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Torture and Positive Law: Jurisprudence  
for the White House

Jeremy Waldron  
Columbia University Law School

# Torture and Positive Law: Jurisprudence for the White House

## **Abstract**

Revelations of ill-treatment of prisoners by American forces at Abu Ghraib and the publication of memoranda showing that Bush administration lawyers have been seeking to narrow the application of the Convention against Torture and other similar provisions – these developments make it necessary for us to think afresh about the character and significance of the various legal prohibitions on torture. This paper argues that the prohibition on torture is not just one rule among others, but a legal archetype – a rule which is emblematic of our larger commitment to break the link between law and brutality. Characterizing the prohibition as a legal archetype affects how we think about the implications of authorizing torture (or interrogation methods that come close to torture); it affects how we think about issues of definition in regard to torture; and it affects how we think about the fragility and contingency of the provisions of positive law that stand between us and barbarism.

## **Torture and Positive Law: Jurisprudence for the White House**

Jeremy Waldron<sup>1</sup>

### **Abstract**

Revelations of ill-treatment of prisoners by American forces at Abu Ghraib and the publication of memoranda showing that Bush administration lawyers have been seeking to narrow the application of the Convention against Torture and other similar provisions – these developments make it necessary for us to think afresh about the character and significance of the various legal prohibitions on torture. This paper argues that the prohibition on torture is not just one rule among others, but a legal archetype – a rule which is emblematic of our larger commitment to break the link between law and brutality. Characterizing the prohibition as a legal archetype affects how we think about the implications of authorizing torture (or interrogation methods that come close to torture); it affects how we think about issues of definition in regard to torture; and it affects how we think about the fragility and contingency of the provisions of positive law that stand between us and barbarism.

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### **1. A shock to the system**

My starting point is the dishonor that descended upon the United States earlier this year in the wake of revelations about what was happening under American control in Abu Ghraib prison in Iraq. I mean more than the Abu Ghraib nightmare itself – the

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<sup>1</sup> Maurice and Hilda Friedman Professor of Law, Columbia University, New York, and Visiting Professor of Law, Victoria University of Wellington. This is an early draft, in the process of conversion from lecture notes to article format. Readers will quickly observe that many citations are missing and that sections 6 and 8 are incomplete. I am grateful to Chief Justice Sian Elias, Dean Matthew Palmer, Les Holborow, Kirstin Howard, Alan Musgrave, and Richard Sutton for their comments and encouragement at the time this was first presented in New Zealand.

photographs of sexual humiliation, the dogs, the hoods, the wires, the beatings.<sup>2</sup> I refer also to the emerging understanding that what took place there was not just the work of a few "bad eggs" like Lyndie England and Charles Graner,<sup>3</sup> but the upshot of a policy determined by intelligence officials to have military police at the prison "set favorable conditions" (that was the euphemism) for the interrogation of detainees.<sup>4</sup>

The shame and dishonor intensified when it was revealed that abuses were not isolated in this one prison, but that cruel and brutal interrogations were also being conducted by American officials elsewhere. We know now that a number of captured officers in Iraq and Afghanistan, including general officers, were severely beaten during interrogation by their American captors and in one case killed by suffocation.<sup>5</sup> We know too that terrorist suspects, enemy combatants, and others associated with the Taliban and Al Qaeda held by the U.S. in the camps at Guantanamo Bay were being interrogated using physical and psychological techniques<sup>6</sup> that had been outlawed

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<sup>2</sup> Cite: NY TIMES\_\_\_\_\_

<sup>3</sup> President Bush said it was "disgraceful conduct by a few American troops, who dishonored our country and disregarded our values." (His response was caricatured by a comedian on THE DAILY SHOW, quoted by Mark Danner (in The Logic of Torture, NEW YORK REVIEW OF BOOKS 51:11, June 24, 2004, p. \_\_\_): "This may have been something we did, but it is not something we would do."

<sup>4</sup> Peter Hermann, Army Sets First Court-martial in Abuses, THE BALTIMORE SUN, May 10, 2004, p. 1A: "A report by Maj. Gen. Antonio M. Taguba notes several incidents that have not yet emerged in photos, including routine beatings of prisoners with broom handles, sodomy, pouring cold water on naked detainees and threatening detainees with rape. Taguba's report describes a military police unit out of control and notes systematic abuse during interrogations by intelligence officers and private contractors. He notes that soldiers said they were told to 'set favorable conditions' for interviews with inmates, which the soldiers have described in e-mail, letters and a diary as orders to rough up the detainees to elicit their cooperation." See also Patrick J. McDonnell et al., Report on Iraqi Prison Found "Systemic and Illegal Abuse." LOS ANGELES TIMES, May 3, 2004, p. A1: "Taguba found that military intelligence interrogators, in apparent violation of Army regulations, 'actively requested that ... guards set physical and mental conditions for the favorable interrogation of witnesses.' These instructions were not relayed to the military police guards through their own chain of command, but through 'lower levels.' One sergeant told investigators that military intelligence interrogators urged guards to 'loosen this guy up for us' and 'make sure he has a bad night.'"

<sup>5</sup> See Miles Moffeit, Brutal interrogation in Iraq: Five detainees' deaths probed, THE DENVER POST, May 19, 2004, p. A1: "Brutal interrogation techniques by U.S. military personnel are being investigated in connection with the deaths of at least five Iraqi prisoners in war-zone detention camps, Pentagon documents obtained by The Denver Post show. The deaths include the killing in November of a high-level Iraqi general who was shoved into a sleeping bag and suffocated, according to the Pentagon report. The documents contradict an earlier Defense Department statement that said the general died 'of natural causes' during an interrogation."

<sup>6</sup> Cite: NY TIMES\_\_\_\_\_

when they were used by British forces against terrorist suspects in Northern Ireland in the early 1970s (outlawed by the European Court of Human Rights)<sup>7</sup> and outlawed when they were used by security forces in Israel against terrorist suspects in the 1990s (outlawed by the Israeli Supreme Court).<sup>8</sup>

Above all, my starting point is the realization that these abuses been taking place not just in the fog of war, but against a legal and political background set by discussions and memoranda back and forth among lawyers and other officials in the White House and the Defense Department about how to narrow the meaning and applicability of domestic and international legal prohibitions relating to torture.

It is dispiriting as well as shameful to those of us who live in the United States to have to turn our attention to this issue.<sup>9</sup> In 1907 the author of the article on “Torture” in the Encyclopedia Britannica was able to state that “the whole subject is now one of only historical interest as far as Europe is concerned.”<sup>10</sup> But it has become a live issue again. With the growth of the security state and the ethnic-loyalty state in the twentieth century, with the emergence of anti-colonial insurgencies and other intractable forms of internal armed conflict, torture has returned and “flourished on a colossal scale.”<sup>11</sup> Nor is it just a rogue-state third-world banana-republic problem: the use of torture has in recent decades disfigured the security polices of France (in Algeria), Britain (in Northern Ireland), Israel (in the Occupied Territories), and now the United States (in Iraq, Afghanistan, and Cuba).

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<sup>7</sup> Ireland v. United Kingdom 25 Eur. Ct. H.R. 1 (1977).

<sup>8</sup> Public Committee Against Torture in Israel v. The State of Israel, H.C. 5100/94, 53(4) P.D. 817 (1999)

<sup>9</sup> An excellent recent article by Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror, 6 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 278 (2003), begins at p. 278 as follows: “There are some articles I never thought I would have to write; this is one.”

<sup>10</sup> Give Twining reference.

<sup>11</sup> Cf. Judith Shklar, The Liberalism of Fear (citation), p. 27: “In Europe and North America torture had gradually been eliminated from the practices of government, and there was hope that it might eventually disappear everywhere. With the intelligence and loyalty requirements of the national warfare states that quickly developed [after 1914], torture returned and has flourished on a colossal scale ever since. ... [A]cute fear has again become the most common form of social control.”

One has to be realistic. What is remarkable, I guess, is not that torture is used, but that it is being defended<sup>12</sup> (or something very close to it is being defended) and defended not just by the hard men of state security agencies, but by some well-known American jurists and law professors. Here are three examples, some of them uncomfortably close to home:

1. Professor John Yoo, who now teaches law at Boalt Hall at the University of California at Berkeley was the lead author of a January 2002 memo (when he was a Deputy Assistant Attorney General in the Justice Department)<sup>13</sup> persuading the Bush administration to withdraw the administration's recognition of the rules imposed by the Geneva Conventions so far as the treatment of prisoners belonging to Al Qaeda and the Taliban was concerned.<sup>14</sup> This pertains particularly to the issue of interrogation and torture. Despite that fact that the Geneva Conventions impose a prohibition on torture in relation to every single category of detainee that they consider (civilians, POWs, captured insurgents, captured members of irregular forces), Professor Yoo argued that captured members of Al Qaeda and the Taliban were not protected by any such prohibition because the particular category of armed conflict in which they were involved was not explicitly mentioned in any of the Conventions under a description that the Bush administration would accept. Moreover Professor Yoo argued that the administration could not be constrained by

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<sup>12</sup> In Siderman de Blake v. Republic of Argentina 965 F.2d 699 C.A.9 (Cal.),1992, a federal judge observed: "That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it."

<sup>13</sup> John Yoo and Robert J. Delahunty, Application of Treaties and Laws to Al Qaeda and Taliban Detainees, Memorandum for William J. Haynes, General Counsel, Department of Defense, January 9, 2002.

<sup>14</sup> E.g., GENEVA CONVENTION III, Article 17: "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind." See also GENEVA CONVENTIONS, Common Article 3: "[E]ach Party to the conflict shall be bound to apply, as a minimum, the following provisions: ... Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.... [T]he following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... (c) outrages upon personal dignity, in particular humiliating and degrading treatment..."

any inference from the Conventions so far as this minimum standard – no torture – was concerned, nor could it be constrained in this regard by ius cogens norms of customary international law.<sup>15</sup>

2. Professor Alan Dershowitz, who teaches law at Harvard Law School, has argued at length in a couple of well publicized books that torture may be a not unacceptable method<sup>16</sup> – morally or constitutionally – for the United States to use and authorize if it is needed to extract information from terrorists that may lead to the immediate saving of lives.<sup>17</sup> Professor Dershowitz has in mind forms of non-lethal torture, such as (in his phrase) “a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life.”<sup>18</sup> He wants us to consider the possibility that such forms of torture might receive explicit and regular legal authorization in the form of judicial torture warrants.

3. Jay Bybee was once a law professor and he has recently been confirmed as a judge on the Ninth Circuit. But he was formerly head of the Office of Legal Counsel in the Department of Justice, and in that capacity he put his name to a memorandum sent to the White House purporting to narrow the definition (or the administration’s understanding of the definition) of “torture” to cover only the most egregious cases of

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<sup>15</sup> Though Professor Yoo was a Deputy Assistant Attorney General when he authored this memorandum, he has characterized suggestions that he voluntarily resign his position at Boalt Hall (in light of his official involvement to this extent with the abomination of torture) as attacks on his academic freedom. See Michael Anderson, Boalt Graduate Defends Demand for Professor’s Resignation, THE DAILY CALIFORNIAN, June 1, 2004.

<sup>16</sup> My convoluted syntax is a tribute to the delicacy with which Professor Dershowitz formulated his suggestion, and to the outrage he displays when anyone suggests he might actually be in favor of the proposal he has mooted.

<sup>17</sup> ALAN DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002), 470-7 and ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) 132-63. Professor Dershowitz’s involvement with this issue goes back at least as far as 1989: see Alan Dershowitz, Is it Necessary to Apply “Physical Pressure” to Terrorists – and to Lie About it? 23 ISRAEL LAW REVIEW 192 (1989).

<sup>18</sup> DERSHOWITZ, WHY TERRORISM WORKS, 144.

cruel, inhuman and degrading treatment during interrogation.<sup>19</sup> Bybee argued that most instances of the infliction of pain to extract information should not be categorized and prohibited as torture when used by U.S. officials. The word “torture” and the prohibition on torture should be reserved, he argued, only for the most extreme instances of the infliction of pain in interrogation. Bybee’s memorandum also compassed a wide array of defenses that might be invoked to exculpate US soldiers or officials who, through some misfortune, might fall foul of various domestic and international prohibitions on torture. I will talk particularly about the definitional aspects of the Bybee memorandum in section 2 of this paper.<sup>20</sup>

The Bush administration has issued various statements disavowing torture.<sup>21</sup> But these statements fail to reassure when they are coupled with this legalistic enterprise within the administration of reducing torture to a rather narrow concept and arguing that torture is not necessarily a war crime when it is used against Al Qaeda, not to mention proposing that even methods which on all accounts are presently

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<sup>19</sup> Memo: “Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A,” from the Justice Department’s Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush. Dated August 1, 2002.

<sup>20</sup> Bybee memorandum repudiated by the administration? – Herman Schwartz, Judgeship Nominees: Twisting the Law on Interrogating Detainees, NEWSDAY (New York) August 18, 2004, p. A39: “The most notorious of these memos, issued Aug. 1, 2002, by the assistant attorney general in charge of the Justice Department Office of Legal Counsel, set out what the White House counsel called the ‘definitive interpretation’ of the law on torture. Ignoring all the term’s widely accepted meanings, the memo defined ‘torture’ as limited to actions that inflict pain equivalent to injuries ‘such as organ failure, impairment of bodily function, or even death.’ The memo also advised that treatment that is only ‘cruel, inhuman or degrading’ is permissible, even though both domestic and international law condemn such treatment. When the memo came to light, the Bush administration quickly repudiated it as ‘irrelevant,’ even though it had been in effect for two years. The official who wrote the memo was Jay S. Bybee, appointed by President George W. Bush to the Ninth Circuit Court of Appeals the year after he wrote it.”

However: \_\_\_\_: “It is clear from a reading of the Working Group Report (Haynes memorandum), dated April 4, 2003, and released to the public by the DOD on June 22. that it incorporated the now-repudiated August 2002 DOJ Bybee memorandum, which had justified torture so long as it doesn’t result in organ failure or death. [Is this right?] Almost half of the 50-page Bybee memo was incorporated virtually verbatim into the Working Group Report.”

<sup>21</sup> Cite administration response to Abu Ghraib abuses. Cite to Rumsfeld and Haynes Working Party. Cite letter from William J. Haynes II, General Counsel, U.S. Department of Defense, to Senator Patrick Leahy (June 25, 2003), available at <http://www.hrw.org/press/2003/06/>



prohibited as torture might be defended on grounds of necessity and regularized as lawful exercises of executive power in response to terrorist threats.

Of course these proposals do face some opposition within the present administration. But I think it's fair to say that the opposition has been much more strident from career soldiers and diplomats, than from lawyers.<sup>22</sup> So we are talking now not just about dishonor to the United States, but also about a degree of dishonor attaching to our profession, that is, to the study and practice of law. Those of us who love the law are disgraced by these actions of our colleagues. Sure, our primary objection to torture ought to be articulated in regard to the immediate predicament of those who are going to suffer the treatment that Dershowitz, Bybee, and Yoo appear to condone. But it is also shocking as a jurisprudential matter. That views like these should be voiced by scholars who have devoted their lives to the law, to the study of the Rule of Law, and to the education of future generations of lawyers – and not just voiced but taken seriously in the legal and political community – is a sort of “shock to the system.” Everyone must choose their response to this situation in the light of where they can work most effectively. To me, the memoranda of Judge Bybee and Professor Yoo and the proposal of Professor Dershowitz indicate the necessity of reflecting a little on the nature of the prohibition on torture and its place in our system of law.

In what follows I want to do two things. First, in section 2, I want to explore the idea that there is something inherently inappropriate about trying to pin down the prohibition on torture with a precise definition – one that would give us an operationalized measure of “severe pain” etc. Although insisting on finding an exact definition sounds all very lawyerly, there is to my mind something creepy and uncouth about it, something unhealthy from the legal point of view, especially when the quest for a definition is put straight to work in the service of a mentality that says “Give us a definition, so we have something to work around, something to game, a determinate envelope to push.”

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<sup>22</sup> Evidence? Perhaps mention this from \_\_\_'s description of emergence of Haynes memorandum: “The Working Group reportedly was wracked with bitter controversy, especially between the DOD civilian and uniformed lawyers. Senior Army, Air Force, and Marine lawyers wrote classified dissenting memos ... in opposition to the position taken by DOD civilians and the DOJ to allow tougher interrogation techniques to be used.”

Secondly, in sections 4-8, I want to explore the idea I mentioned in the last paragraph but one – the idea that messing with or narrowing the definition of torture might deal a body blow to the corpus juris that goes beyond the immediate effects on the mentality of torturers and the terror and suffering of their victims. Beginning in section 3 with some meditation on legal and moral absolutes, I want to explore the proposition that torture is repugnant to law as such, or repugnant at least to the spirit of our law, and I want to examine some of the jurisprudential understandings we might need to make sense of that proposition.

## 2. Issues of Definition

### (a) An ill-defined term?

Recent efforts by Jay Bybee and others to pin down a precise meaning for "torture" are a response to a common belief that the term is vague and ill-defined, or that when an attempt is made to define it, the terms that are used to define it are themselves vague and ill-defined. We proceed with torture as though "we know it when we see it,"<sup>23</sup> and we all have various gruesome paradigms in mind – the rack, the thumbscrew, the electrodes attached to the genitals. But the response to Abu Ghraib scandal made clear that this is far from a consensus about what constitutes torture. Muslim prisoners were humiliated by being made to simulate sexual activity with one another; they were beaten and their fingers and toes were stomped on; they were put in stress postures, hooded and wired, in fear of death if they so much as moved; they were set upon or put in fear of attack by dogs. Was this torture? Is it to be put in a category and on a par with the rack, the thumbscrew, the electricity? Most commentators thought it was torture, but one or two American newspapers resisted the characterization preferring the word "abuse."<sup>24</sup> Some conservative commentators

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<sup>23</sup> ... as Justice Potter Stewart said about obscenity in Jacobellis v. Ohio 378 US 184 (1964)

<sup>24</sup> Geoffrey Nunberg, Don't Torture English to Soft-pedal Abuse, NEWSDAY (New York) May 20, 2004, p. A50: "'Torture is torture is torture,' Secretary of State Colin Powell said this week in an interview on 'Fox News Sunday' with Chris Wallace. That depends on what papers you read. The media in France, Italy and Germany have been routinely using the word 'torture' in the headings of their stories on the abuses in the Abu Ghraib prison. And so have the British papers, not just the left-wing Guardian ('Torture at Abu Ghraib'), but the right-wing Express ('Outrage at U.S. Torture of Prisoners') and Rupert Murdoch's Times ('Inside Baghdad's

suggested that what happened was no worse than fraternity hazing.<sup>25</sup> Calling it hazing was no doubt intended as a provocation, but I think there's also a serious point that these commentators wanted to convey: if we use the word "torture" to characterize what happened under American control in Abu Ghraib prison, are we not depriving ourselves of the language we need to condemn much more vicious or crueler activities? Sir Gerald Fitzmaurice, who was one of the judges in Ireland v. UK (1977), observed in his dissent that if the five techniques that the British had used in the early 1970s as aids to interrogation in Northern Ireland – sleep deprivation, hooding, white noise, stress postures, and severe limitations on food and water – were "to be regarded as involving torture, how does one characterize e.g. having one's finger-nails torn out, being slowly impaled on a stake through the rectum, or roasted over an electric grid?"<sup>26</sup> And I think some of the skeptics about "torture" at Abu Ghraib are saying the same sort of thing.

The lack of clear definition is a common complaint among jurists. New York law professor Marcy Strauss observes in a recent article that "the ... boundaries of the concept of torture are surprisingly blurry." She says:

Some commentators define torture incredibly broadly to include the infliction of virtually any level of physical or emotional pain. For example, Amnesty International and others speak of torture when describing sexual abuse of women prisoners, police abuse of suspects by physical brutality, overcrowded cells, the use of implements such as stun guns, and the application of the death penalty.<sup>27</sup>

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Torture Jail'). But the American press has been more circumspect, sticking with vaguer terms such as 'abuse' and 'mistreatment.' In that, they may have been taking a cue from Defense Secretary Donald Rumsfeld. Asked about torture in the prison, he said, 'What has been charged so far is abuse, which is different from torture. I'm not going to address the "torture" word.'

<sup>25</sup> Frank Rich, The War's Lost Weekend, THE NEW YORK TIMES, May 9, 2004 Section 2, p. 1: "[A] former Army interrogation instructor, Tony Robinson, showed up on another Fox show, 'Hannity & Colmes,' to assert that the prison photos did not show torture. 'Frat hazing is worse than this,' the self-styled expert said." This characterization – that the abuse at Abu Ghraib was more like hazing than like torture – was seconded also by Rush Limbaugh and by Representative Steve King (Iowa?)

<sup>26</sup> Cite

<sup>27</sup> Marcy Strauss, Torture, 8 NEW YORK LAW SCHOOL LAW REVIEW 201 (2003/2004)

And she worries about the consequences of this casual expansion of the term.:

The problem with such a definition is that it knows no real limits; if virtually anything can constitute torture, the concept loses some of its ability to shock and disgust. ... [U]niversal condemnation may evaporate when the definition is so all encompassing."

Some of this worry is far-fetched: Strauss complains that the term is used incredibly loosely: "I've often heard a person say to another: 'you're torturing me,' when that other person won't stop making them laugh. Taking a particularly boring class is often referred to as 'torture' by many students." But that's just silly. These are well-understood figurative uses. The same students who complain that Professor Strauss's classes are "torture" will also complain that her term-tests are "murder," but we don't cite that as a ground for saying that the legal concepts associated with homicide are badly defined.<sup>28</sup>

On the other hand some attempts to pin down the concept seem pedantic. John Langbein, in his otherwise excellent book, Torture and the Law of Proof, says he won't countenance any use of the term which is unrelated to the gathering of evidence. So, for example, he thinks it wrong to describe punishments as torture or to talk of torture as a mode of political terrorization or torture as a mode of gathering information not intended to be used as evidence in legal proceedings.<sup>29</sup>

It is worth noting, too, that not all complaints about lack of definition call for a tightening of the concept. Jeremy Bentham worried about "the delusive power of words" in discussions of torture.<sup>30</sup> But Bentham's own definition is very wide.

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<sup>28</sup> Mention also the common figurative use in law – the idea of "torturing" the meaning of a word or a phrase to yield a particular result.

<sup>29</sup> JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF, (1977) 3.

<sup>30</sup> Twining, Bentham on Torture, \_\_\_\_\_, p. 42.

Torture ... is where a person is made to suffer any violent pain of body in order to compel him to do something, which done ... the penal application is immediately made to cease.<sup>31</sup>

Bentham thought the interests of clarity were served by defining torture to include all cases of the infliction of pain for the sake of coercion so that we could then have a substantive debate about which of these were justified and which not, rather than assuming in advance that everything taken in by the term “torture” was necessarily illegitimate and then debating the definitional ramifications of that.<sup>32</sup> So Bentham would not worry, as Marcy Strauss does, that a wide definition might cause universal condemnation to evaporate.

### **(b) The interest in clear definitions**

Complaints about the definition of “torture” assume that definitional vagueness is always a vice. I don't have any knockdown argument against precision in this area, but I don't think we should simply assume that it is always necessary or desirable.<sup>33</sup>

Sometimes we value “reasonableness” tests or “best interests” tests and we resist attempts to convert these standards into operationalized rules. In other cases, we clearly do want precise, even numerical rules, like speed limits or monetary limits on

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<sup>31</sup> Ibid., p. 43. Bentham applied this definition to the case of “a Mother or Nurse seeing a child playing with a thing which he ought not to meddle with, and having forbidden him in vain pinches him till he lays it down.”

<sup>32</sup> Bentham: “Torture, by many of those who have sitten in judgement over it, seems to have been regarded in one single point of view, as if it were one single thing, applied constantly to one and the same purpose. Those who viewed it in this light which ever part they take, whether they approve it, or whether they condemn it, can not fail of being mistaken. On this subject as much on most others it behoves us to be on our guard not to be led astray by words. There is no approving it in the lump, without militating against reason and humanity: nor condemning it without falling into absurdities and contradictions.” (cite)

It is not surprising that Bentham would say that on this definition torture is not always morally wrong: (1) it's a broad definition; (2) he's a consequentialist; and (3) the currency of his consequentialism is of course pain as well as pleasure.

I must say though that I was quite unprepared for the pedantic enthusiasm with which he pursues this. Consider, for example, “Rule 7” of Bentham's calculus for the infliction of torture: “In order that as little misery be incurred in waste as possible the torture employed should be of such a kind as appears to be the most acute for the time the dolorific application lasts, and of which the pain goes off soonest after the application is at an end.” (!!)

<sup>33</sup> Some material in this section is taken from Jeremy Waldron, Vagueness in Law and Language – Some Philosophical Perspectives, 82 CALIFORNIA LAW REVIEW 509 (1994).

tax deductions. But we acknowledge that numbers can be arbitrary.<sup>34</sup> God said that he would save Sodom from destruction if there could be found fifty righteous people within the city. "Abraham answered and said ... Peradventure there shall lack five of the fifty righteous: wilt thou destroy all the city for lack of five?" (God said, "Alright then, forty-five." And you know how the bargaining went on.)<sup>35</sup>

I guess the argument in favor of precision goes like this. To the extent that the meaning of a term used in legal prohibition is indeterminate, the person to whom it is addressed may not know exactly what is required of him, and he may be left quite unsure as to how exactly the enforcement powers of the state will be used against him. The effect is to chill a person's exercise of his liberty, as he tries to avoid the prospect of being taken by surprise by enforcement decisions.

Now the prohibitions on torture contained in the Geneva Conventions and in the Convention Against Torture apply in the first instance to the state and so the first things we have to ask is this: Is the state in the same position as the ordinary individual in having a liberty-interest in bright lines? Presumably we don't want to say that the state has a general interest analogous to that of the individual in not having its liberty "chilled" by vagueness. I know there is a sort of idiotic Diceyan tradition of treating the state or its officials as individuals just like any other citizen.<sup>36</sup> But there's something fundamentally wrong-headed about that. We set up the state to preserve and enlarge our liberty; the state itself is not conceived as one of the beneficiaries of our libertarian concerns. Even the basic logic of liberty seems inapplicable. In the case of individuals, we sometimes invoke the old principle that everything which is not expressly forbidden is permitted. But it is far from clear that

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<sup>34</sup> Cf. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARVARD LAW REVIEW 1685 (1976): "Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but not all of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of 'free will' directly to the facts of each case."

<sup>35</sup> Genesis 18: 26. Abraham got the final number down to ten...

<sup>36</sup> Citation.

this should be a principle applying to the state.<sup>37</sup> On the contrary, constitutional doctrine often works the other way: in the United States, everything which is not explicitly entrusted to the federal government is forbidden to it; it does not have plenary power.<sup>38</sup>

However, although the prohibition on torture is intended in the first place as a constraint on state policy, it is true that state officials do also have an interest as individuals in regard to war crimes or other criminal prosecutions. For example, 18 U.S.C. 2340 and 2340A purport to fulfill the United States' obligations under the Convention Against Torture by defining torture as an individual criminal offense. Many would say that inasmuch as serious punishment is threatened by §2340A,<sup>39</sup> there is an obligation to provide a tight definition, so that someone who might or might not be regarded as a torturer is not taken unfairly by surprise by a charge or

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<sup>37</sup> Cf. Bruce Harris, The Third Source of Authority for Government Action, 109 LAW QUARTERLY REVIEW 626 (1992).

<sup>38</sup> In this connection, I was intrigued by the suggestion of Justice Scalia, in his dissent in Rasul v Bush (2004), that the executive, just as much as the individual citizen, needs clear and stable precedents to rely on so it can organize its activities with some confidence and certainty about the legal environment in which it is operating. Justice Scalia called the decision of the Supreme Court in Rasul “an irresponsible overturning of settled law,” and he went on:

Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction – and thus making it a foolish place to have housed alien wartime detainees. ... Departure from our rule of stare decisis in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. ... For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.

Of course Justice Scalia is not asserting that the state has a pure liberty interest (analogous, for example, to the liberty interest that someone like Hayek would associate with the certainty aspect of stare decisis: F.A. HAYEK, THE CONSTITUTION OF LIBERTY (1960), \_\_\_). But it has an interest in freedom of action nonetheless in regard to the efficient prosecution of public policy or in this case the efficient prosecution of war.

<sup>39</sup> § 2340A: (a) Offense. - Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

conviction under that section.<sup>40</sup> (Many would say this is an elementary aspect of the Rule of Law.) Against that, however, we ought to bear in mind that the charge of torture is unlikely to come “out of the blue” (as we say in the Antipodes), or to be entirely unexpected by someone already engaging in abuse or mistreatment of prisoners or in treating prisoners in what they themselves (the mistreaters) know is an inhuman or degrading manner. Such persons know already that they are playing with fire. Any concern voiced on their behalf about their being taken by surprise by a charge or conviction under §2340A is surely crocodile tears – “I am shocked, shocked, to find that setting dogs on prisoners or conducting mock executions is regarded as torture.” In cases like this, the claim that one is being treated unfairly by the use of an ill-defined norm is not really convincing. The subject is hardly blindsided. The subject knows that he is in a morally delicate situation (to put it mildly) and that he is taking a huge risk.

One other point in this connection: even if there is a legitimate interest on the part of individual defendants in having a clear definition of torture, it is evident from the tone and direction of the Bybee and Yoo memoranda that they are attempting to exploit this in the interests of state policy. The idea is that by defining the sort of bright line that the interests of potential individual defendants might call for, we can establish room for an official policy of coercive or inhumane interrogation that would be much more problematic if the individual interest in a clear definition were not being pandered to.

Let’s return then to the state. One way of thinking about the need for precise definitions involves asking whether the person or entity constrained by the norm in question – in our case the prohibition on torture – has a legitimate interest in pressing up as close as possible to the norm, and thus a legitimate interest in having a bright line rule stipulating exactly what is permitted and exactly what is forbidden. The idea is that the offense is understood as a point or a threshold on a spectrum of some sort; the subject knows that he is on the spectrum and that there is a point at which his conduct might be stigmatized as criminal; and the question is whether he has a legitimate interest in being able to press up as close to that point as possible, in which

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<sup>40</sup> [Also application of rule of lenity: inasmuch as definition of offense is ambiguous, any ambiguity is to be



case he needs to know exactly where it is. An example of someone who does have such a legitimate interest might be a tax-payer who says “I have an interest in arranging my affairs in order to lower my tax liability much as possible, so I need to know exactly how much I can deduct for charitable contributions, how much I can deduct for entertainment expenses, etc. without crossing the line from avoidance to evasion.” Another example is the driver of an automobile who says “I have an interest in knowing exactly how fast I can go without breaking the speed limit.” For those cases, there does seem to be a legitimate interest in having clear definitions. Compare them however to a couple of other cases: the husband who says, “I have an interest in pushing my wife round a bit and I need to know exactly how far I can go before it counts as domestic violence”; or the professor who says “I have an interest in flirting with my students and I need to know exactly how far I can go without falling foul of the sexual harassment rules” There are some scales one really shouldn't be on, and with respect to which one really does not have a legitimate interest in knowing how far exactly along the scale one should be permitted to go.

So let's apply this to the prohibition on torture. In regard to torture, is there an interest in having clear and bright-line rules, analogous to the taxpayer's interest in entertainment deductions or the driver's interest in the speed limit? If the state (and/or its officials) do have some interest in having precise definitions and bright lines, what exactly is the nature of that interest? We can say in a general way that the United States has an interest in doing whatever is necessary to prevent further terrorist attacks, and in that regard it has a general interest in freedom of action in regard to the efficient prosecution of the war on terrorism. Now since we acknowledge there ought to be some legal restraints on the waging of armed conflict, even armed conflict of this all-important kind, it might be thought that the state needs a clear sense, laid down in advance, of what acts in connection with the waging of the war on terror are permissible and what acts are not. But that moves too quickly. The question is: why exactly is precise definition necessary?<sup>41</sup> And to answer that, we must show that there

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construed in favor of defendant – cite to Castillo, Staples etc.]

<sup>41</sup> Cf. Michael Moore, Torture and the Balance of Evils, 23 ISRAEL LAW REVIEW 280 (1989) at 343, suggesting that there is sometimes a trade-off between precision and accuracy.

is a particular continuum of action that the state and its officials might legitimately be on, along which they have an interest in knowing exactly how far they can go.

The most common argument one hears goes like this. Interrogators have an interest in being as severe and coercive as possible and in being able to inflict as much pain as possible short of violating the prohibition on torture. After all, the point of interrogation is to get people to do what they don't want to do and for that reason pressure is necessary, to elicit information that the subject would rather not reveal. Since interrogation as such is not out of bounds, it may be thought interrogators obviously do have legitimate interest in being on some sort of continuum of pressure and it's just a question of how far along that continuum we ought to go.<sup>42</sup>

There is something wrong with that argument. It is true that all interrogation puts pressure on people to reveal what they would rather not reveal. But there are ways in which the law can pressure people while still respecting them as persons and without using any form of brutality at all. It is quite wrong to suggest that these forms of respectful pressure are on the same scale as torture, just further down the line. So for example: a hostile witness under sub poena on the witness stand (in a case where there is no issue of self-incrimination) is pressured to answer questions truthfully and give information that he would rather not give. The examination or cross examination may be long and grueling and unpleasant, and there are penalties of contempt for refusing to answer and perjury for answering falsely. But that doesn't mean these forms of pressure are on a continuum of brutality with torture, and it's just a question of how far one can go. Certainly the penalties for contempt and perjury are coercive in a sense: they impose unwelcome costs on certain options otherwise available to the witness. Even so, there is a difference of quality not just degree between the coercion posed by legally established penalties for non-compliance and the sort of force that involves using pain to break the will of the person being interrogated.<sup>43</sup> Now, I don't think Alan Dershowitz would agree with what I have just said. He argues that

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<sup>42</sup> Suggestion by Schlesinger committee that revelations of Abu Ghraib abuses have chilled subsequent interrogation practices.

<sup>43</sup> [You may say: "Well, not every context is as formal and as respectful as a courtroom. We are talking about war, not litigation." But actually brutal interrogation of any sort is not permitted with regard to prisoners of war either. So whether or not John Yoo is right that common Article 3 of the Geneva Conventions (prohibiting all

imprisoning a witness who refuses to testify after being given immunity is designed to be punitive – that is painful. Such imprisonment can, on occasion, produce more pain ... than non-lethal torture. Yet we continue to threaten and use the pain of imprisonment to loosen the tongues of reluctant witnesses.<sup>44</sup>

But Professor Dershowitz is wrong. The mistake lies in his equation of “punitive” and “painful.” Though pain can be used as punishment, only the crudest utilitarian would suggest that all punishment is necessarily painful. Imprisonment works coercively because it is undesired, not because it is, in any literal sense, painful. And it is the literal sense that is needed if we are to say that torture and imprisonment are on a continuum.

Some have argued that nevertheless there might be a continuum of discomfort associated with interrogation, and we are entitled to ask how far along that continuum we are permitted to be.<sup>45</sup> After all, we are not required to provide comfortable furniture for the subject of interrogation to sit in, nor are we required to provide cups of tea.<sup>46</sup> Someone may ask: are we required to ensure that the back of the chair that

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sorts of cruel treatment and torture) does not apply to the interrogation of Al Qaeda suspects, still the very existence of the provision is a healthy reminder that the infliction-of-pain-in-interrogation continuum – a continuum marked by torture at the far end – is not something we are supposed to be on at all, even in wartime (even, say, in the Second World War where the stakes were the stakes were considerably higher than they are in the war against Al Qaeda). In relation to that continuum we don't have a legitimate interest in wartime in being allowed to sail up close to bright lines and thresholds in our dealing with prisoners.]

<sup>44</sup> DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 147

<sup>45</sup> Acknowledgment to Jacob Levy and Melissa Williams in discussion.

<sup>46</sup> From Monty Python's famous Spanish Inquisition sketch:

**Cardinal Ximinez** [angrily hurling away the cushions]: Hm! She is made of harder stuff! Cardinal Fang! Fetch...the Comfy Chair!

[Jarring Chord – zoom into Cardinal Fang's horrified face]

**Cardinal Fang** [terrified]: The...Comfy Chair?

[Cardinal Biggles pushes in a comfy chair – a really plush one]

**Cardinal Ximinez**: So you think you are strong because you can survive the soft cushions. Well, we shall see. ... Put her in the Comfy Chair!

[They roughly push her into the Comfy Chair]

**Cardinal Ximinez** [with a cruel leer]: Now – you will stay in the Comfy Chair until lunch time, with only a cup of coffee at eleven.

the subject sits in does not hurt his back or that the seat is not too hard? If the answer is “No,” then surely that means we are on a continuum with some of the techniques of interrogation that are arguably torture, like the Israeli technique of shackling a subject in a stress position in a very small tilted chair (the Shabach).<sup>47</sup> To answer this, it is important to understand – as Jay Bybee argues (rightly, I think, in this case) – that torture is a crime of specific intent:<sup>48</sup> it involves the use of pain deliberately and specifically to break the will of the subject. Failing to provide an armchair for the interrogation room may or may not be permissible; but it is in a different category from specifically choosing or designing furniture in a way calculated to break the will of the subject by the excruciating pain of having to sit in it. That latter choice is on a continuum with torture – and I want to question whether that’s a continuum an official has a legitimate reason for being on. The former choice – failing to provide a comfy chair – is not.

It is time to stop being coy. What Jay Bybee and others have in mind as the particular continuum, in respect to which they say we need a bright line indicating where torture begins, is not a continuum of pressure, nor a continuum of unwelcome penalties, nor a continuum of discomfort. It is a continuum of cruel, inhuman and degrading treatment. Because cruel, inhuman and degrading treatment is not prohibited (by contentions or statutes applying to U.S. personnel) in the same way that torture is prohibited – though it is prohibited under the Torture Convention<sup>49</sup> – Bybee and others reckon that an interrogator might have a reason to be on this spectrum even though he has a reason to stop short at torture. (The difference in reasons stems from differences relating to the type of prohibition, the difference in penalty etc.). That’s the basis of the demand for a precise definition: we have a legitimate interest in treating detainees in a cruel, inhuman and degrading way, but we need to know where on the continuum of such treatment, we cross the line into torture. Whether the rest of us should regard it as an affront to lenity or legality that

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<sup>47</sup> Cite to Black Book: Israel and Palestine.

<sup>48</sup> Cite.

<sup>49</sup> Cite

the definition of torture fails to pander to this interest is something I leave readers to decide.<sup>50</sup>

**(c) The Bybee memorandum**

I have talked a little about the Bybee memorandum – the August 2002 memorandum written for the CIA and the White House by DOJ/OLC chief Jay Bybee.<sup>51</sup> But now I want to focus on it more specifically. It is a detailed 50-page memorandum giving what some have described as the most lenient interpretation conceivable to the anti-torture convention and other anti-torture provisions.<sup>52</sup> (Though subsequently it was officially repudiated, in fact large sections of it were incorporated more or less verbatim into what is now known as the Haynes memorandum, of a working group set up in the Pentagon in January 2003 to reconsider interrogation methods.)<sup>53</sup>

According to Bybee, it is plain that the relevant legal provisions prohibit as torture "only extreme acts" and penalize as torture "only the most egregious conduct." He notes that the Reagan administration's ratification of the Convention Against Torture was accompanied by the following understanding

The United States understands that, in order to constitute torture, an act must be deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering<sup>54</sup>

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<sup>50</sup> See also Jeremy Waldron, Retroactive Law: How Dodgy Was Duynhoven? 10 OTAGO LAW REVIEW 631 (2004), for some analogous discussion as to whether a murder has a legitimate interest ex ante in knowing exactly what the minimum non-parole period for his particular kind of murder will be.

<sup>51</sup> Memo: "Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," from the Justice Department's Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush. Dated August 1, 2002.

<sup>52</sup> References.

<sup>53</sup> See note 20 above

<sup>54</sup> Cite

The terms of the U.S. ratification also said that the word "torture" was to be "reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain." The administration added that such "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture'."<sup>55</sup> And although it is conceded that this might amount to "inhuman treatment," Bybee noted that the US made a reservation to that part of the Convention Against Torture too, saying that the prohibition on inhuman treatment does not apply to the extent that it purports to prohibit anything permitted by the U.S. Constitution as currently interpreted. From all this, Bybee concluded that "certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within [the] proscription against torture."<sup>56</sup> So it is clear what sort of continuum Bybee thinks interrogators should be on: they are, in his opinion, permitted to work somewhere along the continuum of the infliction of pain and of inhuman and degrading treatment, and the question is: where is the bright-line along that continuum – the requisite level of intensity of suffering – where the specific prohibition on torture is supposed to kick in?<sup>57</sup>

Now how on earth does he think that question could be answered? It is all very well to talk about "requisite intensity" and to try and distinguish torture from other forms of inhuman treatment in terms of the severity of the inflicted agony.<sup>58</sup> But this

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<sup>55</sup> These comments came in the comments that accompanied the Administration's recommendation of the treaty to the Senate-- U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 138 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990)

<sup>56</sup> This distinction has been advanced as a basis for permitting a variety of physical abuses as techniques of interrogation. Physical or mental pressure to force answers from unwilling subjects that does not meet the technical definition of "torture" is not wholly disavowed. Some journalists have referred to methods of inflicting pain in interrogation that does not rise to "the requisite intensity" level as "torture lite." (See Mark Bowden, The Dark Art of Interrogation, ATLANTIC MONTHLY, Oct. 2003, p. 53.)

<sup>57</sup> This also affect the way US views non-refoulement provisions. (In In re J-E-, 23 I. & N. Dec. at 294-95, a majority of the United States Board of Immigration Appeals invoked this distinction to return a Haitian refugee to Haiti, where he would likely face police mistreatment and indefinite imprisonment, reasoning that "[i]nstances of police brutality do not necessarily rise to the level of torture.")

<sup>58</sup> Section 2340 defines torture this way: "'torture' means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."

is unlikely to be helpful to the extent that severity and intensity of pain are subjective and to a certain extent inscrutable phenomena.<sup>59</sup> (Are matters made better or worse by the fact that, also on Bybee's account, the crime of torture is a crime of specific intent? Irrespective of the level of pain actually experienced by the person on the receiving end of the cruel and inhuman treatment, the interrogator must actually intend that it rise to the requisite level of severity (whatever that is), otherwise it doesn't count as torture. But what does that intention amount to, given the subjectivity and inscrutability of the mental state supposedly being aimed at?)

Well, Bybee tried to give the definition of torture a somewhat less phenomenological basis. One thing he said was that "the adjective 'severe' conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure." But that's not going to give him the distinction he wants. Presumably that's the whole point of any pain imposed deliberately in cruel and inhuman interrogation, not just the extreme cases Bybee wants to isolate. A more promising approach (more promising for the administration, I mean) involves drawing on statutes governing medical administration, where Bybee said that attempts to define the phrase "severe pain" had been made. He wrote this

Congress's use of the phrase "severe pain" elsewhere in the United States Code can shed more light on its meaning. ... Significantly, the phrase "severe pain" appears in statutes defining an emergency medical condition for the purpose of providing health benefits. (see, e.g., 8 U.S.C. §1369 (2000); 42 U.S.C. §1395w-22 (2000); id. §1395x (2000); id. §1395dd (2000); id. §1396b (2000); id. §1396u-2 (2000)). These statutes define an emergency condition as one "manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent lay person, who possesses an average knowledge of health and medicine) could reasonably expect the absence of immediate medical attention to result in – placing the health of the individual ... (i) in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious

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<sup>59</sup> Marcie Strauss says a pure "severity" threshold would "provide little guidance to interrogators." Cf Strauss, op. cit., p. 211: "Defining torture based on the degree of pain is also fruitless. The amount of physical abuse that causes 'significant' pain cannot be measured objectively, and would provide little guidance to interrogators."

dysfunction of any bodily organ or part.” Id. §1395w-22(d)(3)(B) (emphasis added). Although these statutes address a substantially different subject from §2340, they are nonetheless helpful for understanding what constitutes severe pain.<sup>60</sup>

From this, Bybee concluded that

physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death.

It is hard to know where to begin in one’s comments on this “analysis.” There is first the inherent oddity of trying to operationalize a concept like “severe”; it is like trying to operationalize “excessive” in the Eighth Amendment or “unreasonable” in the Fourth. (All three of these are in part value terms, intended to establishing a standard, not just measurement terms indicating a numerical level of intensity.)<sup>61</sup> Secondly, there is the strange assumption that a term like “severe pain” takes no color from its context or from the particular purpose of the provision in which it is found, but that it unproblematically means the same in a medical administration statute (with the purposes characteristically associated with statutes of this kind) as it does in an anti-torture statute (with the purposes characteristically associated statutes of that kind). Bybee’s use of American medical administration statutes to define “severe pain” for the purposes of §2340 ignores the fact that the latter provision is intended to fulfill our international obligations under the Convention Against Torture (and interpretations must be oriented towards that purpose), while the former provision address the resource problems of a health care regime that is quite peculiar by international standards.

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<sup>60</sup> Bybee memorandum, pp. 5-6.

<sup>61</sup> In this regard they are somewhat different from the term “prolonged” in “prolonged mental harm” in the part of §2340 dealing with mental torture. One might have problems too with Bybee’s analysis of this – “prolonged mental harm” means “significant psychological harm of significant duration, e.g., lasting for months or even years...” – but at least this sort of analysis is not inherently inappropriate for a word like “prolonged.”



As if all that were not enough, there are several glaring defects of basic logic in the detail of the analysis itself. First, the statutory provision that Bybee quotes uses conditions (i) through (iii) to define the phrase “emergency condition” not to define “severe pain.” The provision says that severe symptoms (including severe pain) add up to an emergency condition if conditions (i), (ii) or (iii) are satisfied. But since §2340 doesn’t use the term “emergency condition,” conditions (i) to (iii) are irrelevant to its interpretation.<sup>62</sup> Secondly, Bybee’s analysis reverses the causality implicit in the §1395w-22(d)(3)(B) approach: §1395w-22(d)(3)(B) refers to the likelihood that a severe condition will lead to organic impairment or dysfunction if left untreated, whereas what Bybee infers from it is that pain counts as severe only if it is associated with (which is naturally read as “caused by”) organic impairment or dysfunction.

The sophomoric character of this analysis might be harmless in itself: a B-paper by a distracted law student. But the misconceived character of Bybee’s approach is disgraceful when one considers the service to which this analysis is being put. Bybee is an intelligent man and these are obvious mistakes. I believe he makes these mistakes in order to distort the character of the prohibition on torture and specifically to create an impression in his audience (in the White House) that there is more room for the lawful infliction of pain in interrogation than his audience’s casual acquaintance with the anti-torture statute might suggest.

#### **(d) The approach of the European Court of Human Rights**

Although the European Convention on Human Rights obviously does not apply to the United States, Bybee refers to it, and his approach has something in common with the received understanding of ECHR jurisprudence on this matter.<sup>63</sup> (Though I hasten to add that there is nothing in ECHR jurisprudence remotely corresponding to the detail of the “analysis” just discussed.)

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<sup>62</sup> Something which is A is also B if either (i), (ii), or (iii) applies. This suggests that something may be A even if none of the conditions (i), (ii), or (iii) applies. (Read “severe pain” for “A” and read “emergency condition” for “B”).

<sup>63</sup> Cite Article 3.

The leading case here is Ireland v. United Kingdom (1977),<sup>64</sup> in which the European Court of Human Rights assessed methods of interrogation used by the British in Northern Ireland. As I said earlier, five techniques of what was called “interrogation-in-depth were at issue: sleep deprivation, hooding, white noise, stress postures, and severe limitations on food and water. The European Court of Human Rights held that use of these methods did not constitute torture, but that they were covered by the prohibition on inhuman and degrading treatment. The Court suggested that a special stigma was supposed to be associated with "torture"

it appears ... that it was the intention that the Convention, with its distinction between "torture" and "inhuman or degrading treatment", should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering. (para 168).<sup>65</sup>

Bybee’s conclusion is that European human rights jurisprudence agrees with him that “torture is a grave act beyond cruel, inhuman, or degrading treatment or punishment.”

But Bybee failed to mention two things. He failed to mention the European Commission's conclusion that the five techniques, in combination, were torture and not just inhuman or degrading treatment (and that a minority of judges on the Court accepted this.)<sup>66</sup> More importantly, Bybee failed to mention that both categories of conduct were and are absolutely prohibited under the ECHR (and also by the terms of the International Covenant on Civil and Political Rights). The five techniques may

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<sup>64</sup> Ireland v. United Kingdom 25 Eur. Ct. H.R. 1 (1977).

<sup>65</sup> Political reasons in Ireland case? It has been suggested that the court recognized “that a finding of torture would have been attended by public antipathy toward the perpetrators, the Court allowed its concern with the consequences of its decision to determine its definition of torture.” [ R.J. Spjut, Note, Torture Under the European Convention on Human Rights, 73 AMERICAN JOURNAL OF INTERNATIONAL LAW 267, 270-1 (1979)] – i.e., and this is Cullen’s gloss: If the Court decided the five techniques constituted torture, the "special stigma" attached to such a violation could further anger the Catholic community in Northern Ireland, resulting in the heightening of hostilities against the security forces. – Anthony Cullen, Defining Torture In International Law: A Critique Of The Concept Employed By The European Court Of Human Rights, 34 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 29 (2003 )

<sup>66</sup> Dissenting Judge Zekia said this was an issue on which the Court should have deferred to the fact-finder (i.e., the Commission), esp. when its finding was uncontested.

not have been torture but since the Court determined that their application treated the suspects in an "inhuman and degrading manner," they were prohibited nonetheless.<sup>67</sup> The fact that there is a verbal distinction between torture and inhuman and degrading treatment does not mark an effective normative distinction, so far as the strength and immovability of the prohibition is concerned.<sup>68</sup> And the Court's comments about "special stigma" do not affect that. (Indeed, had the Court been confronted with the situation Bybee thinks he is confronted with – a situation in which there is a weaker prohibition on abuse that is merely (merely!) inhuman, degrading, and cruel than there is on torture – I think it is very unlikely that they would have rejected the Commission's characterization of the five techniques as torture.)<sup>69</sup>

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<sup>67</sup> Sandy Levinson, \_\_\_\_\_ p. 2040: 'one may be genuinely grateful for the [European] court[']s willingness to take seriously the notion of "inhuman and degrading" treatment, whether or not it constitutes torture. But to the extent that one treats torture as a uniquely dreadful phenomenon, then the temptation is to view "merely" inhumane and degrading treatment as potentially permissible, even though it is subject to the same prohibitory norms under the Convention as "torture."'

<sup>68</sup> The prohibition on inhuman treatment like the prohibition on torture is absolute and no derogation from it is permitted even in times of emergency (in the way that derogations are permitted from e.g. the provisions surrounding detention without trial) . Cf. ECHR Article 15: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.... No derogation from ... Article 3 ... shall be made under this provision."

Also, it is worth noting that a Committee of Ministers of the Council of Europe (that's the organization responsible for the ECHR), adopted a set of Guidelines on Human Rights and the Fight Against Terrorism in July 2002, which included a reaffirmation of the absolute prohibition of torture, saying that "[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of . . . ." Acknowledge Levinson for this reference.

<sup>69</sup> Some scholars have suggested that in fact there is an inappropriate demarcation in ECtHR's reading (and certainly in Bybee's reading). See, e.g., Oren Gross, [Are Torture Warrants Warranted? Pragmatic Absolutism And Official Disobedience](#) 2004 MINNESOTA LAW REVIEW 1481 at p. 1488: "The threshold test of suffering has been used in an attempt to fly below the radar of the absolute prohibition on torture. I find such definitional wizardry to be uninteresting and unsatisfactory." Similarly Anthony Cullen (op. cit., p. 44) observes:

"The terms contained in Article 3 were not intended to acquire the specific meanings they have received from the Court. By distinguishing the different limbs of the formula the Court has adopted an approach that essentially weakens its application and stifles the future evolution of the provision."

Perhaps Article 3 need not have been read as using torture and inhuman and degrading treatment to mark different points on a normative continuum. Instead we could read it as a rule surrounded and supported by a standard (like a numerical speed limit surrounded by a requirement that in no circumstances may one drive at speed that is excessive or unreasonable in the circumstances). Or we could think of it in a sort of ejusdem

### 3. Legal Contingency and Moral Absolutes

I now want to step back from some of this and ask: What is it about these definitional shenanigans that seems so disturbing? After all, there is an element of contingency and manipulation in the definition of any legal rule. The age of majority could be higher or lower. The speed limit or the prohibited blood/alcohol limit could be higher or lower. Torture could be defined one way or defined another way. Different legislative history or a different history of interpretation might take us down a different path. We change the detail of rules, as we change the definitions of offenses, all the time. It is part of the normal life of any prohibition. Legal prohibitions (legal provisions generally) are not set in stone. They are positive law provisions and, like all positive law, they are contingent on political decisions and circumstances – both legislative changes and changes in lawyerly and judicial interpretation. Given the new circumstances that we face, is the attempt to narrow the definition of torture really such a “shock to the system,” so far as our jurisprudence is concerned?

Well for one thing, we seem to be dealing in this case not just with fine tuning but with a wholesale attempt to change or reinterpret the prohibition in other ways too: to narrow the class of people whom it protects, to narrow the places at which it applies, to narrow even the class of people whose conduct or whose executive and command decisions are covered by the prohibition.<sup>70</sup> There seems to be a fairly comprehensive assault on our traditional understanding of the whole legal regime relating to torture and the use of coercion in interrogation. I think that’s significant.

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generis sort of way, like a prohibition on “assassination and other forms of political murder.” Certainly this is what earlier ECHR jurisprudence hinted. Cite Greek case. The idea is that all torture is inhuman treatment but not all inhuman treatment is torture, since torture connotes not just a certain degree of severity but also inhuman treatment “which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment.” (Check Turkish cases?)

<sup>70</sup> One feature of the Bybee memorandum that I didn’t mention was its suggestion that the President might have inherent power, as part of his executive authority as Commander-in-Chief to authorize torture for the safety of the nation, and that any statutory restraint upon this might be unconstitutional.): “...Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President’s Commander-in-Chief powers. We find that in the circumstances of the current war against al-Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President’s authority to conduct war.”

But again I have to acknowledge that the life of the law is sometimes to change or reinterpret whole paradigms. Why is that so shocking in this instance?

The question can be generalized: All law in all its features and all the detail of its terms and its application is contingent on politics and circumstances – that’s the lesson of legal positivism. Nothing is beyond revision. Why, then, do we have this sense that something sacred is being messed with in the Bybee memo, or in John Yoo’s or Alan Dershowitz’s proposals? Can a provision of positive law be sacred, in anything approaching a literal sense? (Is there a literal meaning of “sacred” in this secular age?)

Well it is interesting that some among the drafters of the European Convention seemed to think so. I’m not usually one for citing legislative history, but in this case it’s instructive. The following motion was proposed in the travaux préparatoires for the ECHR in 1949 by a UK delegate, a Mr. Cocks:

[T]he Consultative Assembly takes this opportunity of declaring that all forms of physical torture ... are inconsistent with civilized society, are offences against heaven and humanity, and must be prohibited. It declares that this prohibition must be absolute, and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State. It believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain<sup>71</sup>

Lamenting the rise of torture in the twentieth century, Mr. Cocks added this in his speech moving this proposal:

I feel that this is the occasion when this Assembly should condemn in the most forthright and absolute fashion this retrogression into barbarism. I say that to take the straight beautiful bodies of men and women and to maim and mutilate

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<sup>71</sup> Acknowledge EDWARD PETERS, TORTURE for this reference.

them by torture is a crime against high heaven and the holy spirit of man. I say it is a sin against the Holy Ghost for which there is no forgiveness.<sup>72</sup>

Mr. Cock's fellow delegates applauded his sentiments – nobody disagreed with his fierce absolutism on this issue – but they thought this was inappropriate to include in their report. And you can see their point. It's all very well to talk about “the sin against the Holy Ghost”<sup>73</sup> and “crimes against high heaven and humanity,” but they are not exactly legal ideas, and it's unlikely that they resonate even with the good-hearted members of this audience, let alone the steely-eyed Pentagon lawyers who are busy undermining these prohibitions as we speak.

So: can we make sense – without resorting to religious ideas – of the idea of a non-contingent prohibition, a prohibition so deeply embedded that it cannot be modified or truncated in this way?

There are some fairly well-known ways of conceiving the possibility of the legal indispensability of certain norms. In legal theory, we sometimes use a distinction between mala in se and mala prohibita, where the latter refers to things which are offenses solely on account of their being continentally prohibited by the decisions of legislatures and courts, whereas mala in se are things that are in some sense offenses anyway or inherently, whether a particular court or legislature happens to recognize them as such or not. (This is partly a natural law idea, partly a reflection of the fact that in many of its workings law simply embodies the deliverances of basic moral sense.)<sup>74</sup> Or there is the H.L.A. Hart idea of “the minimum content of natural law” – certain kinds of rule (e.g. rules regulating recourse to violence or rules

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<sup>72</sup> THE COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Vol. II (August-November 1949) (The Hague: Martinus Nijhoff, 1975), pp. 36-40.

<sup>73</sup> The reference is to Mark 3: 29 and Luke 12: 10; but those passages seem to indicate that the sin against the Holy Ghost is a form of blasphemy or denial.

<sup>74</sup> Cf. BLACKSTONE, COMMENTARIES \_\_\_\_: Blackstone talks of “crimes and misdemeanors, that are forbidden by the superior laws, and therefore stiled mala in se, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only ... in subordination to the great lawgiver, transcribing and publishing his precepts.”

protecting some form of property) that a legal system couldn't possibly do without, given humans as they are and the world as it is.<sup>75</sup>

Less philosophically, we understand that there are things that positive law might do (that a sovereign parliament might do, for example) that it is – for moral or political reasons – very unlikely to do.<sup>76</sup> And we know there are legal ways of actually diminishing the contingency of legal provisions, i.e., diminishing in their case the vulnerability to revision, redefinition or repeal which, I said (gloomily) at the beginning of this section, was the fate of all provisions of positive law: (i) A provision might be entrenched in a constitution as proof against casual or bare majoritarian alteration. (ii) A norm of international law might acquire the status of ius cogens, as proof against the vagaries of consent that dominate treaty-based international law. (iii) A legal, constitutional, or human rights provision can be associated with an explicit non-derogation clause as proof against the thought that it is alright to abandon rights-based scruples in times of clear and present danger.<sup>77</sup> And in fact there have been attempts in all three of these ways to insulate the prohibition against torture against the vagaries of legal contingency: the Eighth Amendment to

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<sup>75</sup> See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARVARD LAW REVIEW 593 (1958): “[S]uppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace, and could extract the food they needed from the air by some internal chemical process. In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence and rules constituting the minimum form of property--with its rights and duties sufficient to enable food to grow and be retained until eaten – would not have the necessary nonarbitrary status which they have for us, constituted as we are in a world like ours. At present, and until such radical changes supervene, such rules are so fundamental that if a legal system did not have them there would be no point in having any other rules at all.” See also H.L.A. HART, THE CONCEPT OF LA W, pp. 193-9. In both places, Hart is quick to point out that “the minimum content of natural law” by no means implies that any viable legal system will extend even these elementary protections to all those under its control; it need only extend them to enough people to make its control viable. See *ibid.*, p. 200; see also Hart, Positivism, *op. cit.*, p. 624: “a legal system that satisfied these minimum requirements ... might deny to a vast rightless slave population the minimum benefits of protection from violence and theft.”

<sup>76</sup> Cf. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Liberty Fund edition, 1982), p. 33, quoting Leslie Stephen, Science of Ethics, p. 143: “If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.

<sup>77</sup> Non-derogation clauses might work to modify the operation of an explicit derogation mechanism as in the ECHR, or they might work more informally to pre-empt the emergence of judicial doctrines of derogation from basic rights, such as the doctrine appealed to (idiotically) by Justice Holmes, in Schenck v. United States 249 U.S. 47 (1919). For a scathing attack on Schenck, see DERSHOWITZ, SHOUTING FIRE, *op. cit.*, pp. 142 ff.

the U.S. Constitution might be taken as an example of (i), the identification of international norms against torture as ius cogens is an example of (ii),<sup>78</sup> and of course the non-derogation provisions of the European Convention on Human Rights in their relation to Article 3 of that Convention offer a fine example of (iii).<sup>79</sup> But all of these are themselves positive law devices and subject to manipulation and to the vicissitudes of political consent and support.<sup>80</sup> Constitutions, for example, can be amended or reinterpreted: the Eighth Amendment prohibition on cruelty is construed nowadays not to cover any maltreatment that is not imposed as punishment in the context of the criminal process.<sup>81</sup> And even usually rights-respecting regimes can limit or weaken their support for apparently compelling international obligations by definitional or other maneuvers: Professor Yoo argues that the U.S. President cannot be bound by customary international law, and the English Court of Appeal recently determined that the prohibition in the Convention Against Torture on using information obtained by torture (e.g., for the purpose of determining whether an individual's detention as a terrorist suspect was justified) applied only to information that was extracted by torture conducted by agents of the detaining state. The court found no objection to justifying the detention of A by the United Kingdom government on the basis of information about A extracted from another individual, B,

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<sup>78</sup> Ninth circuit in In re Estate of Ferdinand E. Marcos 25 F.3d 1467, 1475 (9th Cir. 1994): "The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of jus cogens. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate."

<sup>79</sup> Cf. ECHR Article 15: "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.... No derogation from ... Article 3 ... shall be made under this provision." Also Article 7 of the International Covenant on Civil and Political Rights explicitly states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," but Article 4.2 of the Covenant also, and just as explicitly, states that "[n]o derogation" from Article 7 is permitted.

<sup>80</sup> For the significance of disagreement about the operation of (i) and (iii), see Jeremy Waldron, Some Models of Dialogue Between Judges and Legislators, 23 SUPREME COURT LAW REVIEW (2d) 7 (2004), at pp. 17-21.

<sup>81</sup> Ingraham v. Wright 430 U.S. 651 (1977), which holds that this prohibition applies only to "punishment imposed as part of the criminal process," or as when Professor Yoo denies that indefinite detention at Guantanamo Bay can possibly violate the Eighth Amendment since it is not regarded by the administration as "punishment." (CS's report of NPR interview)



under torture by the agents of another state.<sup>82</sup> And this despite the simple, comprehensive, and unconditional nature of the relevant CAT provision.<sup>83</sup> In the end, the strength of a legal prohibition - in domestic law and in international law and particularly in the application of international standards in domestic law – is only as strong as the moral and political consensus that supports it.

And there's the difficulty. Especially in these troubled times, it is not hard to make the idea of a legal absolute look silly from an intellectual or philosophical point of view. I mean now not the apparatus of legal absolutism (constitutional entrenchment, non-derogation provisions, and the like), but the very idea that some things should be absolutely prohibited. Philosophically speaking, there do not seem to be the intellectual resources to defend such absolutism. I don't mean that everyone is a consequentialist and that there are no deontological accounts of the prohibition on torture.<sup>84</sup> There are good deontological accounts, but they stop short of absolutism:<sup>85</sup> the principle defended by the deontologist always turns out to be wobbly when sufficient pressure is applied. The fact is that even among those who are not already Bentham-style consequentialists, most of us are moderates in our deontology: we are willing to abandon even our most cherished absolutes in the face of what Robert

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<sup>82</sup> A and others v. Secretary of State for the Home Department, [2004] All ER (D) 62 (Aug), Court of Appeal, 11 August 2004. The relevant holding was: "The Secretary of State could not rely on a statement which his agents had procured by torture, or with his agent's connivance at torture. He was not, however, precluded from relying, [for the purposes of justifying indefinite detention under the Anti-Terrorism, Crime and Security Act], on evidence coming into his hands which had or might have been obtained through torture by agencies of other states over which he had no power of direction. If he had neither procured the torture nor connived at it, he had not offended the relevant constitutional principles. Provided that the Secretary of State was acting in good faith, a recognition of his responsibility for national security was required when assessing his approach to the material available to him. That conclusion was not altered by art 15 of the United Nations Convention Against Torture."

<sup>83</sup> CONVENTION AGAINST TORTURE, Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

<sup>84</sup> For sophisticated accounts see Thomas Nagel, Autonomy and Deontology, in CONSEQUENTIALISM AND ITS CRITICS (Samuel Scheffler ed. 1988), 142 at 156-67, and a fine new paper by David Sussman, What's Wrong with Torture? forthcoming in PHILOSOPHY AND PUBLIC AFFAIRS.

<sup>85</sup> As Sussman points out (op. cit.) giving an account of inherent wrongness of torture is one thing, giving an account which shows that what is inherently wrong may never in any circumstances be done is another. "Inherently" does not mean the same as "absolutely."

Nozick once called “catastrophic moral horror.”<sup>86</sup> For a culture supposedly committed to human rights, we have an amazing difficulty in even conceiving – without some sort of squirm – the idea of genuine moral absolutes. Academics in particular are so frightened of being branded “unrealistic” that many of us will fall over ourselves at the slightest provocation to opine that of course moral restraints must be abandoned when the stakes are high enough. Extreme circumstances can make moral absolutes look ridiculous; and men in our position cannot afford to be made to look ridiculous.

So: moral philosophy classes and law school classes too, according to Alan Dershowitz,<sup>87</sup> thrive on hypotheticals involving scenarios of grotesque disproportion between the pain that a torturer might inflict on an informant and the pain that might be averted by timely use of the information extracted from him: a little bit of pain from the electrodes or the needles for him versus five hundred thousand people saved from nuclear incineration. It’s a tradition reaching back to Jeremy Bentham<sup>88</sup> and, as I have already indicated, it has been revived in recent months by Harvard law professor Alan Dershowitz. And of course after September 11, 2001, the hypotheticals are beginning to look a little less fantastic. Dershowitz asks: “[W]hat if on September 11

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<sup>86</sup> ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, p. 30n.: “The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid.” See also Sanford H. Kadish, Torture, the State and the Individual, 23 ISRAEL LAW REVIEW 345 (1989), at 346: “The use of torture is so profound a violation of a human right that almost nothing can redeem it – almost, because one cannot rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person...” (my emphasis).

<sup>87</sup> See DERSHOWITZ, WHY TERRORISM WORKS, op .cit., p. 132.

<sup>88</sup> Twining, Bentham on Torture. Twining reproduces two unpublished mss – quite long 12pp, and 17 pp. Bentham also writes (in a passage from a third fragment, (quoted from DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 143), quoted in a Twining footnote:

Suppose an occasion were to arise, in which a suspicion was entertained ... that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which is inflicted by the hand of justice, would universally be spoken of under the name of torture. For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was being practiced, should refuse to do so?

Bentham refers to the anti-torture sentiment here (in the face of this sort of example) as "blind and vulgar humanity" of those who "to save one criminal, should determine to abandon 100 innocent persons to the same fate."

law enforcement officials had “arrested terrorists boarding one of the planes and learned that other planes, then airborne, were heading towards unknown occupied buildings?” Would they not have been justified in torturing the terrorists in their custody – just enough to get the information that would allow the target buildings to be evacuated?<sup>89</sup> How could anyone object to the use of torture if it were dedicated specifically to saving thousands of lives in a case like this?

Once one goes down this road, the justification of torture – indeed the justification of anything (why just torture? why not rape? why not terrorism itself?) – is simply a matter of arithmetic coupled with the professor’s ingenuity in concocting the appropriate fact situation. As Seth Kreimer observes,

a sufficiently large fear of catastrophe could conceivably authorize almost any plausibly efficacious government action. Even a small increase in the probability of avoiding a nuclear or biological holocaust could be argued to swamp almost any harm to a single individual.<sup>90</sup>

Alan Dershowitz concedes this too as he acknowledges that there is something disingenuous about his own suggestion that judicial torture warrants would issue to authorize nothing but non-lethal torture.<sup>91</sup> If the number of lives that can be saved is twice that of the number necessary to justify non-lethal torture, why not justify lethal torture or torture with unsterilized needles? The tactics used to discredit absolute prohibitions on torture are, as Kremer points out, tactics that can show in the end that, “to borrow the formula of Dostoevsky's Ivan Karamazov, ... everything is permitted.”<sup>92</sup>

Still, a mere expression of concern about that doesn’t answer Dershowitz’s question: shouldn’t we be willing to allow the use of torture to be authorized at least in a “ticking bomb” case – make it a ticking nuclear bomb in Manhattan, if you like –

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<sup>89</sup> DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 477.

<sup>90</sup> Kremer, op. cit., p. 306

<sup>91</sup> DERSHOWITZ, WHY TERRORISM WORKS, op. cit., 146.

where we are sure that the detainee we are proposing to torture has the information that will save thousands of lives and that he will give it up only if subjected to excruciating pain?

One set of replies to the question – and to my mind, they are quite convincing replies – says that even if the basic fact-situation is no longer so fantastic (in light of the bizarre horrors of September 11), nevertheless the framing of the hypothetical is still far-fetched inasmuch as it asks us to assume that torture warrants will work exactly as Professor Dershowitz says they should work.<sup>93</sup> The hypothetical asks us to assume that the power to authorize torture will not be abused, that intelligence officials will not lie about what is at stake or about the availability of the information, that the readiness to issue torture warrants in one case (where they may be justified by the sort of circumstances Dershowitz cites) will not lead to their extension to other cases (where the circumstances are somewhat less compelling), that a professional corps of torturers will not emerge who stand around looking for work (as it were),<sup>94</sup>

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<sup>92</sup> Kremer, 306.

<sup>93</sup> The best version of this answer comes from Henry Shue, who says: “I can see no way to deny the permissibility of torture in a case just like this.” Henry Shue, Torture, 7 PHILOSOPHY AND PUBLIC AFFAIRS 124 (1978) 124, at p. 141. But Shue goes on to point out that precious few cases have the clean precision of the philosopher’s hypothetical, and they remain fanciful in their closure conditions and in the assurances we are given that the authority to torture will not expand and will not be abused. Think of the background conditions that need to be assumed:

The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being informed; and a priest and doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; ... the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquillizer. ... Most important, such incidents do not continue to happen. There are not so many people with grievances against this government that torture is becoming necessary more often, and in the smaller cities, and for slightly lesser threats, and with a little less care, and so on.” (p. 142)

See also the discussion in Jeremy Waldron, Security and Liberty: the Image of Balance, 11 JOURNAL OF POLITICAL PHILOSOPHY 191 (2003), at 206-8. I think the best one can expect – the very best – is that official torture will be conducted in the way that it has been conducted in recent years by Israeli security officials; and reading accounts of that by those who have experienced it is not particularly encouraging. And the behavior of military police officers at Abu Ghraib prison in Iraq gives us a fair indication of the motives and forms of action lurking in modern culture and consciousness, awaiting opportunities for exercise in this regard.

<sup>94</sup> Seth Kreimer, op. cit., 322: “Modern regimes seem to find that torture is most effectively deployed by a corps of trained officers who can dispense it with cold and measured precision, and such bureaucrats will predictably seek outlets for their skills.”

that the existence of a law allowing torture in some cases will not change the office-politics of police and security agencies, e.g., to undermine and disempower those who argue against torture in other cases, and so on.

In a recent article Dershowitz has opined that if his torture-warrant idea had been taken seriously, it is less likely that the abuses at Abu Ghraib prison in Iraq would have occurred.<sup>95</sup> I must say this is an act of staggering optimism: I mean Dershowitz's thinking that a regime of judicial torture warrants would somehow take care of or prevent the sort of abuses that we saw at Abu Ghraib. What we know about Abu Ghraib and other recent cases is that against the background of any given regulatory regime in these matters, there will be some officials who are prepared to "push the envelope" trespassing into territory that goes beyond what is legally permitted.<sup>96</sup> Even if some do that under cover of exploiting interpretive indeterminacies in the terms of the authorizing law, there will always be others who act in a way that is simply abusive relative to whatever authorization is given them. There is, as Henry Shue notes, "considerable evidence of all torture's metastatic tendency."<sup>97</sup> In the last hundred years or so, it has shown itself not to be the sort of thing that can be kept under rational control. (And remember: It is already expanding.

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<sup>95</sup> Alan Dershowitz, When Torture Is The Least Evil Of Terrible Options, THE TIMES HIGHER EDUCATION SUPPLEMENT, June 11, 2004, p. 20: "A warrant requirement would impose political accountability on whoever was empowered to authorize the torture. In the US, for example, the warrant would have to be issued by the President, the Secretary of Defense or the Chief Justice of the Supreme Court. Such public accountability would, in my view, reduce the chances that torture would ever be authorized except in a truly extraordinary situation.... Some might argue that any compromise with the absolute prohibition against torture, even in the most extreme situations, would lead down the slippery slope to making torture routine, as it apparently became in Abu Ghraib. I would argue that the opposite is true. Abu Ghraib occurred precisely because US policy consisted of rampant hypocrisy: our President and Secretary of Defense publicly announced an absolute prohibition on all torture, and then with a wink and a nod sent a clear message to soldiers to do what you have to do to get information and to soften up suspects for interrogation. Because there was no warrant – indeed no official authorization for any extraordinary interrogation methods – there were no standards, no limitations and no accountability. I doubt whether any President, Secretary of Defense or Chief Justice would ever have given written authorization to beat or sexually humiliate low-value detainees."

<sup>96</sup> Seth Kreimer again, *op. cit.*, 322-3: "Some officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their appointed task. Officials who, in the absence of Professor Dershowitz's system, would be willing to engage in physical abuse in defiance of an absolute legal prohibition would, presumably, be equally willing to engage in "civil disobedience" against the actual or possible denial of their proffered warrant request. The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure."

<sup>97</sup> Shue, *op. cit.*, p. 143.

The torture at Abu Ghraib, for example, had nothing to do with “ticking bomb” terrorism. It was intended to “soften up” detainees so that U.S. military intelligence could get information from them about likely attacks by Iraqi insurgents against American occupiers.)

The important point is that the use of torture is not an area in which human motives are trustworthy: sadism, sexual sadism, the pleasure of indulging brutality, the love of power, and the enjoyment of the humiliation of others – these all-too-human motivations need to be kept very tightly under control, especially in the context of war and terror, where many of the usual restraints on human action are already loosened.<sup>98</sup> If ever there was a case for Augustinian suspicion of the idea that basic human depravity can be channeled to social advantage, this is it. Remember too that we are not asking whether these motives can be judicially regulated in the abstract. We are asking whether they can be regulated in the kind of circumstances of fear, anger, stress, danger, panic and terror in which, realistically, the hypothetical case must be posed.<sup>99</sup>

So, even from a consequentialist point of view, considerations like these might form the basis of a pragmatic case for upholding the prohibition on torture as a legal absolute, even if a case cannot be made in purely philosophical terms for a moral absolute.<sup>100</sup> Making such a case may not be easy, particularly given the definitional issues we discussed in section 2. But if second-best theory is ever appropriate,<sup>101</sup> this seems to me such a case.

However, I do not want to stop there. I think the strategy of constructing a pragmatic case for a legal absolute is exactly right. But in the rest of this paper, I

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<sup>98</sup> Incidentally, it is worth noting the role that the pornographic character of modern American culture played in determining the sort of images and tableaux that seemed appealing to the torturers at Abu Ghraib. (Is it asking too much to expect that those who “defend to the death” our right to suffuse society with pornographic imagery might notice this as one of its not-entirely-harmless effects?)

<sup>99</sup> See also the discussion in JEREMY WALDRON, *THE LAW* (1990), 102-3.

<sup>100</sup> Cf. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience* 88 *MINNESOTA LAW REVIEW* 1481 (2004).

<sup>101</sup> I don’t mean “second-best” because there is a terrorist threat involved, which ideally we wouldn’t face, but “second best” inasmuch we are according great importance not just to the ideal outcomes of a given strategy to deal with a bad situation but also to the prospects for abuse of the strategy under consideration

want to explore an additional idea. This is the idea that certain things might be just repugnant to the spirit of our law, and that torture may be one of them. Specifically I want to make and explore the claim that the prohibition on torture – or the fact that torture is prohibited by a set of interlocking provisions– plays an important emblematic role so far as the spirit of our law is concerned.

#### **4. The Idea of Something’s Being Repugnant to Law**

What I am going to try to explain is the feeling I mentioned at the beginning of this paper – that revelations about the use of torture by agents of the United States and about the attempt to narrow the definition and application of the prohibitions on torture by lawyers working for the United States administer a “shock to the system” so far as law is concerned. I want to ask: why does the prospect of judicially authorizing torture or manipulating definitions and doctrines so that in fact torture becomes legally permissible even if we don’t call it “torture” – why does all this (or why should all this) shock the conscience of a scrupulous lawyer? Is the shock simply that the unthinkable has become thinkable, and thinkable not just speculatively but in practical thought likely to issue in action? Sanford Kadish warned us once that “when torture is no longer unthinkable, it will be thought about,”<sup>102</sup> and I don’t think he just meant thought about in the classroom. We need to consider what the effect on the law is of this abomination’s becoming one of the normal items on the menu of legal consideration.<sup>103</sup>

So: here goes. Maybe there are certain things whose permissibility (in a particular set of circumstances) is plausible or at least morally imaginable considered on its own, but which are such that the impact on the rest of the law of their being permitted is a strong or conclusive factor against allowing them. As an analogy, consider that our private law sets its face adamantly against fraud. Now if we were to admit that a legal claim could be founded on admitted fraud (or on something

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<sup>102</sup> Cite

<sup>103</sup> Cf. Kadish, p. 352: “The deliberate infliction of pain and suffering upon a person by agents of the state is an abominable practice.”

distinguished from fraud only by the most tendentious and transparent definitional maneuvers), that would have an impact on the rest of the law that would go well beyond the injustice wrought to the particular parties affected, and perhaps also well beyond the impact on the incentive structure furnished by the law for claims and transactions of the particular type that were involved. It would also undermine the basis of some very general and pervasive principles, so that instead of being able to say, very generally and in all sorts of areas, that the law will not lend itself to the operation of fraud, we would have to start saying things like “Well, the status of fraud is just one of those things that is lawful in some circumstances and unlawful in others.” A whole lot of common law and equality would threaten to unravel as a result of this admission.

Well, I think that permitting torture under the auspices of law would have a similarly diffuse and pervasive impact on public, administrative, criminal, international, and human rights law, over and above its immediate and appalling impact on the persons subject to it. I am not denying that one can make a purely philosophical case for the use of torture under certain conditions (or I am not denying that right now), nor am I denying that legislatures are jurisprudentially competent to enact a law permitting torture or providing a Dershowitz-like framework for its authorization, if there were some information we particularly wanted to secure from terrorist suspects or whomever. There is no doubt at all that a torture regime could be established here as a matter of positive law (along the lines, say, that Alan Dershowitz suggests), and if it were, I think we would have no difficulty finding American judges willing to administer it and American law professors willing to defend it and write articles about how to work within it. But the possibility that that sort of change would have a drastic, diffuse, and pervasive impact on the rest of the legal system over and above its immediate consequences is something it behooves us to consider.

A second analogy I have found helpful in thinking about this is the argument about slavery in Somerset's case,<sup>104</sup> made famous in recent jurisprudence by its

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<sup>104</sup> Somerset v. Stewart 1 Lofft's Rep. 1; 98 Eng. Rep. 499. (date)



discussion in Robert Cover's book Justice Accused.<sup>105</sup> Somerset was an African slave belonging to a resident of Virginia, who was brought to England by his master in 1769. Somerset made a bid for freedom, running away from his master, but was apprehended and detained aboard ship for a voyage to Jamaica (where his master proposed to resell him). A writ of habeas corpus was brought on Somerset's behalf, and of course counsel for the detainers argued that the English courts were required to recognize Somerset's slave status and his master's property rights as a matter of private international law. Counsel for the petitioner, though, opposed that argument in terms that I want to draw on. He asked:

[S]hall an attempt to introduce perpetual servitude here to this island [Great Britain] hope for countenance? ... [T]he laws, the genius and spirit of the constitution, forbid the approach of slavery; will not suffer it's existence here. ... I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices.

After some hesitation, Lord Mansfield agreed with this argument and ordered that Somerset be discharged.

[T]he state of slavery is of such a nature that it is incapable of being introduced on any reasons ... but only by positive law. ... It is so odious, that nothing can be suffered to support it, but positive law.<sup>106</sup>

Now, Lord Mansfield is evidently not denying that there could be a valid law in England establishing slavery. His position draws on the fact that natural law prohibits slavery, but his is not the classic natural law position so far as positive law is concerned, viz. "lex inusta non est lex" – that such an edict would be too unjust to deserve the status "law." If Parliament established slavery, then slavery would be the

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<sup>105</sup> ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 16-17 and 87-8.

<sup>106</sup> And he concluded his judgment by saying, in terms that would not necessarily strike us as politically correct: "The black must be discharged."

law, and we would just have to put up with the traumatic shock that would deal to the rest of our legal principles about liberty etc. The prospect of that shock, though, is one of the things that convinced Lord Mansfield that nothing short of explicit parliamentary legislation could be suffered to allow this. The act of restraint (the affront to liberty) implicit in confining a person on the basis that he is another man's chattel is "so high an act of dominion" that nothing but explicit positive law will do to legitimate it. That is why any attempt to bring it in – or to bring its effects in (so far as liberty and restraint are concerned), by the back door, so to speak – would have to be resisted.

I think something analogous is true of torture. There is no question but that it could be introduced into our law, directly by legislation, or indirectly by so narrowing its definition that torture was being authorized de jure in all but name. But its introduction – openly (as Alan Dershowitz contemplates) or surreptitiously as Jay Bybee seems to be arguing – would be contrary to "the genius and spirit" of our law. There is in our particular legal heritage – the heritage of Anglo-American law – a long tradition of rejecting torture and of regarding it as alien to our jurisprudence. True, torture warrants were issued under the first Queen Elizabeth. But they were issued in the exercise of prerogative power, not by the courts. Blackstone's comment on this is telling. He observes that the refusal to authorize torture was an early point of pride for the English judiciary:

[W]hen, upon the assassination of Villiers duke of Buckingham ..., it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England.<sup>107</sup>

Indeed, a case can be made that torture is now to be regarded as alien to any system of law. It may once have been, as John Langbein argues, bound up intimately

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<sup>107</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, cite. Vol. \_\_, 257-8); see also LANGBEIN, op. cit., 73.

with the civilian law of proofs.<sup>108</sup> But as Edward Peters observes, “[a]fter the end of the eighteenth century, torture ... came to be considered ... the supreme enemy of humanitarian jurisprudence ... and the greatest threat to law and reason that the nineteenth century could imagine.”<sup>109</sup> The figure of the torturer came to be regarded as hostis humanis generis.<sup>110</sup>

Be that as it may, torture is certainly seen – or has been seen until very recently – as inherently inimical and alien to our system of law. American courts have always been anxious to distance themselves from “the kind of custodial interrogation that was once employed by the Star Chamber, by the Germans of the 1930's and early 1940's”<sup>111</sup>

There have been, and are now, certain foreign nations with governments ... which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.<sup>112</sup>

Torture is seen as characteristic not of free, but tyrannical governments.

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.... The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other

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<sup>108</sup> LANGBEIN, op. cit.

<sup>109</sup> EDWARD PETERS, TORTURE 75 (expanded ed. 1996).

<sup>110</sup> See also Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (“[T]he torturer has become--like the pirate and slave trader before him --hostis humani generis, an enemy of all mankind.”).

<sup>111</sup> Chavez v. Martinez, 123 S. Ct. 1994, 2012 (2003) (Stevens, J.).

<sup>112</sup> Ashcraft et al. v. State of Tennessee, 322 U.S. 143 (1944)

ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose.<sup>113</sup>

The idea is that this may be something that happens elsewhere in the world, but not in a free country, or not in (what used to be referred to as) a Christian country,<sup>114</sup> or at any rate, not under the law of a country like ours. Our constitutional arrangements are spurred precisely by the desire to set the face of our law against such “ancient evils.”<sup>115</sup>

Now, I want to take this one step further. It is not only that torture is and has been banned in legal systems like ours, and banned under what most of us think or thought was a reasonably comprehensive, non-technical definition. It is not merely that torture is or has been banned and that many of us have long approved and felt proud of that fact. I also want to argue that the ban on torture serves a certain function in

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<sup>113</sup> Chambers v. Florida 309 US 227 (1940) at 236-38.

<sup>114</sup> It is interesting that the availability of torture under Muslim governments used to be cited as one ground for the practice of allowing consular officers to deal with American sailors or merchants charged or embroiled in disputes while in foreign parts. See Supreme Court of the United States v. McIntyre, Superintendent of the Penitentiary of the State of New York at Albany. 140 U.S. 453 (1891), at 462-3:

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen, and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the “Middle Ages.” During those ages these commercial magistrates, generally designated as “consuls,” possessed to some extent a representative character, sometimes discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen, and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over western Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments [to] withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries, and the successful prosecution of commerce with their people. ...

<sup>115</sup> Chambers v. Florida, p. 236

our legal system over and above the direct and immediate and of course all-important function of prohibiting the practice. It is not just one provision of positive law among others; it has a strategic role, embodying the spirit of whole areas of legal doctrine and legal ethos. To develop this point, I want to delve for a moment into some slightly more abstract jurisprudential issues – “jurisprudence for the White House,” as I put it in the subtitle of this paper.

### **5. Positivism and Legal Archetypes**

One of the things that people have found consistently wrong with the positivist conception of law – at least in its popularly received version<sup>116</sup> – is that it views law simply as a heap or accumulation of rules, whose validity conditions are discrete and each of which might be considered, interpreted, and applied one by one, each without reference to any of the others or to any other legal materials. Legal positivists are reputed to treat law in a piecemeal way – as a set of unrelated commands or rules, each self-sufficient in its source or pedigree, its meaning, and its application.<sup>117</sup> Two sorts of criticisms have been made of this picture.

First, it does not give enough attention to the importance of structure and system in the law, to the way in which various substantive legal provisions – rules, precedents, and doctrines – hang together, and reinforce and supplement one another, adding up to a whole that is greater than the sum of its parts.<sup>118</sup> And secondly, the positivist picture of law as a heap or accumulation of individual rules, fails to give adequate consideration to aspects of law other than rules – background principles, policies, purposes, and the like.

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<sup>116</sup> That is, popularly received among jurists other than the handful (Joseph, Jules, etc.) who actually contribute to the detailed elaboration of the positivist conception...

<sup>117</sup> See e.g., Richard H. Fallon, Reflections on the Hart and Wechsler Paradigm, 47 VANDERBILT LAW REVIEW 953, at 953 (1994).

<sup>118</sup> Notice that the lack of systematicity associated with legal positivism is doctrinal systematicity. Positivists do provide a structured understanding of the notion of legal system, but they understand it purely in terms of the systematicity of sources of law. [Refer to Waldron, Transcendental Nonsense and System in the Law, 100 COLUMBIA LAW REVIEW 16 (200\_) at pp. \_\_\_.]

That second criticism was of course Ronald Dworkin's criticism<sup>119</sup> and outlined by him as the basis of a new non-positivist jurisprudence, in which the law is understood to include not just rules, but also principles, policies, and other sorts of norms and reasons which operate quite unlike rules. In many ways, the Dworkinian elements operate more like moral considerations or moral reasons; only they are distinctively legal, being emergent features of actually existing legal systems and varying from country to country as law does and in a way that moral considerations do not. Policies, principles, and so on operate as background features; they do their work in back of the rules of the legal system in question – filling in gaps, helping us with hard cases, providing touchstones for legal argument, and in a sense capturing the underlying spirit of whole areas of doctrine. One of the jurisprudential claims I want to make in this paper is that the prohibition on torture operates not only as a rule, but also rather like one of those background features that Dworkin has identified.

On the first criticism of positivism – that positivism does not give enough attention to the importance of structure and system in the law, and to the way in which various legal provisions work together and reinforce and supplement one another – what I have in mind is not global holism, at the level of the entire corpus juris.<sup>120</sup> I'm thinking of more local holisms in particular areas of law.

A very easy example would be the way in which the separate provisions of a single statute are supposed to work together, united by their contribution to a common statutory purpose. A given statute may contain dozens, often hundreds of provisions. Now maybe many of these particular provisions have each their own particular purpose. Still, we expect the purpose of each section or subsection to be both contributory and subservient to the purpose of the legislation as a whole. A statute is not just a heap of little laws. It operates as an integrated whole and the purpose of the whole statute explains what is being aimed at and also how the whole enterprise of aiming at that goal or purpose is organized. We expect the statute to be structured so

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<sup>119</sup> Refer to Ronald Dworkin, The Model of Rules, in TAKING RIGHTS SERIOUSLY.

<sup>120</sup> Refer to Dworkin's holism and also to the idea of local priority in LAW'S EMPIRE. [*Incorporate something about local priority into text?*]

that this is possible, and we expect that many of the provisions are unintelligible apart from that broader purposive structure.

That, as I said, is an easy example. If you expand it out a bit, you can sometimes also see different statutes working together, or an array of different precedents and doctrines on various aspects of some legal issue working together, to embody a common purpose or legal policy. There are big pictures as well as little pictures, and we are all familiar with the sort of pedantic legal technician who doesn't get it, who cannot see the forest for the trees, who fails to adjust his understanding of some point of detail in the light of the significance of the whole. Think of the way the rules of evidence and procedure in criminal cases work together with the rules relating to search warrants and the rules governing the behavior of the police to determine a single regime of search and seizure; or think of the way substantive and procedural rules about contract formation and consideration come together with rules about contractual duty, breach, damages and liability to add up to a more or less coherent package of contractual freedom and responsibility.

In emphasizing these elements of structure, am I urging a return to formalism? The emphasis on local structure has something in common with Langdellian formalism.<sup>121</sup> But I don't want to be read as suggesting that there is anything natural or given about the cohering of laws in these various areas. Langdell believed contract law was in and of itself a structure of reason, while some of his followers thought the law of contract embodied the nostrums of laissez-faire economics.<sup>122</sup> Modern formalists like Ernest Weinrib believe tort law necessarily embodies the spirit of Aristotlean corrective justice.<sup>123</sup> I am not wanting to take such a view. The spirit of a cluster of laws is not something given; it is something we create, albeit sometimes implicitly or even unwittingly. It emerges from the way in which, over time, we treat the laws we have concocted, by legislation and precedent. Its emergence is a matter of our beginning to see in a shared settled and background way that together the provisions and precedents in question serve a certain point or embody a certain

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<sup>121</sup> Cite to Langdell, and to Tom Grey's discussion.

<sup>122</sup> Cite

<sup>123</sup> Cite

principle, and of our beginning to construct legal arguments that turn on their serving that point or embodying that principle. No particular structure or set of structures is dictated to us by reason. But structure there must be. Law cannot work without it. And it is as important to understand the principles and policies that work to structure a given area of law as it is to understand the textual detail of the legal rules themselves.

Return for a moment to the easy example – the single statute comprising hundreds of provisions. In the case of a single statute, there is sometimes a provision explicitly stating the purpose of the legislation. In other cases, we have to infer the purpose from the statute as a whole. The same two possibilities arise with larger clusters of law. Sometimes we have to infer the underlying principle or policy, in the way Ronald Dworkin suggests in his theory of interpretation in Law's Empire.<sup>124</sup> Sometimes though – and this is where I go beyond Dworkin<sup>125</sup> – there is one provision in the cluster which by virtue of its force, clarity, and vividness expresses more or less explicitly the spirit of the whole area of law. It embodies the spirit of this local complex in the clear and distinct way in which it presents and epitomizes something we regard as all-important in the area. *<atrocious sentence; rewrite>* It becomes a sort of emblem or token or icon of that area: I shall say it becomes an archetype of the spirit of the area of law in question.<sup>126</sup>

“Archetype” is known in philosophy by its Lockean and Jungian senses. For John Locke, the archetype of a general idea was either the particular experience on which that idea was based, or (in the case of a complex idea) the original mental concoction which gave rise to persistence of the general idea.<sup>127</sup> For Jung, an archetype is an image, theme or idea that haunts and pervades a mind or haunts and

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<sup>124</sup> RONALD DWORKIN, LAW'S EMPIRE (1986), Chs. 2 and 7.

<sup>125</sup> Though not, I think, in contradiction of his work.

<sup>126</sup> Sometimes in law, archetype means a sort of pattern for a document or a legal or legislative strategy which can be boilerplated from jurisdiction to jurisdiction. Sometimes it just means paradigm (as in Aya Gruber, Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense 52 BUFFALO LAW REVIEW 433 (2004), at 510: “victims who participate in restorative programs and receive victims' rights fit better into the presupposed archetype of the blameless victim.”)

<sup>127</sup> JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Nidditch edition) 376-7 (Book II, Ch. 31, section 3).



pervades our collective consciousness: a sort of “myth motif.”<sup>128</sup> My use of “archetype” is rather straightforward in contrast to these sophisticated bodies of thought. It is closer to Jung’s than to Locke’s in the following (crude) sense: I am talking about the archetype as something shared by the participants in a given legal system, not just as a feature of an individual mind. On the other hand, my usage closer to Locke’s than to Jung’s in repudiating any sense that a given archetype is inevitable or predetermined.

When I use the term “archetype”, I mean a particular item (or ste of items) in a normative system which has a significance going beyond its immediate normative content, a significance stemming from the fact that it furnishes or sums up or makes vivid to us or seems to provide the key to the point, purpose, policy, or principle (or one of the points, purposes, policies, or principles)<sup>129</sup> of a whole area of law. Like a Dworkinian principle or policy, the archetype-function is a background function in the law. But archetypes differ from Dworkinian principles and policies in that they also operate as foreground provisions. They do foreground work – as rules or precedents – but in doing that work they sum up the spirit of a whole body of law that goes beyond what they require on their own terms. The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise.

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<sup>128</sup> Jung conceived of the archetypes as autonomous structures within the collective unconscious. They were pre-existent, self-generating “forces of nature,” as he sometimes called them, rather than (as many mistakenly believe) artifacts of cultural experience. He writes (in *Memories, Dreams, Reflections*, pages 392-393):

The archetype is . . . an irrepresentable, unconscious, pre-existent form that seems to be part of the inherited structure of the psyche and can therefore manifest itself spontaneously anywhere, at any time . . . Again and again I encounter the mistaken notion that an archetype is determined [by cultural influences] in regard to its content . . . It is necessary to point out once more that archetypes are not determined [by cultural experience] as regards their content, but only as regards their form and then only to a very limited degree.

<sup>129</sup> One way in which what I said in the previous paragraphs is slightly misleading is that when we talk about the purpose of a statute, we presuppose that there is just one. This may be in fact a mistake even for particular statutes. It is almost certainly a mistake for the clusters of law that I have in mind. They may be redolent of many purposes, suffused with a number of principles, dedicated to several policies, and so on. Accordingly, there may be several archetypes for a given area of law.

The “publicly” point – vividly, effectively, publicly – is I suspect very important. From one point of view, archetypes are like legislative purposes and that’s a fairly technical function. But from another point of view, archetypes may be less important for the legal technician than they are for the way law communicates itself and its spirit to the whole people whose lives it is supposed to govern and who are in one way or another at its mercy. They are matters of the law’s self-presentation. The phrase “the spirit of the law” captures both these aspects, I believe.

Well, I want to argue that the various prohibitions on torture amount, individually or collectively, to a legal archetype. What are they archetypal of? What is the purpose, policy, or spirit of an area of the law that this archetype – on my account – so effectively embodies and conveys?

The answer has to do with the relation between law and force, on the one hand, and law in its dealing with its subjects as people (as persons, as agents), on the other hand. In the broadest sense, the prohibition on torture is expressive of the following important underlying policy of the law: law is no longer brutal; law is no longer savage; law no longer rules through abject fear and terror. The idea is that even where the law operates forcefully, there will no longer be the connection that has existed in the past between law and brutality. There will be instead a connection between the spirit of law and respect for human dignity – respect for human dignity even in extremis, even in situations where law is at its most coercive and its subjects at their most vulnerable.<sup>130</sup> The rule (or interlocking set of domestic and international rules) against torture functions as a sort of archetype of this very general policy. The rule against torture is vividly emblematic of our determination to break the link between law and brutality, between law and terror, and between law and the enterprise of trying to break a person’s will). No one denies that law has to be forceful and final. No one denies that it is important for law to prevail in the last analysis, and that, in Max Weber’s phrase, “the threat of force, and in the case of need its actual use ... is

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<sup>130</sup> Though I refer to human dignity as the underlying value here, I am conscious that dignitarian discourse can quickly become effete and exaggerated: cf. the way Justice Scalia made fun of the “sweet-mystery-of-life” approach to constitutional rights in his dissent in Lawrence v. Texas (2003). Actually it is more important to stress the negative side of this relation – breaking the link between law and brutality.

always the last resort when others have failed.”<sup>131</sup> But forcefulness can take many forms, and – as I already mentioned in my discussion of compelled testimony<sup>132</sup> – not all of it involves the sort of savage breaking of the will that is the aim of torture and the aim too of many of the cruel, inhuman, and degrading methods that the Bush administration would like to distinguish from torture. (Nor does all legal forcefulness involve the torturer’s enterprise and the enterprise of those who use the cruel, inhuman, and degrading methods that the administration would like to distinguish from torture of inducing a regression of the subject into an infantile state, where the elementary demands of the body supplant almost all adult thought.) The force of ordinary legal sanctions and incentives does not work like that, nor does the literal force of physical control and confinement.<sup>133</sup> For example, when a defendant charged with a serious offense is brought into a courtroom, he is brought in whether he likes it or not, and when he is punished, he is subject to penalties that are definitely unwelcome and that he would avoid if he could; in these instances there is no doubt that he is subject to force and coercion. But force and coercion in these cases do not work by reducing him to a quivering mass of “bestial desperate terror,”<sup>134</sup> which is the aim of every torturer (and the aim of those who would inflict cruel, degrading and inhuman treatment in interrogation which they say does not amount to torture).<sup>135</sup> So: when I say that the prohibition on torture is an archetype of our determination to break any link between law and savagery or between law and brutality, I am not looking piously to some sort paradise of force-free law. I am looking rather to the idea

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<sup>131</sup> MAX WEBER ECONOMY AND SOCIETY (Guenther Roth and Claus Wittich eds., 1978), p. 54.

<sup>132</sup> See above, section 2 (b), notes 43-45 and accompanying text.

<sup>133</sup> I mean the ordinary force of control and confinement authorized by our law; there are of course torturous versions of control and confinement used extra-legally by our police and prison guards.

<sup>134</sup> Arendt’s phrase

<sup>135</sup> Austin Sarat and Thomas Kearns, A Journey Through Forgetting: Toward a Jurisprudence of Violence, in THE FATE OF LAW (Austin Sarat and Thomas Kearns eds., 1993) claim that “force is disdainful of reason” and that it “tends to short-circuit the pathways of rational agency.” But this is too quick. Sometimes coercion works by constraining choices rather than eliminating agency. For a discussion, see Jeremy Waldron, Terrorism and the Uses of Terror, 8 JOURNAL OF ETHICS (2004) 5, at 10-16.

that law can be forceful without compromising the basic dignity even of those it constrains and punishes.<sup>136</sup>

I will say more about the way torture operates as an archetype in section 6. But it may help us get our bearings at this stage if I mention two or three other examples of legal archetypes – i.e., provisions or precedents which do this double duty of operating themselves as rules or requirements but also operating, in this epitomizing way, as emblems or icons of whole areas of legal commitment.<sup>137</sup>

The best example, I think, is given by the Habeas Corpus statutes. The importance of the Great Writ is not exhausted by what it does in itself, overwhelmingly important though that is. The writ is also archetypal of the whole orientation of our legal tradition towards liberty, in the physical sense of freedom from confinement and archetypal too of law's set against arbitrariness in regard to actions that impact upon the liberty of the subject.

Precedents are sometimes archetypes. Again the best example is the most obvious: Brown v. Board of Education<sup>138</sup> is in itself authority for a fairly narrow proposition about segregation in schools, and its immediate effect was notoriously limited. But its archetypal power is staggering and in the years since 1954 it has become an icon of the law's commitment to demolish the structures of de jure (and perhaps also de facto) segregation, and to pursue and discredit badges of racial inferiority wherever they crop up in American law or public administration.

A third example might be the requirement of the Miranda warnings, as an adjunct to arrest and a preliminary to police interrogation,<sup>139</sup> Chief Justice Rehnquist

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<sup>136</sup> Those – like Sarat and Kearns, *op. cit.* – who maintain dogmatically that law is always violent and that the most important feature about it is that it works its will, in Robert Cover's phrase, "in a field of pain and death" (Cover, Violence and the Word, 95 YALE LAW JOURNAL 1601 (1986)) will be unimpressed by the distinctions I am making. For them, law's complicity with torture in the cases I have discussed, is just business as usual.

<sup>137</sup> The idea of a legal archetype is not original with me, though it is not usually elaborated as I have elaborated it in this section. See also Karl Kirkland, Efficacy of Post-divorce Mediation and Evaluation Services, 65 ALABAMA LAWYER 187 (2004), at 188: "The best interests standard exists independently of our work as a Platonic form or legal archetype that can always be utilized as a "true North" type objective standard to guide through individual issues." Other cites?

<sup>138</sup> 349 U.S. 294 (1954)

<sup>139</sup> Cf. Miranda v. Arizona 384 U.S. 436 (1966)

observed in Dickerson v. United States (2000)<sup>140</sup> that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture." That cultural presence is not just in the formulae recited at the time of arrest in a thousand episodes of Cops or Law and Order, but also in the culture of policing with which the Miranda warnings are associated.

My examples so far are all from public or constitutional law. But there are archetypes in private law too: the doctrine of adverse possession in property law might be regarded as archetypal of the law's interest in settlement and predictability; the rule about not enquiring into the adequacy of consideration is archetypal of contract law's commitment to market-based notions of fairness; Donoghue v. Stevenson is archetypal in the English law of negligence; and so on.

A final example, less familiar to American audiences, comes from my native New Zealand. Considered in itself the Treaty of Waitangi<sup>141</sup> signed in 1840 by representatives of the British Crown and Maori chiefs has limited and disputable significance; but it is now the keystone to a whole area of "Treaty law" that goes beyond the text(s) of the agreement itself, and includes numerous more recent statutes, precedents, findings, and settlements. Modern Treaty law embodies an attitude towards race relations and historic injustice in New Zealand that is no older than 1975. And I can imagine someone asking "Why, then, do we need to refer back to this 1840 parchment?" But we would be making a mistake if we thought that the Treaty itself could be discarded without loss or "read down" in a radical or destructive way. The Treaty of Waitangi is important not just for the understanding of its own provisions but as an epitomizing emblem of a whole range of legal commitments. Take it away, or read it out of existence, and those commitments take on a different and more fragile and fragmented character.<sup>142</sup>

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<sup>140</sup> cite

<sup>141</sup> For the text and recent effect of the treaty, see <http://www.waitangi-tribunal.govt.nz/about/treatyofwaitangi/>

<sup>142</sup> Whether that would be a good thing or a bad thing is another question. I suspect it would be a good thing. You see: legal archetype is not a natural law idea. It is a structural idea, and there may be good archetypes and bad archetypes, archetypes of good law and archetypes of bad law. See the discussion below, in section 9: text accompanying note 172.

And that I think is true of the other examples, too. In each case we could modify, redefine, even abolish the specific work that the archetypal provision does, and that of course would have an effect. But the broader impact of such modification on the spirit and morale of the law in the relevant area would be much more extensive than that, because of the more diffuse commitment that the archetype embodies. And this I think is true of torture too: if we were to permit the torture of Al Qaeda and Taliban detainees, or if we were to define what most of us regard as torture as not really “torture” at all, or if we were to set up a regime of judicial torture warrants, maybe only a few score detainees would be affected in the first instance. But the broader and more diffuse impact on the body of the law would be staggering. We would have given up the lynch-pin of the modern doctrine that law will not operate savagely or countenance brutality. We would no longer be able to state that doctrine in any categorical form. Instead we would have to say, more cautiously and with greater reservation: “In most cases the law will not permit or countenance brutality, but since torture is now permitted in a (hopefully) small and carefully cabined class of cases, we cannot rule out the possibility that in other cases – perhaps in the first instance also a small and fastidiously defined range of cases – the use of brutal tactics will be permitted along with the exploitation of desperate fear by agents of the law.” The repudiation of brutality in the world would become a technical matter (“Sometimes it’s repudiated, sometimes it’s not”) rather than a shining issue of principle.

## **6. The Prohibition on Torture as an Archetype in Modern Law**

*(incomplete)*

I want to add something more about the archetypal connection between the prohibition on torture and other areas of law, particularly American constitutional law. (What follows is just a sample, and rather undeveloped doctrinally; but this is something that any of us can figure out for ourselves by running the word “torture” through any database of decisions of federal courts.) The idea is that, for each of the headings listed below, the prohibition plays a sort of emblematic role. I am not arguing that prohibiting torture is the most important function of each of these areas

of law. I am arguing instead that the existence of that prohibition is taken as archetypal with regard to law in each of these areas.

(i) It has been said of the constitutional prohibition on cruel and unusual punishment that the original impetus for the Eighth Amendment came from the Framers' repugnance towards the use of torture, which was regarded as incompatible with the liberties of Englishmen.<sup>143</sup> The primary concern of the drafters was to proscribe “‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.”<sup>144</sup> Even for those sentenced to death, the Court has held for more than a century that “punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden.”<sup>145</sup> “Wanton infliction of physical pain” is said to be outside the scope of legitimate punishment, even for the most heinous of crimes.<sup>146</sup>

In this connection, it is worth mentioning the abolition of corporal punishment as a form of state punishment (and increasing prohibitions on its use by parents and in schools). We recoil from Singapore cases – flogging as a punishment etc.<sup>147</sup> We see it as ruled out by the very mentality that rules out torture.

Then there is the issue of capital punishment – especially outside the United States. When I presented an earlier version of this paper in New Zealand, I was asked by a member of the audience whether there was any relation between recent American willingness to countenance the use of torture and the USA’s outlier status on the death penalty. Certainly, in Europe and elsewhere, the prohibition on torture and repudiation of the death penalty are seen as part of the same enterprise, and related to

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<sup>143</sup> Estelle v. Gamble, 429 U.S. 97, 102 (1976))

<sup>144</sup> In re Kemmler, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”). See also Granucci, Nor Cruel and Unusual Punishment Inflicted: The Original Meaning, 57 CALIFORNIA LAW REVIEW 839 (1969), at p. 842

<sup>145</sup> Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

<sup>146</sup> And we are shocked when this is whittled down on a narrow textualist basis as it was in Ingraham v. Wright 430 U.S. 651 (1977), which holds that this prohibition applies only to “punishment imposed as part of the criminal process,” or as when Professor Yoo denies that indefinite detention at Guantanamo Bay can possibly violate the Eighth Amendment since it is not regarded by the administration as “punishment.” (CS’s report of NPR interview)

<sup>147</sup> Refer to Dershowitz on this

the general anti- brutality policy mentioned earlier. Conversely, much of the case that Alan Dershowitz makes for taking his torture ideas seriously is based on the fact that we are already well-disposed towards capital punishment.<sup>148</sup>

Mention also issues about ECHR and PC/Caribbean jurisprudence on administration of death penalty as torture/idt – “death row phenomenon” – long confinement and unpredictable execution date.<sup>149</sup>

(ii) Then there is the role of the rule against torture as the epitome of the requirement of procedural due process. “The rack and torture chamber may not be substituted for the witness stand.”<sup>150</sup>

Consider the opinion of Frankfurter J. in Rochin v. California (1952).<sup>151</sup> In that case, narcotics detectives directed a doctor to force an emetic solution through a tube into the stomach of a suspect against his will. The suspect vomited, producing morphine capsules he had swallowed when he first saw the detectives. The morphine was introduced into evidence. Justice Frankfurter, writing for six members of the Court, said of Mr. Rochin's treatment: "These ... are methods too close to the rack and the screw." And Frankfurter added that “to sanction [this] conduct ... would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society.”<sup>152</sup> That is the sort of sentiment that I had in mind when I talked in the previous section about the determination to break the link between law and brutality.

A similar link between the constitutional privilege against self incrimination, torture and the underlying spirit of our law was set out in a 1944 U.S. Supreme Court decision, where it was said that

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<sup>148</sup> DERSHOWITZ, WHY TERRORISM WORKS, op. cit., pp. 147-9

<sup>149</sup> Soering v. United Kingdom 11 EHRR 439 (1989); Pratt v. Attorney-General for Jamaica [1994] 2 A.C; (but see also recent reversal of Privy Council approach?)

<sup>150</sup> Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

<sup>151</sup> 342 U.S. 165 (1952)

<sup>152</sup> *Ibid*, at pp. 173-4



the constitutional privilege against self-incrimination ... grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.<sup>153</sup>

(iii) Less straightforwardly, there is the relation between the prohibition on torture and the idea of substantive due process. Here it is less plausible to say that the prohibition on torture is an archetype, although it is the case that something like torture has been clearly prohibited, even where no issue of admissibility of evidence is involved. In Chavez v. Martinez (2003),<sup>154</sup> the Supreme Court rejected the position that torture to obtain relevant information is a constitutionally acceptable law enforcement technique if the information is not introduced at trial. There was considerable disagreement about the facts in Chavez, but there seemed to be a consensus that the Court's in other cases on the Fifth Amendment's Self-Incrimination Clause "do[es] not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial."<sup>155</sup> As Justice Kennedy put it, "[a] constitutional right is traduced the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place."<sup>156</sup> So I think one can say at least this: if there is anything to the substantive due process idea, the

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<sup>153</sup> United States v. White 322 U.S. 694(1944) 697-8

<sup>154</sup> 532 U.S. 938 (2001)

<sup>155</sup> Justice Thomas at \_\_\_. Also Justice Stevens said the type of brutal police conduct involved "constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty." (cite)

<sup>156</sup> Cite

claim that torture for any purpose is unconstitutional comes close to capturing the minimum. [Arguments against this position?]

(iv) It is not only in the decisions of the courts, that we find an array of doctrines and principles epitomized by the prohibition on torture. We find it also in regard to the general culture of law enforcement. The third degree used to be a pervasive feature of the culture of policing. It has now largely disappeared from the culture of policing, though occasional abuses surface.<sup>157</sup> Refer to Jerome Skolnick (book Above the Law) on the huge cultural changes that were necessary to eliminate coercion in police station houses. You can't just have a bit of restraint here and a bit of abuse there – the prohibition needs to be incorporated into whole training and peer relations and supervision and disciplinary regimen. We have moved onto a whole new footing so far as interrogations are concerned. The care taken with videotaping interrogations etc. Miranda warnings And so there are serious questions about how much might unravel if torture secures any sort of authorized foothold.

(vi) More controversial resonance: prohibition on wounding etc. (“genital torture”) even in consensual S&M activity. House of Lords in R. v. Brown (1993).<sup>158</sup>

## **7. Engine Of State And Rule Of Law**

I have been arguing that the prohibition on torture is a legal archetype emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity even when law is at its most forceful and its subjects are at their most vulnerable. But in its modern revival, torture does not present itself primarily or in its most egregious forms as an aspect of legal practice. It presents itself instead as an aspect of state practice, by which I mean it involves agents of the state seeking to acquire information needed for security or military or

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<sup>157</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967): "[T]oday the third degree is almost nonexistent...."

<sup>158</sup> [1994] 1 A.C. 212 (H.L.)

counter-insurgency purposes, rather than (say) police, prosecutors or agents of a court seeking to obtain information which can then be put to some forensic use. For the most part, this has been true throughout our tradition. Our practices have not always been uncontaminated by torture, but to the extent that torture has been authorized in England and America it has not been used as part of the judicial process; this contrasts with the Continent where torture was intimately bound up with the law of proofs.<sup>159</sup> So, for example, William Blackstone observed that the rack in Tudor times, particularly under the first Queen Elizabeth, was "occasionally used as an engine of state, [but] not of law."<sup>160</sup> And that is true too of what has been under discussion in this paper. The Yoo and Bybee memoranda address the issue of the legality of certain courses of action that might be undertaken by state officials and authorised at the highest level by the executive. But they are not proposing that torture be incorporated into criminal procedure in the way that it was, for example in the law of proofs in Continental Europe until the eighteenth century. I guess the suggestion that Professor Dershowitz raises can be read as a way of introducing torture into the fabric of the law, with its specific provision for judicial torture warrants. But even Dershowitz is primarily concerned with judicial authorization of state torture for state purposes, not judicial authorization of state torture as a mode of input into the criminal process.

So what is the relevance of my argument about legal archetypes to a practice which no one proposes to connect specifically with law or legal practice? Why am I so preoccupied with the trauma to law of what is essentially a matter of power?

Well, one point is that "engines of state" and "engines of law" are not so widely separated as the Blackstone observation might lead us to believe. Even if one were to take the view that what is done in holding cells in Iraq, Afghanistan, or Guantanamo Bay is done in relation to a state of emergency or done in relation to the

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<sup>159</sup> Alan Dershowitz's account of the relation between torture and the law of proofs is garbled and comprehensively misreads John Langbein's account (in LANGBEIN, *op. cit.*). The law of proofs was not, as Dershowitz suggests it was (DERSHOWITZ, *WHY TERRORISM WORKS*, *op. cit.*, p. 155), an aspect of Anglo-Saxon law. Contrary to what Dershowitz suggests (*ibid.*, p. 157), the torture warrants which Langbein says were issued in England in the sixteenth and seventeenth centuries had nothing to do with the law of proofs, which was a Continental phenomenon. And the introduction of trial by jury, with an entitlement to evaluate circumstantial evidence unconstrained by anything like the law of proofs, occurred in England centuries before the 1600s, which is when Dershowitz suggests it was introduced (*ibid.*, p. 157).

<sup>160</sup> BLACKSTONE, *COMMENTARIES*, Vol IV, p. 267

waging of war rather than as part of a legally constituted practice, still the thought that torture (or something very like torture) by American officials is permitted would be a legally disturbing thought. For we know that in general, there is a danger that abuses undertaken in extraordinary circumstances (extraordinary relative to the administration of law and order at home) may come back and haunt or infect the practices of the domestic legal system as well. This a concern voiced by Edmund Burke in his apprehensions about the effect on England of the unchecked abuses of Warren Hastings in India,<sup>161</sup> and it is voiced too – though as sad diagnosis – by Hannah Arendt as she offers the tradition of racist and oppressive administration in the African colonies as part of her explanation of the easy acceptance of the most atrocious modes of oppression in twentieth century Europe.<sup>162</sup> The warning has been sounded often enough: “Don’t imagine that you can build a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents, and what will be done at home by the police or other agents of the state at home to those who can be designated as enemies of society.” You may say, “Well, surely there’s a distinction in principle between what we do when we’re at war, and what we do in peacetime. We shouldn’t be too paranoid that the first will infect the second.” The response is that while this may be a basis for some degree of reassurance about the prospect of insulating the engines of law from the exigencies of some wars, it is not a basis for confidence at all in regard to the sort of war in which we are said to be currently involved – a war without end and with no boundaries, a war fought in the American homeland as well as in the cities, plains and mountains of Afghanistan and Iraq.

A second point is that although we are dealing with torture as “an engine of state,” still the issue of law and legality has been made central. Maybe there are hard men in our intelligence agencies who are prepared to say (whenever they can get away with it): “Just torture the detainees, get the information, and we’ll sort out the legal niceties later.” But even if this is happening, a remarkable feature of the modern debate is that an effort is also being made to see whether something like torture can be

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<sup>161</sup> Cite to Burke and also to CONOR CRUISE O’BRIEN, THE GREAT MELODY

<sup>162</sup> Cite to ORIGINS OF TOTALITARIANISM

accommodated within the very legal framework that purports to prohibit torture. An effort is being made to see whether the law can be stretched or deformed to actually permit and authorize this sort of thing. And that raises an interesting question: Should we be pleased that the Bush administration cares enough about legality to embark on this debate? Or should we be appalled? The administration really does seem to be interested in the prospects for a regime of torture (or a regime of cruel and inhuman interrogation) that is legally authorized or at least not categorically and unconditionally prohibited. Is this a sort of a tribute to law? Or is it an affront to law (like trying to get an honorable father's favour for a thoroughly disreputable friend)?

At any rate, on this account the context we are working with involves the idea of the Rule of Law, and specifically the enterprise of subjecting what Blackstone called “the engines of state” to legal regulation and restraint. And I am happy to restate the concern that I have in those terms: I am concerned about the effect on that enterprise – the Rule of Law – of a weakening or an undermining of the legal prohibition on torture. For I believe that the prohibition on torture does also operate as an archetype of the Rule of Law. That agents of the state will no longer be allowed to torture those who fall into its hands seems an elementary incident of the Rule of Law as it is understood in the modern world. If this protection is not assured, then the prospects for the Rule of Law generally look bleak indeed. Sure, it can't be denied that the Rule of Law ideal has many meanings,<sup>163</sup> and I can imagine a Bybee or a Dershowitz saying that the regulation of torture might be as much a triumph for the Rule of Law as its prohibition.<sup>164</sup> This is not just sarcastic: I think Professor Dershowitz really is concerned that the alternative to his proposal is not “no torture” but torture conducted sub rosa, beneath legal notice, and with law's complicity or

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<sup>163</sup> See Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 21 LAW AND PHILOSOPHY, 137 (2002).

<sup>164</sup> I can imagine Professor Dershowitz even seeing it as an achievement. What greater tribute is there to the Rule of Law than that it is capable of regularizing torture rather than leaving it beyond the pale of legal regulation? This abomination that we thought antithetical to law will be – mirabile dictu – subject to legal control if only the Dershowitz proposal is adopted.

silence. And I believe he thinks that is much worse for the Rule of Law than the judicial torture warrant regime he has in mind.<sup>165</sup>

Nevertheless I think a case can be made that it is the prohibition which is really archetypal in this regard. Think back to Judith Shklar's concern, mentioned at the beginning of this paper, about the danger that "acute fear" will again become "the most common form of social control."<sup>166</sup> States in the twentieth century (and now apparently also in the twenty-first century) suffer from a standing temptation to try and get their way by terrorizing the populations under their authority with the immense security apparatus they control and the dreadful prospects of torture and other violence that they can deploy if necessary against their internal and external enemies. Much more than mere arbitrariness and lack of regulation, this is the apprehension that most of us have about the modern state. The Rule of Law offers a way of responding to that apprehension for, as we have seen, law (at least in the heritage of our jurisprudence) has set its face against brutality, and has found ways of remaining forceful and final in human affairs without savaging or terrorizing its subjects. The promise of the Rule of Law, then, is the promise that this sort of ethos can increasingly inform the practices of the state and not just the practices of courts, police, prosecutors etc. In this way, a state subject to law becomes not just a state whose excesses are predictable or state whose actions are subject to forms, procedures and warrants, but a state whose exercise of power is imbued with this broader spirit of the repudiation of brutality. That's the hope, and I think the prohibition on torture is an archetype of that hope: it is archetypal of what law can offer, and in its application to the state, it is archetypal of the project of bringing power under this sort of control. And then the point can be stated also the other way round: to be willing to abandon the prohibition on torture or to define it out of existence is to be willing – among other things – to sit back and watch how much of that enterprise unravels...

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<sup>165</sup> See DERSHOWITZ, *WHY TERRORISM WORKS*, 150. For the opposite view, see Kadish, *op. cit.*, 355.

<sup>166</sup> Shklar, *Liberalism of Fear*, *op. cit.*, note 11, p. 27.

## 8. An Archetype of International Law

*(incomplete)*

I have said that the prohibition on torture is archetypal of our particular legal heritage, and that it is also archetypal of a certain sort of commitment to the Rule of Law. Beyond that, we may ask also about its archetypal status in international law, particularly international humanitarian law and the law of human rights. I do think a case can be made, similar to the cases I made in sections 5 and 7, that the prohibition is an archetype in both these areas.

(And maybe international law, on account of its inherent fragility, needs archetypes more than municipal law does.) *Say more.*

Mention Geneva Conventions. Perhaps archetype of Geneva Convention is something like the rule that a captured soldier is only required to reveal his name, rank, and number. But prohibition on torture and ill-treatment certainly looms pretty large.

What about human rights law? Certainly torture is widely understood as the paradigmatic human rights abuse. It is the sort of evil that arouses human rights passions and drives human rights campaigns. The idea of a human rights code which lacked a prohibition on torture is barely intelligible to us. Now it is true that even human rights advocates accept the idea that human rights are subject to interpretation and subject also to limitation to meet “the just requirements of morality, public order and the general welfare in a democratic society.”<sup>167</sup> And few are so immoderate in their human rights advocacy that they do not accept that “[i]n time of public emergency which threatens the life of the nation” the human rights obligations of the state may be limited.<sup>168</sup> People are willing to accept that the human rights regime does not unravel altogether when detentions without trial (on the British model) is permitted or Habeas Corpus is suspended or freedom of assembly is limited in times of grave emergency. But were we to put up for acceptance as an integral part of the main body of human rights law the proposition that people may be tortured in times of emergency, I think people would sense that the whole game was being given away,

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<sup>167</sup>UDHR Art. 29(2).

<sup>168</sup>ICCPR, Art. 4(1).

that human rights law itself was entering a crisis. Sanford Kadish made the following observation near the end of his article on torture:

The deliberate infliction of pain and suffering upon a person by agents of the state is an abominable practice. Since World War II, progress has been made internationally to mark the perpetrators of such practices as outlaws. This progress has been made by proclamations and conventions which have condemned these practices without qualification.... Any claim by a state that it is free to inflict pain and suffering upon a person when it finds the circumstances sufficiently exigent threatens to undermine that painfully won and still fragile consensus. ... If any state is free of the restraint whenever it is satisfied that the stakes are high enough to justify it, then the ground gained since WWII threatens to be lost. ... Lost would be the opportunity immediately to condemn as outlaw any state engaging in these practices. Judgment would be a far more complicated process of assessing the proffered justification and delving into all the circumstances.<sup>169</sup>

Also in this regard, we also need to consider the importance for the international human rights regime of the fact that it is not just any old state but the world's one remaining super-power that is defecting from the unconditional prohibition on torture. Opinions may differ about this. Some may think that U.S. moral leadership in human rights law and humanitarian international law generally has already been squandered, so that little further damage can be done. Others still worry about a contagion effect.<sup>170</sup>

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<sup>169</sup> Kadish, *op. cit.*, 354.

<sup>170</sup> Cf. Marcy Strauss, \_\_: “[O]nce the United States employs torture, it is likely that such practices would spread worldwide. At a minimum, the nation would lose its ability to condemn torture or other unacceptable acts of cruelty perpetrated in other parts of the world. Even if we could assure the world that torture would be utilized only in extreme circumstances, any moral leadership would be destroyed.”

See also Sanford Levinson \_\_\_ cite 81 TEXAS LAW REVIEW 2013, at p. 2053, who quotes Oona Hathaway as offering “in conversation” a special reason for the United States, above all other countries, to adhere absolutely to the rule against torture:



It might be said by someone like Jay Bybee in behalf of the present administration that all this talk of crisis and the possible unraveling of international consensus etc. makes some sense when we talk about the rule against torture, but perhaps less sense if we are talking only about repudiating the rule relating to cruel, inhuman, or degrading treatment. I have serious doubts about this. For one thing, Bybee is also (as we have seen) party to the enterprise of trying to re-categorize as merely (!) cruel, inhuman, and degrading treatment a considerable amount of what has previously and quite properly been regarded as torture. The human rights community is not easily fooled, and it would be an archetypal blow to that community if the rule which in fact prohibits torture were to unravel under this sort of definitional pressure. For another thing, we must not become so jaded that the phrase “cruel, inhuman, and degrading” treatment simply trips off the tongue as something much less taboo than torture. It is not a technical term. “Inhuman treatment” means what it says, and its antonymic connection with the phrase “human rights” is not just happenstance. The word “inhuman” means much more than merely “inhumane.” To treat a person inhumanly is to treat him in the way that no human should be treated (and/or perhaps in the way that no human should treat another). On this basis it would not be hard to argue that the absolute prohibition on inhuman treatment (for example, in the UDHR, the ICCPR, and ECHR) is as much a paradigm of the international human rights movement as the absolute prohibition on torture.

## 9. Conclusion

This has been a wandering and speculative (not to mention incomplete) analysis, rather than a tight analytical argument. Let me end with a few cautionary remarks about the concept of legal archetype that I have been using.

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This involves what might be termed the ‘contagion effect’ if the United States is widely believed to accept torture (either directly or by its allies) as a proper means of fighting the war against terrorism. The United States is, for better and, most definitely, for worse, the ‘new Rome,’” the giant colossus striding the world and claiming to speak on behalf of good against evil. Part of being such a colossus may be the need to accept certain costs that lesser countries need not be expected to pay. Our very size and power (and moral pretensions) may require that we limit our responses in a way that might not be necessary for smaller countries far more “existentially” threatened by their enemies than the United States has yet been demonstrated to be. If we give up the no-torture taboo, then why shouldn’t any other country in the world

First, I don't want to exaggerate the significance of undermining a legal archetype, either in general or in this special case of torture. Undermining an archetype will usually have an effect on the general morale of the law in a given area. It may become much harder for us to hang on to a proper sense of why the surrounding law is important and to convey that sense to the public. If we start issuing torture warrants, it may be harder, for example, to hang on to a proper sense of the importance of the exclusionary rule for involuntary confessions. If "inhuman treatment" is not banned from our interrogation centers, it may be harder to hang on to the conviction that flogging is not an acceptable punishment. But I am not saying that all this surrounding law necessarily unravels, the instant we diminish the force of the archetype. It's more that each of the surrounding provisions will be kind of thrown back on its own resources and each will be only as resilient (in the face of attempts at repeal, amendment or redefinition) as the particular arguments that can be summoned in its favor; it will lose the benefit of the archetype's gravitational force; it will derive less or it will derive nothing from the more general sense of the overall point of this whole area of law, previously epitomized in the archetype.

I guess it's possible that our sense of the purpose, policy, or principle behind the area of law in question will find another archetype if the existing archetype is damaged. But remember that archetypes do dual duty: they do not just epitomize the spirit of the law; they also contribute to it with their primary normative force. So any attempt to find a second archetype when the first archetype is damaged is not just like finding a new logo. It will involve a damaged policy or an injured principle going in search of a compromised archetype to enable us to retrieve and protect whatever is left of the broken spirit of the law.

Secondly, I should not exaggerate the significance of something's being an archetype. From a normative point of view, archetypes might be good or bad; they may be archetypal of good law or bad law. Lochner v. New York (1905)<sup>171</sup> is or was archetypal of a certain approach to economic regulation which married the freedom-of-contract provisions of the US Constitution to the dogmas of laissez-faire

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be equally free to proclaim its freedom from the solemn covenant entered into through the United Nations Convention?

<sup>171</sup> Cite

economics, and that archetype was discredited when the general legal doctrine was discredited. (Indeed, the shock to the system of disrupting or undermining an archetype may well be part of an effective strategy for necessary legal reform.) I mentioned at the end of section 5, that the Treaty of Waitangi is archetypal of a certain approach to race relations law and historic injustice in New Zealand.<sup>172</sup> But I think, personally, that this body of law has done a lot of damage, and that it would be better if the archetype were undermined. So this is not a natural law idea that I am talking about. An archetype is only as important as the spirit of the area of surrounding law that it epitomizes. And it is up to us to make that estimation.

Of course natural law ideas may determine our judgement of the importance of a given archetype and the area of law it stands for. That is certainly the case with torture. I believe – and I hope that most of my readers share this belief – that the prohibition on torture does epitomize something very important in the “spirit and genius” of our law, and that we mess with it at our peril. It’s not something to be taken lightly, if we take seriously what I have referred to as the more general policy of breaking the link between law and brutality. I also think that what I have referred to as the general dissociation of law from brutality has a natural law basis, too. But again that’s not why I call the prohibition on torture an archetype. Archetype is a structural idea; natural law (or less grandly our basic moral sense) comes into play to determine the importance of the structures involved and to determine too the value of what we might lose if an archetype is damaged.

One final caveat. There are all sorts of reasons to be concerned about torture, and I am under no illusion that I have focused on the most important. The most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is almost always associated with this enterprise whether it is legalized or not. The issue of the relation between the prohibition on torture and the rest of the law, the issue of archetypes, is a second tier issue. By that I mean it does not confront the primary wrongness of torture; it is a second-tier issue like the issue of our proven inability to keep torture under control, or the fatuousness of the suggestion made by

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<sup>172</sup> See above text accompanying notes 141-2.

Professor Dershowitz and others that we can confine its application to exactly the cases in which it might be thought justified. Given that we are sometimes tongue-tied about what is really wrong with an evil like torture, work at this second tier is surely worth doing. Or it is surely worth doing anyway, as part of the general division of labor, even if others are managing to produce a first tier account of the evil.<sup>173</sup>

I have found this second-tier thinking about archetypes helpful in my general thinking about law. I have found it helpful as a way of thinking about what it is for law to structure itself and present itself in a certain light. I have found it helpful to think about archetypes as a general topic in legal philosophy, as a corrective to some of the simplicities of legal positivism, and as an interesting elaboration of Dworkin's jurisprudence. Most of all, I have found this exploration helpful in understanding what the prohibition on torture symbolizes. By thinking about the prohibition as an archetype I have been able to reach a clearer and more substantive sense of what we aspire to in our jurisprudence: a body of law and a Rule of Law that renounces savagery and a state that pursues its purposes (even its most urgent purposes) and secures its citizens (even its most endangered citizens) honorably and without recourse to brutality and terror.

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<sup>173</sup>Refer again to Sussman's article.