parachute Use to Prevent Death and Major Trauma Related to Gravitational Challenge: Systematic Review of Randomized Controlled Trials*, 327 BRIT. MED. J. 1459 (2003).

Thus, despite our many agreements, we see a danger in the author's reasoning. By suggesting that (a) the U.S. torture program was "scientific" and (b) it cannot be scientifically proven by "straw men" that torture is ineffective in general and ineffective in the U.S. program in particular, it can be deduced that torture was effective. Perhaps this is not what he wanted to say, but in fact this is what might be concluded by the reader and so we believe it is important to respond. After addressing the straw men argument, we turn to the epistemology of science. We conclude with a summary of where the science actually stands on the effectiveness of interrogational torture.

I. The CIA Torture Program

Bloche claims that "proponents of the position that the CIA's torture program didn't 'work' have summoned a series of straw men" that do not reflect the "program's design."² Since a "straw man" is a kind of idealization, the author's use of the term is doubly ironic insofar as he both counters it with another ideal—the design of the program by Mitchell and Hubbard—and fails to confront that ideal with how the program actually worked in practice.

Bloche's first straw man is the mistaken model by torture opponents of a "battle of wills" between interrogator and detainee face-to-face rather than the actual model guiding the CIA program: forcing the prisoner to battle himself by maintaining stress positions or wanting to sleep.³ From working with torture survivors, however, as one of us has done, it is clear that the battle of wills is ineliminable. The torture may not be the medieval red-hot poker but instead be the cumulative or combined effect of manipulation of the environmental, psychological (threats, fear, sleep deprivation, manipulation of sense, manipulation of emotions, attacks to individual and collective identity, or coercive interviewing tactics), and physical (pain-related) elements. This is simply breaking one's will by other means.

If Bloche uncritically accepts the Mitchell/Hubbard ideal in place of a supposed straw man, how does that ideal stack up against what actually happened at the CIA black sites? We know, for example, that seven of the thirty-nine detainees subjected to the most extreme set of tortures never became compliant and so generated exactly zero intelligence reports.⁴ Many other detainees outwitted their captors by providing false information, including high-value detainees, like Abu Zubaydah, Ammar al-Baluchi, Hambali, and Khalid Sheikh Mohammed (KSM).⁵ KSM provides a vivid example of just such a battle of wills. While captive at the CIA's black site in Poland, KSM "liked to joust with his inquisitors," "count[ed] off the

2. M. Gregg Bloche, *Toward a Science of Torture?*, 95 TEXAS L. REV. 1329, 1337 (2017).

3. *Id.*

4. S. REP. NO. 113-288, at xi & n.1 (2014).

5. *Id.* at 85–96, 108–09, 394–95.

seconds” while being waterboarded, and responded to a CIA officer’s admonition “that she knew everything about him and that he shouldn’t lie to her” by “lean[ing] back in his chair and sa[ying], “Then why are you here?”⁶

Bloche’s second opponent straw man is also the second phase of interrogation according to the Mitchell/Hubbard model. The opponent straw man, according to Bloche, assumes interrogators brutalize until the information is elicited, whereas the CIA’s program was two-phased.⁷ The first phase discussed as the first straw man above supposedly “induce[s]” compliance by pitting the victim against himself (e.g., via stress positions), whereas the second phase allegedly “sculpt[s]” that compliance to generate true information rather than false confessions.⁸ Bloche makes much of this distinction, this “key nuance.”⁹

This distinction between inducing and sculpting compliance, however, was never clear in theory or in practice. In the essay, Bloche quotes Biderman, who himself takes pains to “point out that the distinction between inducing compliance and shaping compliance is purely an analytic division. The two kinds of methods are not independent of one another nor separate in time.”¹⁰ Nor do the Biderman or Seligman models offer any help with deception. Unencumbered by scientific theory in this questioning phase, Mitchell touted his recognition of “poker ‘tells,’ or body language that would tip [interrogators] off to when he was telling the truth and when he was being deceitful.”¹¹ Research, however, tells a different story. Vrij and his colleagues demonstrate experimentally that detecting deception by verbal or non-verbal cues is impossible.¹²

Unsurprisingly then, detecting deception became a problem for Mitchell and the CIA. In his discussion Bloche employs phrases like “Mitchell . . . contended that interrogators could sculpt compliance” and CIA interrogators “took the danger of false leads seriously” and “sought to bring science to bear.”¹³ None of this, however, is evidence they actually were able to detect falsehoods. Moreover, Bloche’s further point that Hubbard organized professional psychological conferences on detecting deception attended by

6. Adam Goldman, *The Hidden History of the CIA’s Prison in Poland*, WASH. POST (January 23, 2014), https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html?utm_term=.0959616e588c [<https://perma.cc/9PNH-LJK7>].

7. Bloche, *supra* note 2, at 1333–34.

8. *Id.* at 1334.

9. *Id.*

10. Albert D. Biderman, *Communist Attempts to Elicit False Confessions from Air Force Prisoners of War*, 33 BULL. N.Y. ACAD. MED. 616, 618 (1957); Bloche, *supra* note 2, at 1333–34; see also PAU PÉREZ-SALES, *PSYCHOLOGICAL TORTURE: DEFINITION, EVALUATION, AND MEASUREMENT* 156–57 (2017) (noting Biderman’s model utilized eight different techniques that could be used concurrently to teach the prisoners to comply).

11. JAMES E. MITCHELL & BILL HARLOW, *ENHANCED INTERROGATION* 58 (2016).

12. See generally Aldert Vrij et al., *Psychological Perspectives on Interrogation*, 12 PERSP. ON PSYCHOL. SCI. 927 (2017).

13. Bloche, *supra* note 2, at 1335 (emphasis added).

Mitchell and Jessen before, during, and after they were torturing terrorist suspects in Black Sites around the world suggests they were having trouble detecting deception, not that it worked.¹⁴ Indeed, at the July 2003 CIA conference cited by Bloche, just under a year from when Mitchell had tortured Abu Zubaydah for three weeks straight, one month after KSM had recanted false information he gave under waterboarding at the CIA's Polish prison, and after some 50 detainees had already been tortured by the CIA, Mitchell told conference participants that he still hoped to learn, stating "if we are interviewing a terrorist, how can we tell if he is lying."¹⁵

Bloche's third and final opponent straw man concerns the charge by critics about how the CIA used sleep deprivation. Critics such as O'Mara charge that the CIA's use of sleep deprivation failed to recognize its "corrosive effects on cognition" when in fact the CIA and its medical staff were well aware of these dangers and took them into account in both the design and execution of this particular method of torture.¹⁶ Leaving aside the question of why he ignores the other tortures, Bloche again takes CIA statements at face value, taking effort as evidence of action.¹⁷ So the torturers "fretted over" the problem of cognitive and memory impairments and medical staff "were instructed" to take this into account when balancing "helplessness" with ensuring that victims were "reasonably attentive, and clear-thinking."¹⁸ Once again, the "A for effort" approach might be contrasted with the clear data available from the Senate report, which shows that detainees were often kept awake long enough to induce hallucinations—and then kept awake some more.¹⁹ Arsala Khan was sleep deprived long enough to hallucinate that the CIA had let dogs maul and kill his family members—and to provide information during these hallucinations that would go into the only intelligence report ever generated from his torture.²⁰

Is this science or simple brutality? Trial and error using cruel methods looking for serendipitic findings is not science. It is brutality, pure and simple. Sleep depriving someone and asking them questions to get them off balance is straightforwardly classical torture right out of Koestler's *Darkness at Noon* and gives further lie to the supposedly scientific model of torture imagined by Mitchell et al. Instead, Mitchell's method was really simply a series of random trial-and-error tests, some of them using extreme cruelty, not guided by any theory and incapable of leading to any meaningful

14. See *id.*; see also DAVID H. HOFFMAN ET AL., REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION 167–69 (2015) [hereinafter HOFFMAN REPORT].

15. HOFFMAN REPORT, *supra* note 14, at 128, 173, 176; S. REP. NO. 113–288, at 458–61 (2014); JOHN W. SCHIEMANN, DOES TORTURE WORK? 241–42 (2016).

16. Bloche, *supra* note 2, at 1337.

17. See *id.*

18. *Id.* at 1336–37.

19. S. REP. NO. 113–288, at 109–10, 132–33, 412 (2014).

20. *Id.* at 109.

conclusion, as they were not designed to isolate the effect of any single procedure, if this was ever possible at all.

II. Model of Science

Bloche dismisses the relevance of the information in the Senate torture report as “anecdotal evidence” that “tells us nothing” about torture as an interrogation method.²¹ A scientific approach that might actually reveal something requires a systematic comparison of interrogation methods. He notes that “[t]he history of medicine is replete with deeply held beliefs, based on anecdotal impression, about the effectiveness of treatments that were later proven useless, even harmful.”²² This is no doubt true. It is also just as true that *all* evidence related to psychotherapy or pharmacology of human suffering in general and trauma in particular is very low, too low according to the Cochrane standards, adduced by the author, yet many have been shown to be very helpful.²³

Bloche identifies the two ways “medical researchers” would make such a comparison of methods. First, according to the preferred “gold standard” method, the researcher is the data generating process (DGP) by “creating” the data in a randomized clinical trial (RCT).²⁴ Second, given the difficulty of implementing RCTs in practice, there is the fallback method of estimating the DGP given to us by the world by statistically adjusting for different methods and populations found in real world data.²⁵ Since neither has or can be done for interrogational torture for both scientifically practical and ethical reasons, there can be no science of torture’s effectiveness in providing valuable information. In short, “a scientific answer to the question of whether torture of any sort is more effective than lawful interrogation methods is unachievable.”²⁶

This claim rests on an overly narrow model of science. “Science” incorporates a broad range of methods and practices different than randomized, controlled trials used for testing pharmacological agents in medical studies. Theories and claims in physics are tested and checked deductively via mathematical modeling in addition to experimental testing. Geologists do not test theories of plate tectonics directly but instead create smaller scale physical models, as well as model the processes of interest computationally. In life sciences, such as biology, lab work is complemented by both theoretical (analytical and computational modeling) approaches and empirical observations in the field not rising the rigor of an RCT. No one claims they are not doing real science. Social science—less controlled than

21. Bloche, *supra* note 2, at 1338.

22. *Id.* at 1339.

23. *See id.* at 1348.

24. *Id.* at 1339.

25. *Id.*

26. *Id.* at 1344.

physics—incorporates a range of methods, from mathematical modeling (in both analytical and computational variants), lab experiments, natural experiments in the field, and quantitative and qualitative field observations.

What is more, it is by no means clear that the medical-study RCT model that Bloche advocates is even appropriate for assessing the effectiveness of interrogational torture. The Cochrane standards can only be rigorously applied to pharmacological studies, not to the social sciences, psychology, or other branches of health sciences.²⁷ Applying a pharmacological model and standard to behavioral research (as an interrogation setting is) is irrelevant and out of focus.

A very simple alternative is naturalistic studies with so-called high-value detainees. Some of them entail very sophisticated methodologies that provide sound conclusions.²⁸ Alleging that RCTs are the only standard of proof would mean, for instance, that in order to study the ways of transmission of the Human Immunodeficiency Virus, we should test different ways of contamination in randomized samples of experimental subjects. Epidemiology understands perfectly well how to derive data from qualitative assessments, risk analysis, and cohort studies, just to mention some of the most known models.

Bloche also fails to note another key difference. In medicine, pharmacological studies have different IV phases (from in-vitro to human trials).²⁹ The purpose of this is to detect secondary effects or unacceptable risks.³⁰ Most new drugs are discarded because of their unwanted effects.³¹ Efficacy is to be proven in those drugs which are first proven to be safe.³² In contrast, interrogational torture has proved to have at least the following two devastating “secondary” effects, amply demonstrated in the Senate torture report as well as other investigations and not contested by Bloche:

27. See generally THE COCHRANE COLLABORATIONS, COCHRANE HANDBOOK FOR SYSTEMATIC REVIEWS OF INTERVENTIONS, <http://handbook-5-1.cochrane.org/> [<https://perma.cc/X54N-AXPP>].

28. See generally Laurence Alison et al., *The Efficacy of Rapport-Based Techniques for Minimizing Counter-Interrogation Tactics Amongst a Field Sample of Terrorists*, 20 PSYCHOL., PUB. POL’Y, & L. 421 (2014); Jacqueline R. Evans et al., *An Empirical Evaluation of Intelligence-Gathering Interrogation Techniques from the United States Army Field Manual*, 28 APPLIED COGNITIVE PSYCHOL. 867 (2014); Christian A. Meissner et al., *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459 (2014); Brent Snooks et al., *A Lesson on Interrogations from Detainees: Predicting Self-Reported Confessions and Cooperation*, 42 CRIM. JUST. & BEHAV. 1243 (2015).

29. See Gerlie Gieser, *Clinical Pharmacology 1: Phase 1 Studies and Early Drug Development*, FOOD & DRUG ADMIN., <https://www.fda.gov/downloads/training/clinicalinvestigatortraining/course/ucm340007.pdf> [<https://perma.cc/486T-EVN2>].

30. See *id.*

31. See Press Release, Biotechnology Innovation Org., New Study Shows the Rate of Drug Approvals Lower Than Previously Reported (Feb. 14, 2011) <https://www.bio.org/media/press-release/new-study-shows-rate-drug-approvals-lower-previously-reported> [<https://perma.cc/BB39-DP6T>].

32. See Gieser, *supra* note 29.

1. A high number of innocents tortured. In Guantanamo according to the work of law professor Mark Denbeaux and his colleagues, 55% of detainees were “not accused of committing a single hostile act” and “[f]ewer than 10% conceivably fit [the] description” of fighters for al Qaeda and the Taliban.³³ Of the 780 original detainees only 41 were deemed enough of a threat to justify continued imprisonment—a shockingly low 5%.³⁴ “Since 2002, 779, including at least 15 children, have been imprisoned at Guantanamo.”³⁵ 732 of the detainees have gradually been freed without charges.³⁶ Nine have died (some of whom having committed suicide), and according to Human Rights Watch, as of August 2018 just six have been convicted by a military tribunal while another three have had their convictions vacated.³⁷ In the CIA program, almost one in every four (26 out of 119 detainees or 22%) of its detainees was wrongfully held according to the CIA’s own rules.³⁸ Of torture survivors who have suffered complex traumas (“mental death”), somewhere between 15% to 40% will suffer permanent damage depending on the length and intensity of torture.³⁹
2. False information/confessions. Many studies document the high percentage of false confessions linked to coercive interrogations (up to 20% according to studies).⁴⁰ Misleading or entirely false

33. Mark P. Denbeaux, *The 14 Myths of Guantánamo*, Statement within *Guantanamo Reports*, SETON HALL L. (April 26, 2007), <https://bit.ly/2RamhxE> [<https://perma.cc/8HK2-XEM7>].

34. Mark Denbeaux et al., *Report on Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, Report within *Guantanamo Reports*, SETON HALL L. (Feb. 8, 2006), <https://bit.ly/2SVd4qe> [<https://perma.cc/LK29-PA7T>].

35. *Guantánamo Bay*, REPRIEVE, <https://reprieve.org.uk/topic/guantanamo-bay/> [<https://perma.cc/987B-ZA4P>].

36. *Q&A: Guantanamo Bay, US Detentions, and the Trump Administration*, HUM. RTS. WATCH (June 27, 2018) <https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration> [<https://perma.cc/5CNV-FNM5>] [hereinafter *Q&A: Guantanamo Bay*].

37. *The Guantanamo Trials*, HUM. RTS. WATCH (Aug. 9, 2018), <https://www.hrw.org/guantanamo-trials> [<https://perma.cc/D27Z-F2QQ>]; see *Guantánamo Bay, supra* note 35 (noting that 4 men have been convicted of crimes and 9 men have died); *Guantánamo by the Numbers*, ACLU (May 2018) <https://www.aclu.org/issues/national-security/detention/guantanamo-numbers> [<https://perma.cc/7Q8V-LSVM>] (documenting that 9 detainees have died, 7 of whom apparently committed suicide, and 8 detainees were convicted in illegitimate military commission); *Q&A: Guantanamo Bay, supra* note 36 (highlighting that 9 detainees have died, 6 of whom reportedly committed suicide); Charlie Savage, *Military Identifies Guantánamo Detainee Who Died*, N.Y. TIMES (Sept. 11, 2012) <https://www.nytimes.com/2012/09/12/us/politics/detainee-who-died-at-guantanamo-had-release-blocked-by-court.html> [<https://perma.cc/KAD4-5MZG>] (indicating that 9 men have died, some of whom committed suicide).

38. S. REP. NO. 113–288, at xxi, 15–16 (2014).

39. See generally Grant Hilary Brenner, *The Expected Psychiatric Impact of Detention in Guantanamo Bay, Cuba, and Related Considerations*, 11 J. TRAUMA & DISSOCIATION 469 (2010); Angela Ebert & Murray J. Dyck, *The Experience of Mental Death: The Core Feature of Complex Posttraumatic Stress Disorder*, 24 CLINICAL PSYCHOL. REV. 617 (2004).

40. See Deborah Davis & Richard A. Leo, *Interrogation-Related Regulatory Decline: Ego Depletion, Failures of Self-Regulation, and the Decision to Confess*, 18 PSYCHOL., PUB. POL’Y, & L. 673, 674 (2012) (documenting that 20%–25% of post-conviction exonerations are linked to false

information is even more likely under torture for two reasons. The first is the incentive to avoid more pain by saying anything and the second can be inadvertent, due to the stress put on the brain.⁴¹

Follow Bloche's clinical trial model to its logical conclusion and imagine a medical procedure that not only permanently damaged a *minimum* of one in ten patients but also randomly damaged completely healthy people. Any such procedure—no matter how efficacious—would not only fail to be even considered for a randomized controlled trial but the doctor applying it would likely be jailed.

Indeed, to consider, as the author seems to do, that Mitchell was a “scientist” is an outrage to science. Mitchell and Jessen were career military officers and then private contractors for the CIA. They were not research scientists with a significant scientific publication record.⁴² Perhaps unsurprisingly then, the methods he “experimented” were mere trial and error, with human beings treated as animals.⁴³ One of the methods tried by Mitchell

was making uncooperative prisoners strip to their underwear, having them sit in a chair while shackled hand and foot to a bolt in the floor, and forcing them to endure strobe lights and screamingly loud rock and rap music played through two close loudspeakers, while the air-conditioning was turned up to maximum levels.⁴⁴

Again, this was brutality, not science.

Bloche's references to “scientific proof” and its cognates also betray a conception of science that is epistemologically flawed.⁴⁵ The sciences—whether physical, biological, social, or behavioral—are fundamentally Popperian: theories are always considered tentative, waiting the next round of attempts to falsify them.⁴⁶ Modern science proceeds on the assumption of

confessions); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3, 4, 6–7, 14–19 (2010).

41. See generally SHANE O'MARA, WHY TORTURE DOESN'T WORK (2015).

42. Nor were they qualified as interrogators, despite being granted exclusive authority to develop, operate, and assess their own interrogation operations. “Neither psychologist had any experience as an interrogator, nor did either have specialized knowledge of al-Qa’ida, a background in counterterrorism, or any relevant cultural or linguistic expertise.” S. REP. NO. 113–288, at xx (2014). In spite of that, Mitchell, Jessen & Associates (the company they formed) were financially rewarded with an \$81 million contract (and a budget in excess of \$180 million dollars). *Id.* Additionally, Mitchell and Jessen each received over \$1 million from the CIA. *Id.* Their daily compensation reached \$1,800 per day, which was four times that of other interrogators. *Id.* at 66.

43. See Robert Jay Lifton, Author of “The Nazi Doctors”: Psychologist Who Aided Torture Should be Charged, DEMOCRACY NOW! (May 7, 2015), https://www.democracynow.org/2015/5/7/robert_jay_lifton_author_of_the [<https://perma.cc/KUJ7-ZPBZ>].

44. PHYSICIANS FOR HUMAN RIGHTS, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES (2005) (citing Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES (Oct. 17, 2004) <https://www.nytimes.com/2004/10/17/politics/broad-use-of-harsh-tactics-is-described-at-cuba-base.html> [<https://perma.cc/KE55-QMMK>]).

45. See Bloche, *supra* note 2, at 1338, 1345, 1348, 1350, 1353.

46. KARL R. POPPER, CONJECTURES AND REFUTATIONS 54 (1962).

probabilistic confidence and what is indeed possible with respect to the supposed effectiveness of interrogational torture is a probabilistic set of statements given the available evidence.

III. Science on Torture

So, what does this evidence have to say and how scientific is it? Bloche identifies and largely dismisses two sets of evidence that torture does not work. The first is the enormous neurobiological data on the brain under stress.⁴⁷ Bloche is skeptical of overwhelming research on the negative effects of stress on brain systems supporting the recall of episodic memories, partly because the original experiments did not rise to the level of torture in the CIA program, and it is possible that that difference might cause motivational changes to outweigh the cognitive deficits.⁴⁸ Not only does this ignore the fact that more severe stressors are likely to degrade cognition even further, it also misunderstands the role of the comparison. Any new claim that contradicts a mountain of theory and evidence about the way the brain works should be treated with profound skepticism and require a commensurately powerful set of evidence to the contrary. Bloche himself admits this evidence was never forthcoming.⁴⁹

The second set of evidence is the Senate torture report. Bloche minimizes the relevance of the Senate “torture report” since it is a summary of findings and conclusions, and we do not have access to the 6,000 plus pages of the underlying supporting evidence.⁵⁰ While much indeed remains shrouded in secrecy, it is possible—laborious and painstaking to be sure, but possible—to assess some of the claims and counterclaims by poring through the 800-odd pages of the majority report and the Republican and CIA responses—not to mention the many CIA documents that have been released as the result of FOIA requests and legal discovery. All these sources provide significant documentary evidence, such as internal CIA communications, evidence that can be used to assess the claims of Mitchell/Hubbard that their torture was effective.⁵¹ And in terms of “effectiveness,” the program was simply a catastrophe. The Senate Intelligence Committee Report is clear and their number one conclusion leaves no place to doubt: “The CIA’s use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees.”⁵² What is more, these

47. See generally Thomas Elbert et al., *The Influence of Organized Violence and Terror on Brain and Mind—A Co-Constructive Perspective*, in *LIFESPAN DEVELOPMENT AND THE BRAIN* 326 (Paul B. Baltes, Patricia A Reuter-Lorenz & Frank Rösler, eds., 2006); Thomas Elbert et al., *The Tortured Brain*, 219 *ZEITSCHRIFT FÜR PSYCHOLOGIE/J. PSYCHOL.* 167 (2011); Andreas Maercker & Simon Forstmeier, *Torture and Atrocity Sequelae in Methodologically Sophisticated Studies*, 219 *ZEITSCHRIFT FÜR PSYCHOLOGIE/J. PSYCHOL.* 182 (2011); O’MARA, *supra* note 41.

48. Bloche, *supra* note 2, at 1331–32.

49. See *id.* at 1332.

50. *Id.* at 1338.

51. See e.g., S. REP. NO. 113-288 (2014).

52. *Id.* at xi.

findings are consistent with another scientific approach that questions the effectiveness of interrogational torture from a purely logical exploration via formal game theory.⁵³

In this context, Bloche's dismissal of retrospective studies as violating the Common Rule on human-subjects research is puzzling. On the one hand, it has been shown that Mitchell and Jessen conducted unethical research with human beings—research that may be considered war crimes and crimes against humanity by violating the Nuremberg code.⁵⁴ If there is any doubt, we can cite Mitchell's own words. In his apologia *cum* memoir he states that the purpose was to induce fear and anxiety “based on . . . Pavlovian classical conditioning.”⁵⁵ And Jane Mayer cites an exchange from FBI sources: “Mitchell announced that the suspect had to be treated ‘like a dog in a cage,’ informed sources said. ‘He said it was like an experiment, when you apply electric shocks to a caged dog, after a while, he’s so diminished, he can’t resist.’”⁵⁶ The FBI agents, with their traditions of working within the U.S. criminal legal framework, were appalled. They argued that Zubayda was not a dog; he was a human being. “Mitchell, according to the informed sources, retorted, ‘Science is science.’”⁵⁷

On the other hand, while it is true that a certain type of study that associated particular information with particular individuals could plausibly run afoul of Common Rule prohibitions, the Senate torture report already associates names and information; they are in the public domain. And though Bloche downplays the significance of the Senate report based on CIA documents, he nevertheless repeats (uncritically and without comment) the CIA's Office of Medical Services own conclusions about the effectiveness of various CIA tortures.⁵⁸ The failure to be more skeptical of the OMS conclusions aside, there is nothing wrong with examining such data in an effort to assess effectiveness.

A recent review provides several examples.⁵⁹ Alison and other researchers found that “motivational interviewing” led to better results than that of even minor negative interrogator behaviour in an analysis of 418 video

53. See generally SCHIEMANN, *supra* note 15, at 223–51; Sandeep Baliga & Jeffrey C. Ely, *Torture and the Commitment Problem*, 83 REV. ECON. STUD. 1406 (2016).

54. See generally PHYSICIANS FOR HUMAN RIGHTS, *DOING HARM: HEALTH PROFESSIONALS' CENTRAL ROLE IN THE CIA TORTURE PROGRAM* (December 2014); STEPHEN SOLDZ ET AL., *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* (2015); Reñee Llanusa-Cestero, *Unethical Research and the C.I.A. Inspector General Report of 2004: Observations Implicit in Terms of the Common Rule*, 17 ACCOUNTABILITY RES. 96 (2010); Michael Welch, *Clinical Torture: Drifting in the Atrocity Triangle*, 6 OÑATI SOCIO-LEGAL SERIES 957 (2016).

55. MITCHELL & HARLOW, *supra* note 11, at 45–46.

56. JANE MAYER, *THE DARK SIDE* 156 (2008).

57. *Id.*

58. Bloche, *supra* note 2, at 1336–37, 1341–44.

59. See Pau Pérez-Sales, *Drawing the Fine Line Between Interrogation and Torture: Towards a Universal Protocol on Investigative Interviewing*, 27 TORTURE 1, 3–4 (2017).

interviews with 29 terrorists suspects.⁶⁰ Another study by Alison and his colleagues with terrorists of various stripes reported that “treating [suspects] with respect, dignity, and integrity” mitigated resistance tactics on the part of the suspects.⁶¹ Finally, another study compared the Direct Approach, “one of the most commonly used techniques by U.S. interrogators” in which suspects are questioned in a “business-like manner,” with the Scharff technique, an empathetic method used by a friendly and successful German Luftwaffe interrogator.⁶² They found, *inter alia*, that “the Scharff technique elicits more new information than the Direct Approach” and that “sources faced with the Scharff technique underestimate how much new information they have revealed during the interaction.”⁶³

Bloche himself approvingly points to yet another branch of science, one he variously refers to as “lawful interrogation stratagems that build on concepts from cognitive psychology,” “techniques of interpersonal influence,” and “empirically tested psychotherapeutic methods.”⁶⁴ After providing a brief review and noting their limitations, he nevertheless concludes that “the research findings on memory, persuasion, and resistance that undergird the cognitive psychology-based approach merit the tentative belief that it gets better results,” and “it lends support to preference for this approach over the Mitchell model or other abusive methods.”⁶⁵ In short, Bloche’s argument that the scales are so precariously tipped away from torture rests both on his unsupported devaluation of these findings as merely “science-based” with “indirect empirical support” and on his expectation that full verification and truth is possible, and possible only with randomized controlled trials.⁶⁶

IV. Conclusion

Bloche ends his essay with a call and a “challenge for all who reject torture” not to show that it does not work but “to convince Americans that the torturer’s brutality is a marker of weakness and fear, not national resurgence.”⁶⁷ As compelling an argument as we find that second virtue ethics critique, it clearly has not moved many hearts or minds. Bloche himself notes that nearly two-thirds of Americans say torture often or sometimes justified.⁶⁸ The reason is at least partly because about the same proportion of

60. See generally Laurence J. Alison et al., *Why Tough Tactics Fail and Rapport Gets Results: Observing Rapport-Based Interpersonal Techniques (ORBIT) to Generate Useful Information from Terrorists*, 19 PSYCHOL., PUB. POL’Y, & L. 411 (2013).

61. Alison et al., *supra* note 28, at 428.

62. Pär Anders Granhag et al., *The Scharff Technique: On How to Effectively Elicit Intelligence from Human Sources*, 29 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 132, 138 (2016).

63. *Id.*

64. Bloche, *supra* note 2, at 1345.

65. *Id.* at 1348.

66. *Id.* at 1344–45.

67. *Id.* at 1355.

68. *Id.* at 1330.

those who think it is sometimes justified condition their support on its effectiveness.⁶⁹ Bloche's insistence that no scientific argument can be made when in fact there is indeed a powerful scientific argument unnecessarily and mistakenly weakens the anti-torture position. Torture does not work. We know. They know.

69. SCHIEMANN, *supra* note 15, at 5 (A 2011 national survey found that "nearly two-thirds of all those who think that harsh interrogation methods can sometimes be justified, say that the techniques would not be justified if they were not effective.").