

## ARTICLES

### TORTURE AND POSITIVE LAW: JURISPRUDENCE FOR THE WHITE HOUSE

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*In recently published memoranda, Justice Department lawyers have suggested that it is not in all circumstances wrong or unlawful to inflict pain in the course of interrogating terrorist suspects. Also, at least one legal scholar has suggested that the United States might institute a system of judicial torture warrants, to permit coercive interrogation in cases where it might yield information that will save lives.*

*The shocking nature of these suggestions forces us to think afresh about the legal prohibition on torture. This Article argues that the prohibition on torture is not just one rule among others, but a legal archetype—a provision which is emblematic of our larger commitment to nonbrutality in the legal system. Characterizing it as an 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 absolute character of the legal and moral prohibitions on torture.*

*On this basis, the Article concludes not only that the absolute prohibition on torture should remain in force, but also that any attempt to loosen it (either explicitly or by narrowing the definition of “torture”) would deal a traumatic blow to our legal system and affect our ability to sustain the law’s*

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*commitment to human dignity and nonbrutality even in areas where torture as such is not involved.*

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#### INTRODUCTION

My starting point is the dishonor that descended upon the United States early in 2004 as a result of revelations about what was happening under American control in Abu Ghraib prison in Iraq. That dishonor involved more than the Abu Ghraib nightmare itself—the photographs of sexual humiliation, the dogs, the hoods, the wires, the beatings.<sup>1</sup> It has become apparent that what took place there was not just a result of the depravity of a few poorly trained reservists, 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>2</sup>

1. See James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. Times, Apr. 29, 2004, at A15.

2. See Peter Hermann, *Army Sets 1st Court-Martial in Abuses*, Balt. Sun, May 10, 2004, at 1A (“A report by Maj. Gen. Antonio M. Taguba . . . 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”*, L.A. Times, May 3, 2004, at A1 (“Taguba found that military intelligence interrogators . . . ‘actively requested that . . . guards set physical and mental

The concern and the dishonor intensified when it was revealed that abuses were not isolated in this one prison, but that 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>3</sup> We know too that terrorist suspects, enemy combatants, and others associated with the Taliban and Al Qaeda held by the United States in the camps at Guantánamo Bay were interrogated using physical and psychological techniques<sup>4</sup> that had been outlawed by the European Court of Human Rights after their use by British forces against terrorist suspects in Northern Ireland in the early 1970s,<sup>5</sup> and outlawed by the Israeli Supreme Court after their use by security forces in Israel against terrorist suspects in the 1990s.<sup>6</sup>

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

It is dispiriting as well as shameful to have to turn our attention to this issue.<sup>7</sup> In 1911, the author of the article on “Torture” in the *Encyclopædia Britannica* wrote that “[t]he whole subject is now one of only

conditions for the favorable interrogation of witnesses.’ . . . 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.’”). See generally Seymour M. Hersh, *Chain of Command: The Road From 9/11 to Abu Ghraib 1–72* (2004) (discussing conditions at Abu Ghraib and extent of government’s involvement).

3. See Miles Moffeit, *Brutal Interrogation in Iraq: Five Detainees’ Deaths Probed*, *Denver Post*, May 19, 2004, at A1 (“Brutal interrogation techniques by U.S. military personnel are being investigated in connection with the deaths of at least five Iraqi prisoners. . . . 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.”); see also National Briefing, *Colorado: Trial Ordered in Death of Iraqi General*, *N.Y. Times*, June 4, 2005, at A12 (“Three soldiers have been ordered to stand trial at Fort Carson on murder charges concerning the death of an Iraqi general, who suffocated during an interrogation in 2003.”).

4. These included deprivation of sleep, food, and water; covering detainees’ heads with hoods; and forcing them to stand in physically stressful positions. Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, *N.Y. Times*, Mar. 9, 2003, § 1, at 1.

5. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 41, 94 (1978).

6. See HCJ 5100/94 Pub. Comm. *Against Torture in Israel v. Israel* [1999] IsrSC 53(4) 817.

7. A recent article by Seth Kreimer on this issue begins: “There are some articles I never thought I would have to write; this is one.” Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 *U. Pa. J. Const. L.* 278, 278 (2003).

historical interest as far as Europe is concerned.”<sup>8</sup> But it has come to life again. With the growth of the ethnic-loyalty state and the security state in the twentieth century, the emergence of anticolonial insurgencies and other intractable forms of internal armed conflict, and the rise of terrorism, torture has returned, and as Judith Shklar writes, “flourished on a colossal scale.”<sup>9</sup> It is not just a rogue-state, third-world, banana-republic phenomenon: The use of torture has in recent decades disfigured the security policies of France (in Algeria),<sup>10</sup> Britain (in Northern Ireland),<sup>11</sup> Israel (in the Occupied Territories),<sup>12</sup> and now the United States (in Iraq, Afghanistan, and Cuba).<sup>13</sup>

Perhaps what is remarkable is not that torture is *used*, but that it (or something very close to it) is being *defended*,<sup>14</sup> and by well-known American jurists and law professors. Here are three examples:

(i) Professor John Yoo now teaches law at the University of California at Berkeley. While on leave from Boalt Hall as a Deputy Assistant Attorney General in the Justice Department, Professor Yoo was the lead author of a January 2002 memorandum persuading the Bush Administration to withdraw its 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>15</sup> This pertained particularly to the issue of interrogation and torture. Professor Yoo argued that captured members of Al Qaeda and the Taliban were not protected by any

8. 27 Encyclopædia Britannica 72, 72 (11th ed. 1911); see also W.L. Twining & P.E. Twining, *Bentham on Torture*, 24 N.I.L.Q. 305, 305 (1973) (quoting same).

9. Judith Shklar, *The Liberalism of Fear*, in *Liberalism and the Moral Life* 21, 27 (Nancy Rosenblum ed., 1989).

10. See Pierre Vidal-Naquet, *Torture: Cancer of Democracy: France and Algeria 1954–62*, at 29–106 (Barry Richard trans., 1963) (examining political and judicial breakdown in France surrounding systematic use of torture in Algerian War of Independence).

11. See Michael O’Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 Am. J. Int’l L. 674, 674–80 (1977) (considering reports and litigation concerning interrogation techniques used by British security forces in Northern Ireland).

12. See Human Rights Watch/Middle East, *Torture and Ill-Treatment: Israel’s Interrogation of Palestinians from the Occupied Territories* 108–240 (1994) (documenting coercive methods in use at Israeli interrogation centers); see also Amnesty International, *Israel/Occupied Territories and the Palestinian Authority: Five Years After the Oslo Agreement: Human Rights Sacrificed for “Security”* 8–18 (1998) (detailing how Israel’s “legalization and systematization of torture has [since 1993] . . . become a more entrenched part of the system in which Palestinian detainees find themselves”).

13. See generally *The Torture Papers: The Road to Abu Ghraib* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (presenting U.S. government documents supporting and recording use of coercive techniques in Afghanistan, Guantánamo Bay, and Abu Ghraib).

14. Cf. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (“That states engage in official torture cannot be doubted, but all states believe it is wrong, [and] all that engage in torture deny it . . .”).

15. Memorandum from John Yoo, Deputy Assistant Att’y Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. 1 (Jan. 9, 2002) (on file with the *Columbia Law Review*) [hereinafter Yoo Memorandum].

prohibition on torture or cruel interrogation arising out of the Geneva Conventions 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.<sup>16</sup> Moreover, Professor Yoo argued that the Administration was not constrained by any inference from the Geneva Conventions so far as torture was concerned, nor was it constrained in this regard by jus cogens norms of customary international law.<sup>17</sup>

(ii) Alan Dershowitz is a professor at Harvard Law School who, in two well-publicized books, has argued that torture may be a morally and constitutionally acceptable method for United States officials to use to extract information from terrorists when the information may lead to the immediate saving of lives.<sup>18</sup> He has in mind forms of nonlethal torture, such as “a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life . . . .”<sup>19</sup> Professor Dershowitz wants us to consider the possibility that it might be appropriate for torture of this kind to receive explicit authorization in the form of judicial torture warrants.<sup>20</sup>

(iii) Jay Bybee is a judge on the Ninth Circuit and former law professor at Louisiana State University and the University of Nevada. Between 2001 and 2003, Bybee was head of the Office of Legal Counsel in the Department of Justice, and in that capacity he put his name on a memorandum sent to the White House purporting to narrow the definition (or the Administration’s understanding of the definition) of “torture” so that it did not cover all cases of the deliberate infliction of pain in the course of an interrogation.<sup>21</sup> The word “torture” and the prohibition on torture should be reserved, Bybee argued, only for the infliction of the sort of extreme pain that would be associated with death or organ failure.<sup>22</sup> He also argued that legislation restricting the use of torture by U.S. forces

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16. *Id.* at 11–25. This position was also urged by then-White House counsel Alberto Gonzales, who characterized aspects of the Geneva Convention protections as “quaint” and “obsolete.” Julian Coman, *Interrogation Abuses Were ‘Approved at Highest Levels,’* *Sunday Telegraph* (London), June 13, 2004, at 26. Alberto Gonzales is now Attorney General of the United States.

17. See Yoo Memorandum, *supra* note 15, at 34–39.

18. See Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age* 470–77 (2002); Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 132–63 (2002) [hereinafter *Dershowitz, Why Terrorism Works*]; see also Alan Dershowitz, *Tortured Reasoning*, in *Torture: A Collection* 257, 257–80 (Sanford Levinson ed., 2004).

19. Dershowitz, *Why Terrorism Works*, *supra* note 18, at 144.

20. *Id.* at 156–63.

21. See Memorandum from Office of the Assistant Att’y Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) (on file with the *Columbia Law Review*) [hereinafter *Bybee Memorandum*].

22. *Id.* at 6.

under *any* definition might be unconstitutional as a restriction on the President's power as Commander-in-Chief.<sup>23</sup>

These proposals have not arisen in a vacuum. The United States suffered a catastrophic series of terrorist attacks on September 11, 2001, and since then the Bush Administration has committed itself to a "war on terror" and an active doctrine of preemptive self-defense. In Al Qaeda it faces a resourceful enemy that obeys no legal restraints on armed conflict and may attack without warning at any time. The issue of torture arises because of the importance of intelligence in this conflict: Success in protecting a country from terrorist attack depends on intelligence more than brute force; good intelligence is also necessary for protecting our armed forces from insurgent attack in countries like Iraq (whose occupation by the United States is connected with the war on terror).

I have heard colleagues say that what the Bush Administration is trying to do in regard to torture should be understood sympathetically in light of these circumstances, and that we should be less reproachful of the Administration's efforts to manipulate the definition of "torture" than we might be in peacetime. I disagree; I do not believe that "everything is different" after September 11.<sup>24</sup> The various municipal and international law prohibitions on torture are set up precisely to address the circumstances where torture is likely to be most tempting. If the prohibitions do not hold fast in those circumstances, then they are of little use in any circumstance. In what follows, therefore, I shall consider the various attempts that have been made to narrow or modify the prohibitions on torture as though they were attempts to narrow its normal meaning or its normal application. This is because those who set up the prohibitions envisaged that circumstances of stress, fear, and danger would be the normal habitat in which these provisions would have to operate.

I want to place particular emphasis on the fact that these efforts to modify the prohibition on torture have been undertaken by lawyers.<sup>25</sup> Sure, our primary objection to torture ought to be out of consideration

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23. *Id.* at 33–39.

24. It is worth noting that a Committee of Ministers of the Council of Europe (the organization responsible for the European Convention on Human Rights) adopted a set of guidelines for the fight against terror in July 2002 that included a reaffirmation of the absolute prohibition of torture. See Comm. of Ministers, Council of Eur., Guidelines on Human Rights and the Fight Against Terrorism 8 (2002), available at [http://www.coe.int/T/E/human\\_rights/h-inf\(2002\)8eng.pdf](http://www.coe.int/T/E/human_rights/h-inf(2002)8eng.pdf) (on file with the *Columbia Law Review*) ("The 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 . . ."). For this reference I am grateful to Sanford Levinson, "Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11, 81 *Tex. L. Rev.* 2013, 2013–17 (2003).

25. Other authors have expressed this concern. See Richard H. Weisberg, *Loose Professionalism, or Why Lawyers Take the Lead on Torture*, in *Torture*, *supra* note 18, at 299, 300–04; David Luban, *Liberalism and the Unpleasant Question of Torture*, 91 *Va. L. Rev.* (forthcoming Oct. 2005) (manuscript at 37–41, on file with the *Columbia Law Review*);

for the potential victims of the treatment that Yoo, Dershowitz, and Bybee appear to condone. But the defense of torture is also shocking as a jurisprudential matter. That views and proposals 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 is a matter of dishonor for our profession. Reading the memoranda of Judge Bybee and Professor Yoo and the mooted proposal of Professor Dershowitz shook my faith in the integrity of the community of American jurists. At the very least, it indicates the necessity of our thinking more deeply about the nature of the rule against torture, its place in our legal system, and the responsibilities that lawyers (particularly lawyers working in government) have to uphold the integrity of our law in this regard.<sup>26</sup>

In what follows, I want to do several things. In Part I of this Article, I shall explore the idea that there is something wrong with trying to pin down the prohibition on torture with a precise legal definition. Insisting on exact definitions may sound very lawyerly, but there is something disturbing about it when the quest for precision is put 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."

Part II of this Article will consider whether the rule against torture can be regarded as an absolute. This is often treated as a moral question, but I also want to consider the idea of a *legal* absolute. The rule against torture is often presented as a legal absolute, but in this Part, I want to consider the persuasiveness of claims made by Professor Dershowitz and others that we should be willing to recognize legal exceptions to this rule.

Part III of this Article continues the exploration of the idea that the rule against torture may have extraordinary legal force. In Part III, I want to defend the proposition that torture is utterly repugnant to the spirit of our law, and I want to explore the idea that narrowing or otherwise undermining the definition of torture might deal a body blow to the corpus juris that would go beyond the immediate effects on the mentality of torturers and the terror and suffering of their victims. I shall argue that the rule against torture operates in our law as an *archetype*—that is, as a rule which has significance not just in and of itself, but also as the embodiment of a pervasive principle. As the notion of a legal archetype is new and unfamiliar, I shall spend some time outlining and illustrating the jurisprudence that is necessary to make sense of this idea.

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Andrew Rosenthal, *Legal Breach: The Government's Attorneys and Abu Ghraib*, N.Y. Times, Dec. 30, 2004, at A22.

26. See Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 Am. J. Int'l L. 689, 691–95 (2004) (noting ethical requirements of the American Bar Association Model Rules of Professional Conduct and observing that "it is only these professional qualities that protect against legal advice or advocacy that might undermine the national interest in respect for law, or subvert or erode the international legal order").

Finally, in Part IV, I will extend the analysis to consider the relation between prohibitions on torture and the idea of the rule of law—specifically, the idea of subjecting the modern state to legal control. In this Part, I will consider also the application of the argument in Part III to the role played by the prohibition on torture in international law and, in particular, the international law of human rights.

## I. LEGAL DEFINITIONS

### A. *The Texts and the Prohibitions*

The law relating to torture comprises a variety of national, regional, and international norms. The basic provision of human rights law is found in the International Covenant on Civil and Political Rights (which I shall refer to hereinafter as “the Covenant”):<sup>27</sup>

Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>28</sup>

Article 4 of the Covenant provides that “[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation,”<sup>29</sup> but article 4 also insists that no derogation from article 7 may be made under that provision.<sup>30</sup> The United States ratified the Covenant in 1994, though with the following reservation:

[T]he United States considers itself bound by Article 7 to the extent that “cruel, inhuman or degrading treatment or punishment” means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>31</sup>

This is part of a pattern of reservations from human rights conventions in which the United States asserts its right to rely on its own constitutional law in any case of overlap with international human rights law where the international standards might prove more demanding.

Besides the Covenant, we also have to consider a more specific document—the international Convention Against Torture (which I shall refer to hereinafter as “the Convention”).<sup>32</sup> This instrument requires states to “take effective legislative, administrative, judicial or other measures to

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27. International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, S. Exec. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

28. *Id.* art. 7. There is also a provision in article 7 prohibiting medical experimentation without consent. *Id.*

29. *Id.* art. 4(1).

30. *Id.* art. 4(2).

31. S. Exec. Rep. No. 102-23, at 22 (1992).

32. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].



prevent acts of torture in any territory under its jurisdiction,"<sup>33</sup> and to "ensure that all acts of torture are offences under its criminal law."<sup>34</sup> Again there is a nonderogation provision (implying in effect that states must establish an absolute rather than a conditional or derogable ban on torture),<sup>35</sup> and again, there is a similar reservation relating to cruel, inhuman, and degrading treatment in the U.S. ratification of the Convention.<sup>36</sup> In addition, the Convention goes beyond the Covenant (not to mention other regional human rights instruments such as the European Convention on Human Rights (ECHR)),<sup>37</sup> in that it attempts to give a definition of torture:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>38</sup>

This definition, particularly in its reference to the *intentional* infliction of *severe* pain, was the starting point of the recent American discussion by Jay Bybee and others.<sup>39</sup>

33. Id. art. 2(1).

34. Id. art. 4(1). The Convention also imposes requirements of nonrefoulement of refugees likely to face torture, id. art. 3, requirements to ensure that officials are prohibited from using torture and that the prohibition is included in their training, id. art. 10, requirements to promptly investigate allegations of torture, id. art. 12, to protect complainants against retaliation, id. art. 13, and to secure a right to redress and compensation for victims of torture, id. art. 14. There is also a prohibition on the use in legal proceedings or proceedings before any official tribunal of "any statement which is established to have been made as a result of torture . . . except against a person accused of torture as evidence that the statement was made." Id. art. 15.

35. Id. art. 2(2) ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.").

36. See S. Exec. Rep. No. 101-30, at 29-31 (1990).

37. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights] ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment."); id. art. 15(1)-(2) ("In time of war or other public emergency . . . 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.").

38. Convention Against Torture, supra note 32, art. 1(1). However, article 1(2) states: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

39. See *infra* Part I.D.

In pursuance of its obligations under the Convention, the United States has enacted legislation forbidding torture outside the United States by persons subject to U.S. jurisdiction.<sup>40</sup> The antitorture statute makes it an offense punishable by up to twenty years imprisonment to commit, or conspire or attempt to commit torture.<sup>41</sup> The offense is also punishable by death or life imprisonment if the victim of torture dies as a result.<sup>42</sup> Moreover, the statute defines torture as follows:

“[T]orture” 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.<sup>43</sup>

There is an additional definition of “severe mental pain and suffering” in terms of “prolonged mental harm” caused by or resulting from the threat of death, physical torture, or the administration of mind-altering substances to oneself or others.<sup>44</sup>

Finally, there are the Geneva Conventions, which deal with the treatment of various categories of vulnerable individuals in circumstances of armed conflict.<sup>45</sup> The best-known provision is article 17 of the Third Geneva Convention, which provides that “[n]o 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.”<sup>46</sup> In addition, the four Geneva Conventions share a common article 3, which provides as follows:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms . . . 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:

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40. See 18 U.S.C. § 2340 (2000). It is assumed that ordinary provisions of criminal and constitutional law sufficiently prohibit torture within the United States.

41. 18 U.S.C.A. § 2340A(a), (c) (West 2001).

42. 18 U.S.C. § 2340A(a).

43. *Id.* § 2340(1).

44. *Id.* § 2340(2).

45. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

46. Geneva Convention III, *supra* note 45, art. 17.

(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 . . . .<sup>47</sup>

Common article 3 applies to all the persons the Geneva Conventions protect, which include not just prisoners of war, but wounded soldiers, shipwrecked sailors, detained members of irregular forces, and so on.<sup>48</sup>

These provisions, together with the protections that law routinely provides against serious assault and abuse, add up to an interlocking set of prohibitions on torture. They are what I have in mind when I refer to “the prohibition on torture” (or “the rule against torture”), though sometimes one element in this interlocking set, sometimes another, will be most prominent in the arguments that follow.

### B. *Rules and Backgrounds*

What is the effect of these provisions? How should we approach them as lawyers? Should we use the same strategies of interpretation as we use elsewhere in the law? Or is there something special about the prohibitions on torture that requires us to treat them more carefully or considerately? These are the questions that will occupy us throughout the remainder of this Article.

I want to begin this discussion by considering the scope and application of the prohibitions on torture. John Yoo has suggested that the Geneva Conventions, read literally, apply to some captives or detainees but not others, and that they do not apply to Al Qaeda and Taliban detainees in the war on terror.<sup>49</sup> What sort of reading, what sort of interpretive approach is necessary to reach a conclusion like that? To answer this question, it is helpful to invoke the old distinction between *malum prohibitum* and *malum in se*—two ways in which a legal prohibition may be regarded.<sup>50</sup>

On the *malum prohibitum* approach, we may think about the text of a given legal provision as introducing a prohibition into what was previously a realm of liberty. Consider the introduction of parking regulations as an analogy. Previously, we were at liberty to park our cars wherever we liked along the streets of our small town. But one day the town government adopts parking regulations, which restrict how long one can park. So now our freedom is limited. Those limits are defined by the regula-

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47. Geneva Convention I, *supra* note 45, art. 3; Geneva Convention II, *supra* note 45, art. 3; Geneva Convention III, *supra* note 45, art. 3; Geneva Convention IV, *supra* note 45, art. 3.

48. See sources cited *supra* note 47.

49. See Yoo Memorandum, *supra* note 15, at 1–2.

50. For a discussion on the distinction between *malum in se* and *malum prohibitum*, see *New Jersey v. T.L.O.*, 469 U.S. 325, 379 & n.21 (1985); *Jordan v. De George*, 341 U.S. 223, 236–38 (1951).

tions that have been enacted: The text of the regulations determines the extent of the prohibition, and we must consult the text to see exactly what is prohibited and what is left free. Overparking is a *malum prohibitum* offense: It consists of violating the letter of the regulations. If the regulations had not been enacted, there would be no offense. And the corollary of this is that anything that is not explicitly prohibited by the regulations remains as free as before.

The other approach is a *malum in se* approach. Some things are just wrong, and would be wrong whether positive law prohibited them or not. What legal texts do is articulate this sense of wrongness and fill in the details to make that sense of wrongness administrable.<sup>51</sup> So, for example, a statute prohibiting murder characteristically does not make unlawful what was previously permissible; it simply expresses more clearly the unlawfulness of something which was impermissible all along. It follows that consulting the statutory provision in a rigidly textualist spirit might be inappropriate; it certainly would be inappropriate if one were assuming that anything not prohibited by the exact terms of the text must be regarded as something that one was entirely free to do.

The distinction between *malum prohibitum* and *malum in se* might seem to depend on a natural law theory, in which some of law's functions are related to the administration of natural law prohibitions while other functions are related to positive law's capacity to generate new forms of regulation.<sup>52</sup> But that need not be so. All we need in order to make sense of *malum in se* and distinguish it from *malum prohibitum* is to discern some preexisting normative background to the prohibition that is legally recognizable. That normative background may be a shared moral sense or it may be some sort of higher or background law: natural law, perhaps, or international law. We should note, however, that the distinction between *malum in se* and *malum prohibitum* is not clear cut. Even in our parking example, there will have been some background reasons governing the way it was appropriate to park even before the regulations were introduced: Do not park unsafely or inconsiderately, do not block access, and so on. These reasons do not evaporate when the explicit regulations are introduced.

Now let us apply these distinctions to the rule against torture. I think it is obvious that the U.S. antitorture statute<sup>53</sup> cannot plausibly be con-

51. See John Finnis, *Natural Law and Natural Rights* 281–90 (1980) (discussing the derivation of “positive” from “natural” law).

52. Blackstone drew this distinction as follows:

[C]rimes and misdemeanours, that are forbidden by the superior laws, and therefore stifled *mala in se*; such as murder, theft, and perjury . . . 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.

1 William Blackstone, *Commentaries* \*54 (footnote omitted).

53. 18 U.S.C. § 2340 (2000). For discussion on the U.S. antitorture statute, see *supra* notes 40–44 and accompanying text.

strued according to the *malum prohibitum* model. It does not represent the first introduction of a prohibition into an area that was previously unregulated and in which everyone was previously at liberty to do what they liked. On the contrary, the statute fulfilled a treaty obligation that the United States already had under the Convention, and it also applied and extended the spirit of existing criminal law. It gave definition to an existing and legally recognized sense of the inherent wrongness of torture. Something similar is true of the Convention itself and also of the Covenant. They themselves are not to be conceived as new pieces of positive international law encroaching into what was previously an unregulated area of freedom. Like all human rights instruments, they have what Gerald Neuman has called a *suprapositive* aspect: They were “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.”<sup>54</sup> Though they are formal treaties based on the actual consent of the states that are party to them, they also represent a consensual acknowledgment of deeper background norms that are binding on nations anyway, treaty or no treaty.

It might be thought that the Geneva Conventions are a special case because they are designed to limit armed conflict, and *there* the background or default position is indeed that anything goes. That is, one might think that armed forces are normally at liberty to do anything they like to enemy soldiers in time of war—bombard, shoot, kill, wound, maim, and terrify them—and that the function of the Geneva Conventions is precisely to introduce a degree of unprecedented regulation into what would otherwise be a horrifying realm of freedom. Under this reasoning, the *malum prohibitum* approach is appropriate, and therefore we have no choice but to consult the strict letter of the texts of the Conventions to see exactly what is prohibited and what has been left as a matter of military freedom. John Yoo’s memorandum approaches the Geneva Conventions in that spirit. He implies that absent the Conventions we would be entitled to do anything we like to enemy detainees; grudgingly, however, we must accept some limits (which we ourselves have negotiated and signed up for). But we have signed up for no more than the actual texts stipulate.<sup>55</sup> When we run out of text, we revert to the default position, which is that we can do anything we like. Now—this line of reasoning continues—it so happens that as a result of military action in Afghanistan and Iraq, certain individuals have fallen into our hands as captives who do not have the precise attributes that the Geneva

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54. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *Stan. L. Rev.* 1863, 1868 (2003).

55. This impression is based on Yoo Memorandum, *supra* note 15, at 11 (“[M]embers of the al Qaeda organization do not receive the protection of the laws of war.”); *id.* at 34 (“[C]ustomary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda and the Taliban.”).

Conventions stipulate for persons protected by its prohibitions. So—the conclusion runs—the textual prohibitions on maltreatment do not apply to these detainees, and we are back in the military default position: We can do with them whatever we like.<sup>56</sup>

Yoo's approach is wrong in three ways. First, its narrow textualism embodies a bewildering refusal to infer anything along *eiusdem generis* lines from the existing array of categories of detainees that *are* covered. The Geneva Conventions reiterate elementary protections (against, for instance, torture) for one category of detainee, the same protections for a second category of detainee, the same protections for a third category of detainee, and so on. And now we have detainees in a fourth category that does not exactly fit the literal terms of the first three. It might be reasonable to think that the earlier categories give us a sense of how to go on—how to apply the underlying rule—in new kinds of cases.<sup>57</sup> That is how lawyers generally proceed. That is how we infer, for example, that the Third Amendment to the U.S. Constitution applies to the quartering of sailors, marines, and airmen as well as soldiers.<sup>58</sup> But Professor Yoo proceeds as though the methods of analogy, inference, and reasoned elaboration—the ordinary tools of our lawyerly trade—are utterly inappropriate in this case.

In any case, it is simply not true that the texts of the Geneva Conventions represent the first introduction of prohibitions into a previously unregulated area. The Geneva Conventions, like the Convention Against Torture and the International Covenant, respond to a strongly felt and well-established sense that certain abuses are beyond the pale, whether one is dealing with criminal suspects, political dissidents, or military detainees, and that they remain beyond the pale even in emergency situations or situations of armed conflict. There are certain things that are not to be done to human beings and these international instruments represent our acknowledgment by treaty of that fact. Professor Yoo asserts that the United States cannot regard itself as bound by norms of customary international law or even *jus cogens* norms of international law; he thinks that we must regard ourselves as having a free hand to deal with detainees except to the extent that the exact letter of our treaty obligations indicates otherwise.<sup>59</sup> But such argument as he provides for this assertion relies on the *malum prohibitum* approach, which, as we have already seen, is inappropriate in this area.

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56. See *id.* at 42.

57. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. Rev. 781, 798–800 (1989) (discussing Wittgenstein's theory of rule-following).

58. See Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 St. Louis U. L.J. 587, 645–46 (2004). But see Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. Chi. L. Rev. 483, 493 (1991) (arguing that omission of sailors is deliberate).

59. See *supra* note 55 and accompanying text.

Third, Yoo's analysis lacks a sense of the historic context in which the conventions governing captives and detainees were negotiated and reformulated in 1949. It has been suggested by Scott Horton that the modern Geneva Conventions are in part a response to experience during the Second World War.<sup>60</sup> The conventions then existing were vulnerable to being treated as a patchwork of rules with piecemeal coverage, encouraging Germany, for example, to argue that it could exclude from the benefit of their coverage various categories of detainee such as commandos, partisans, pilots engaged in acts of terror, and those who fought on behalf of a new kind of political entity (the Soviet Union).<sup>61</sup> The conventions were renegotiated in 1949 precisely to prevent this sort of exploitation of loopholes, and it is quite discouraging now to see American lawyers arguing for the inapplicability of the Conventions on grounds that are strikingly similar—new forms of warfare, new types of non-state entity, etc.—to those invoked by Germany in that period.

### C. *The Interest in Clear Definitions*

Let me turn now to the word "torture" itself in these various provisions of municipal and international law. Some of the provisions—the Covenant, for example—offer no elucidation of the meaning of the term. The Covenant just prohibits torture; it does not tell us what torture is. It seems to proceed on the theory that "we know it when we see it,"<sup>62</sup> or that we can recognize this evil using a sort of visceral "puke" test.<sup>63</sup> In a 1990 Senate hearing, a Department of Justice official observed that "there seems to be some degree of consensus that the concept involves conduct the mere mention of which sends chills down one's spine."<sup>64</sup> Is this sufficient?

Well, the trouble is that we seem to puke or chill at different things. The response to the Abu Ghraib scandal indicated the lack of any settled consensus in this matter. 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

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60. See Scott Horton, *Through a Mirror, Darkly*, in *The Torture Debate in America* (Karen J. Greenberg ed., forthcoming Sept. 2005) (manuscript at 11–12, on file with the *Columbia Law Review*).

61. *Id.*

62. This was what Justice Potter Stewart said, notoriously, about obscenity in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

63. Oliver Wendell Holmes once said that a law was constitutional unless it made him want to "puke." See Letter from Oliver Wendell Holmes to Harold Laski (Oct. 23, 1926), in *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935*, at 887, 888 (Mark DeWolfe Howe ed., 1953). I am indebted for this reference to Richard Posner, *Overcoming Law* 192 (1995).

64. *Convention Against Torture: Hearing Before the Comm. on Foreign Relations, 101st Cong. 13* (1990) (statement of Mark Richard, Deputy Assistant Att'y Gen., Criminal Div., Dep't of Justice).

set upon or put in fear of attack by dogs.<sup>65</sup> Was this torture? Many commentators thought it was, but one or two American newspapers resisted the characterization, preferring the word “abuse.”<sup>66</sup> Some conservative commentators suggested that what happened was no worse than hazing.<sup>67</sup> The impetus for this distinction seems to be that if we use the word “torture” to characterize what Americans did in Abu Ghraib prison, we might be depriving ourselves of the language we need to condemn much more vicious activities.<sup>68</sup>

Unlike the Covenant, the Convention Against Torture and the U.S. antitorture statute offer more than just a term and an appeal to our intuitions. Their definitional provisions offer us ways to analyze torture in terms of what lawyers sometimes call “the elements of the offense.” Criminal law analyzes rape, for example, in terms of a certain sort of physical action (sexual intercourse), under certain circumstances (compulsion by the use or threat of force, or impairment of the victim’s ability to control

65. Richard A. Oppel Jr., *Guilty Plea by Sergeant in Abuse Case*, N.Y. Times, Oct. 21, 2004, at A10; T.R. Reid, *Case Against Soldier Is Presented: Two Ex-Detainees Describe Alleged Abuse at Prison in Iraq*, Wash. Post, Jan. 12, 2005, at A3.

66. Newsday reported the following characterization:

“Torture is torture is torture,” Secretary of State Colin Powell said this week in an interview . . . .

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. . . .

But the American press has been more circumspect, sticking with vaguer terms such as “abuse” and “mistreatment.” . . . [T]hey 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.”

Geoffrey Nunberg, *Don’t Torture English to Soft-Pedal Abuse*, Newsday (Nassau Cty., N.Y.), May 20, 2004, at A50.

67. See Frank Rich, *The War’s Lost Weekend*, N.Y. Times, May 9, 2004, § 2, at 1 (“[A] former Army interrogation instructor, Tony Robinson, showed up on [a] Fox show . . . to assert that the prison photos did not show torture. ‘Frat hazing is worse than this,’ the self-styled expert said.”). This characterization was seconded by Rush Limbaugh, who said on his radio program:

“This is no different than what happens at the Skull and Bones initiation, and we’re going to ruin people’s lives over it, and we’re going to hamper our military effort, and then we are going to really hammer them because they had a good time. You know, these people are being fired at every day. . . . You ever heard of emotional release?”

Cathy Young, *Cruelty Cuts Across Nationality, Gender Lines*, Boston Globe, May 10, 2004, at A15.

68. Similarly, Judge Sir Gerald Fitzmaurice asked in his dissent in *Ireland v. United Kingdom* if the five techniques that the British had used in Northern Ireland in the early 1970s—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?” 25 Eur. Ct. H.R. (ser. A) at 130 (1978) (separate opinion of Fitzmaurice, J.).



her conduct).<sup>69</sup> Similarly, these provisions analyze torture as a certain sort of action, performed in a certain capacity, causing a certain sort of effect, done with a certain intent, for a certain purpose, and so on. Some of the elements in the antitorture statute and the Convention are the same: Both, for example, distinguish torture from pain or suffering incidental to lawful sanctions.<sup>70</sup> But debates about definition are likely to result from differences in the respective analyses—the analyses of “mental torture,” for example, are slightly different.<sup>71</sup> Now, I shall have some harsh things to say about the quest for definitional precision in the remainder of this Section and the next. But nothing that follows is supposed to preclude or even frown upon the sort of analysis or analytic debate that I have just mentioned.

Instead, I want to consider a kind of complaint about definitional looseness (and an attempt to narrow the definition of “torture”) that goes well beyond this business of analyzing the elements of the offense. Both the Convention and the antitorture statute refer to the intentional infliction of “severe” pain or suffering.<sup>72</sup> Since pain can be more or less severe, evidently the word “severe” is going to be a site for contestation between those who think of torture in very broad terms and those who think of it in very narrow terms. The word looks as though it is supposed to restrict the application of the word “torture.” But as with a requirement to take “reasonable care” or a constitutional prohibition on “excessive” bail, we are not told what exactly the restriction is—that is, we are not told where exactly severity is on the spectrum of pain, and thus where the prohibition on torture is supposed to kick in.

We might ask: What is the point of this restriction? Why narrow the definition of torture so that it covers only severe pain? After all, some theorists have embraced a broad definition of the word. Jeremy Bentham worried about “the delusive power of words” in discussions of torture.<sup>73</sup> But his own definition was very wide: “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>74</sup> Though he used the term “violent” to qualify “pain,” Bentham meant it to refer to the suddenness of the pain’s onset, rather than its severity.<sup>75</sup> So, for example, he applied the word “torture” to the case of “a Mother or Nurse seeing a child playing with a thing which he

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69. See Model Penal Code § 213.1 (1962).

70. See *supra* Part I.A.

71. It is a weakness of this Article that I say almost nothing about the definition of mental torture. That silence is not supposed to condone what the various Bush Administration memoranda have said on that topic. One cannot do justice to everything in one Article, and this one is already too long.

72. See *supra* Part I.A.

73. Twining & Twining, *supra* note 8, at 308 (quoting Bentham Manuscripts, University College London Collection, box 46, 63–70).

74. *Id.* at 309.

75. See *id.* at 310–11.

ought not to meddle with, and having forbidden him in vain pinches him till he lays it down.”<sup>76</sup> Evidently he thought the interests of clarity would be served by defining torture to include *all* cases of the sudden infliction of pain for the sake of immediate coercion. It is not surprising that Bentham would take this view. He was, after all, a consequentialist and the currency of his consequentialism was pain as well as pleasure. He favored adjusting the meanings of words to facilitate a substantive debate about which inflictions of pain are justified and which are not, rather than assuming in advance that everything taken in by the term “torture” is necessarily illegitimate and then debating the definitional ramifications of *that*.<sup>77</sup>

Most modern discussions, however, work from the opposite assumption. They begin with the sense that there is something seriously wrong with torture—even if it is not absolutely forbidden—and they approach the issue of definition on that basis. Marcy Strauss, for example, complains that “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>78</sup> She worries about the consequences of this casual expansion of the term: “[I]f 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.”<sup>79</sup> She implies that we have a certain normative investment in the term—we use it to mark a serious moral judgment—and we ought to adjust our definition so as to protect that investment.

What do those who are dissatisfied with the vagueness of the phrase “severe pain or suffering” have in mind? What would be a more determinate definition? Presumably, it would be some *measure* of severity, something to turn the existing vague standard into an operationalized rule. In Part I.D, we shall consider Jay Bybee’s attempt to provide just such a measure. But first I want to discuss the very idea of such precision. What

76. *Id.* at 310.

77. Thus Bentham argued, “There is no approving [torture] in the lump, without militating against reason and humanity: nor condemning it without falling into absurdities and contradictions.” *Id.* at 337.

78. Marcy Strauss, *Torture*, 48 N.Y.L. Sch. L. Rev. 201, 215 (2004).

79. *Id.* Some aspects of Professor Strauss’s concern are unconvincing. She complains: “Taking a particularly boring class is often referred to as ‘torture’ by many students.” *Id.* at 208 n.16. But it is silly to object to figurative uses. The same students who complain that Professor Strauss’s classes are “torture” may also say that her tests are “murder,” but that is not a ground for worrying about the legal definition of “murder.”

We should also remember that there is a common figurative use of the word “torture” in law—the idea of “torturing” the meaning of a word or a phrase to yield a particular result. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”).

motivates the demand for a precise measure of severity? We know that in almost all cases when we replace a vague standard with an operationalized rule, the cost of diminishing vagueness is an increase in arbitrariness. We specify a number, but cases just below that number might seem to be excluded arbitrarily.<sup>80</sup> That sort of arbitrariness can itself reflect badly on the normative investment we have in the relevant provision. So why is this cost worth risking?

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

Is this a compelling argument? We should begin by recalling that the prohibitions on torture contained in the Geneva Conventions and in the Convention Against Torture apply in the first instance to the state and state policy. Is the state in the same position as the ordinary individual in having a liberty interest in bright lines and an interest in not having its freedom of action chilled?<sup>81</sup> I don't think so: We set up the state to preserve and enlarge *our* liberty; the state itself is not conceived as a beneficiary of our libertarian concern. Even the basic logic of liberty seems inapplicable. In the case of individuals, we say that everything that is not expressly forbidden is permitted. But it is far from clear that this principle should apply to the state.<sup>82</sup> Indeed, constitutional doctrine often works the other way around: In the United States, everything which is not

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80. Duncan Kennedy described this sort of arbitrariness with the following example: 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.

Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1689 (1976).

81. There is an English doctrine that the state or its officials should be treated just like any other individual. See A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 114–15 (LibertyClassics 1982) (8th ed. 1915). But see Carol Harlow & Richard Rawlings, *Law and Administration* 38–47 (1984) (suggesting that this doctrine is generally in disrepute); Jeremy Waldron, *The Law* 39–42 (1990) [hereinafter Waldron, *The Law*] (same).

82. Cf. B.V. Harris, *The "Third Source" of Authority for Government Action*, 109 *L.Q.R.* 626, 633–36 (1992) (challenging analogy of government to legal person in United Kingdom and discussing limits of government's lawmaking capacity).

explicitly entrusted to the federal government is forbidden to it; it does not have plenary power.<sup>83</sup>

However, although the prohibition on torture is intended mainly as a constraint on state policy, soldiers and other officials do also have an interest as individuals in anticipating war crimes or other prosecutions. The antitorture statute purports to fulfill the obligations of the United States under the Convention by defining torture as an individual criminal offense.<sup>84</sup> Many would say that inasmuch as that statute threatens serious punishment, there is an obligation to provide a tight definition. If that obligation is not fulfilled, they will say, then lenity requires that the defendant be given the benefit of whatever ambiguity we find in the statute.<sup>85</sup> The doctrine of lenity, then, is the basis of the demand for precision.

Against this, however, we need to remember that the charge of torture is unlikely to be surprising or unanticipated by someone already engaged in the deliberate infliction of pain on prisoners: “I am shocked—*shocked!*—to find that ‘waterboarding’ or squeezing prisoners’ genitals or setting dogs on them is regarded as torture.” Remember, we are talking about precision or imprecision in regard to a particular element in the definition of torture—the severity element. The potential defendant is one who already knows that he is inflicting considerable pain; that is his intention. The question he faces is whether the pain is severe enough to constitute torture. It seems to me that the working definition in the antitorture statute already gives him all the warning he needs that he is taking a huge risk in relying upon casuistry about “severity” as a defense against allegations of torture.<sup>86</sup>

One other point in this connection. Even if there is a legitimate interest on the part of potential individual defendants in having a precise definition of torture, there is the further question about whether it is appropriate to exploit this in the interest of the state. It is evident from the Yoo memorandum, for example, that an interpretation guided in part by lenity is being used to determine what U.S. policy should be and what

83. Is the state entitled, as we sometimes think individuals are entitled—see Friedrich A. Hayek, *The Constitution of Liberty* 139–40, 156–57 (1960)—to a legally predictable environment in which it can exercise whatever liberty it has? I was intrigued by a suggestion to this effect by Justice Scalia in his dissent in *Rasul v. Bush*:

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.

124 S. Ct. 2686, 2706 (2004) (Scalia, J., dissenting).

84. See *supra* note 41.

85. Cf. *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (stating that lenity requires that “ambiguous criminal statute[s] . . . be construed in favor of the accused”).

86. However, Gerald Neuman has argued forcefully in a private communication to the author that the concern for the individual is heightened in the military context when the individual is acting under orders and needs to know whether to take the risk of disobeying the orders that are given to him.

U.S. officials should permit and authorize.<sup>87</sup> Defining the sort of bright line that lenity calls for has the effect of carving out space for an official policy of coercive interrogation that would be much more problematic if the Administration did not present itself as pandering to the individual interest in clear definitions. As we think about the case that can be made for precision, we need to remember that this is how any argument based on lenity is likely to be exploited.

Let us return now to the general question of precision in law. One way of thinking about the need for precise definition involves asking whether the person constrained by the norm in question—state or individual—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 may be understood as a threshold on a continuum of some sort; the subject knows that he is on the continuum 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 move as close to that point as possible. If he *does* have such an interest, then he has an interest in having the precise location of the crucial point on the continuum settled clearly in advance.<sup>88</sup> If he does not, then the demand for precision may be treated less sympathetically.

An example of someone who has such a legitimate interest might be a taxpayer who says, “I have an interest in arranging my affairs to lower my tax liability as much as possible, so I need to know exactly how much I can deduct for entertainment expenses.” Another example is the driver who says, “I have an interest in knowing 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 some other cases: the husband who says, “I have an interest in pushing my wife around 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 should not be on*, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.

Let us apply this to the prohibition on torture. In regard to torture, is there an interest in being able to press up against clear bright-line rules, analogous to the taxpayer’s interest in pushing his entertainment

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87. See Yoo Memorandum, *supra* note 15, at 3 (suggesting that rule of lenity, requiring interpretation in defendant’s favor, should be basis of interpretation offered by Justice Department to White House for purposes of determining U.S. policy toward interrogation).

88. Some material in Part I.C is adapted from Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 Cal. L. Rev. 509 (1994), especially *id.* at 534–36 (discussing whether vagueness is always undesirable in law).

deductions to the limit or the driver's interest in going at exactly sixty-five mph? The most common argument goes like this: Interrogators have an interest in being as 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 do not want to do, and for that reason, pressure of some sort 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 a legitimate interest in being on a continuum of pressure, and it is just a question of how far along that continuum we ought to allow them to go. If we fail to specify that point, we might chill any use of pressure in interrogation, even what might turn out to be legitimate pressure.<sup>89</sup>

What is wrong with this argument? Well, it is true that all interrogation *puts pressure* on people to reveal what they would rather not reveal. But there are ways the law can pressure people while still respecting them as persons and without using any form of brutality. And it is quite wrong to suggest that these forms of respectful pressure are marked on the scale of brutality, just down the line from torture. So for example: A hostile witness under subpoena 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 grueling, and there are penalties of contempt for refusing to answer and perjury for answering falsely. These are forms of pressure, but they are not on a continuum of brutality with torture. Certainly the penalties for contempt and perjury are coercive: They impose unwelcome costs on certain options otherwise available to the witness.<sup>90</sup> Even so, there is a difference of quality, not just of degree, between the coercion posed by legally established penalties for noncompliance and the sort of force that involves using pain to break the will of the person being interrogated. I doubt that Professor Dershowitz would agree with what I have just said. Dershowitz argues that "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 nonlethal torture. Yet we continue to threaten and use the pain of imprisonment to loosen the tongues of reluctant witnesses."<sup>91</sup> But Dershowitz's argument is fallacious 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 unde-

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89. See Bradley Graham, *Abuse Probes' Impact Concerns the Military: Chilling Effect on Operations Is Cited*, Wash. Post, Aug. 29, 2004, at A20 (suggesting that investigation of abuse is hampering current military intelligence-gathering operations as interrogators become more cautious).

90. For a more complete account of coercion, see generally Robert Nozick, *Coercion*, in *Philosophy, Politics and Society* 101 (Peter Laslett et al. eds., 1972).

91. Dershowitz, *Why Terrorism Works*, supra note 18, at 147.

sired, 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 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>92</sup> After all, we are not required to provide comfortable furniture for the subject of interrogation to sit in. So, one might ask, “Are we required to ensure that the back of the chair that 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 low tilted chair.<sup>93</sup>

To answer this, it is important to understand that torture is a crime of specific intent: It involves the use of pain deliberately and specifically to *break the will* of the subject. Failing to provide a comfortable 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 is a continuum an official has a legitimate reason for being on. The former choice—failing to provide an armchair or a cushion—is not.

If I am right about all this, then we should be suspicious about the attempt that the Bush Administration has made to pin down a definition of torture and to try to stipulate precisely the point of severity at which the prohibition on torture is supposed to kick in. Far from being the epitome of good lawyering, we might suspect that this enterprise represents an attempt to weaken or undermine the prohibition, by portraying it as something like a speed limit which we are entitled to push up against as closely as we can and in regard to which there might even be a margin of toleration which a good-hearted enforcement officer, familiar with our situation and its exigencies, might be willing to recognize. These suspicions are confirmed, I think, by the character of the actual attempts that have been made to give the prohibition on torture this sort of spurious precision.

#### D. *The Bybee Memorandum*

I now want to focus more specifically on the August 2002 memorandum written for the CIA and the White House by Jay Bybee, chief of the Office of Legal Counsel in the Department of Justice.<sup>94</sup> The fifty pages of

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92. This point was pressed on me by Jacob Levy and Melissa Williams in discussion.

93. See Pub. Comm. Against Torture in Isr., *Torture, in Israel/Palestine: The Black Book* 113, 125 (Reporters Without Borders ed., 2002).

94. Bybee Memorandum, *supra* note 21.

the Bybee memorandum give what some have described as the most lenient interpretation conceivable to the Convention and other antitorture provisions.<sup>95</sup> Although the memorandum was subsequently officially repudiated, large sections of the Bybee memorandum were incorporated more or less verbatim into what is now known as the Haynes memorandum,<sup>96</sup> produced by a working group set up in the Pentagon in January 2003 to reconsider interrogation methods.

According to Bybee,<sup>97</sup> the relevant legal provisions prohibit as torture “only extreme acts” and penalize as torture “only the most egregious conduct.”<sup>98</sup> He notes that the American ratification of the Convention Against Torture was accompanied by an express understanding that “in order to constitute torture, an act must be a 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>99</sup> In discussions at the time, it was suggested that the word “torture” should be reserved for practices like “sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain.”<sup>100</sup> Administration officials added that such “rough treatment as generally falls into the category of ‘police brutality,’ while deplorable, does not amount to ‘torture.’”<sup>101</sup> Although he conceded that this sort of brutality might amount to “inhuman treatment,” Bybee noted that the United States made a reservation to that part

95. See, e.g., Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 *Geo. J. Legal Ethics* 557, 559 (2005) (noting the memorandum’s “remarkably narrow construction of torture”); see also Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 534–37 (2005) (statement of Harold Hongju Koh, Dean of Yale Law School) (describing the Bybee memorandum as “perhaps the most clearly erroneous legal opinion I have ever read,” as offering “a definition of torture so narrow that it would have exculpated Saddam Hussein,” and as “a stunning failure of lawyerly craft”); Michael Traynor, *Citizenship in a Time of Repression*, 2005 *Wis. L. Rev.* 1, 5 (2005) (cataloging criticisms of the Bybee memorandum).

96. Memorandum from William J. Haynes, II, Gen. Counsel, Dep’t of Def., to Donald Rumsfeld, Sec’y of Def. (Nov. 27, 2002) (on file with the *Columbia Law Review*). For discussion of the relation between the Bybee and Haynes memoranda, see Herman Schwartz, *Judgeship Nominees: Twisting the Law on Interrogating Detainees*, *Newsday* (Nassau Cty., N.Y.), Aug. 18, 2004, at A39.

97. John Yoo has acknowledged that he had substantial involvement in the actual formulation of what I am calling the Bybee memorandum. See Maria L. La Ganga, *Scholar Calmly Takes Heat for His Memos on Torture*, *L.A. Times*, May 16, 2005, at A1. However, because this memorandum went out under Judge Bybee’s name, it is he who must take ultimate responsibility for the legal and ethical issues associated with its production. For some of these issues, see *supra* notes 25–26 and accompanying text.

98. Bybee Memorandum, *supra* note 21, at 1–2.

99. *Id.* at 16 (citing S. Treaty Doc. No. 100-20, at 4–5 (1988)).

100. *Id.* (citing S. Exec. Rep. No. 101-30, at 14 (1990)).

101. *Id.* at 17 (citing S. Treaty. Doc. No. 100-20, at 4). These comments accompanied the Administration’s recommendation of the treaty to the Senate, where the reservations met with unanimous consent. See 136 *Cong. Rec.* 36, 192–94 (1990).



of the Convention Against Torture as well, to the effect that the prohibition on inhuman treatment would not apply to the extent that it purported to prohibit anything permitted by the U.S. Constitution as currently interpreted.<sup>102</sup> 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>103</sup>

It is clear, then, what sort of continuum Bybee thinks interrogators should be on, in the interest of knowing the precise location of a torture threshold. It is not a continuum of pressure, nor is it a continuum of unwelcome penalties, nor is it a continuum of discomfort. Interrogators, in Bybee’s opinion, are permitted to work somewhere along the continuum of the deliberate infliction of pain, and the question is: Where is the bright line along that continuum where the specific prohibition on torture kicks in?<sup>104</sup> If we cannot answer this, Bybee fears, our interrogators may be chilled from *any* sort of deliberate infliction of pain on detainees.

I leave readers to decide whether this is a legally reputable exercise. Bybee purports to draw some support from the jurisprudence of the European Convention of Human Rights, even though the ECHR does not apply to the United States.<sup>105</sup> The leading case is one I have already mentioned—*Ireland v. United Kingdom*, in which the European Court of Human Rights assessed methods of interrogation used by the British in Northern Ireland in the early 1970s.<sup>106</sup> 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.<sup>107</sup> In holding that the use of these methods did not constitute torture, the Court observed: “[I]t 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.”<sup>108</sup> Bybee reads that as reinforcing his view that “torture” and “inhuman or degrading treatment” should be regarded as different zones on the same scale, with the first being an extreme version of the second.<sup>109</sup>

102. Bybee Memorandum, *supra* note 21, at 17 (citing S. Treaty Doc. No. 100-20, at 15–16).

103. *Id.* at 1.

104. For Bybee’s view that torture is a point on a continuum, see *id.* at 22 (describing scope of Convention Against Torture as directed at “pain and suffering . . . at the extreme end of the spectrum”).

105. *Id.* at 27–29.

106. 25 Eur. Ct. H.R. (ser. A) at 66–67 (1978).

107. *Id.* at 41. As I said at the outset, these methods are very similar to interrogation methods that were being used in Guantánamo Bay at the time Bybee wrote his memorandum. See *supra* note 4 and accompanying text.

108. 25 Eur. Ct. H.R. (ser. A) at 66.

109. See Bybee Memorandum, *supra* note 21, at 29.

However, Bybee failed to mention two things about this decision. First, in *Ireland v. United Kingdom*, the European Commission (as opposed to the Court) of Human Rights had concluded that the five techniques, in combination, *were* torture and not just inhuman or degrading treatment.<sup>110</sup> Both parties to the suit and a minority of judges on the Court accepted this determination.<sup>111</sup> Second, and more importantly, Bybee failed to mention that *both* categories of conduct were and are absolutely prohibited under the ECHR. The five techniques may not have been termed torture by the Court, but because the Court determined that their application treated the suspects in an inhuman and degrading manner, they were prohibited nonetheless.<sup>112</sup> The fact that there is a verbal distinction in article 3 of the ECHR between torture and inhuman and degrading treatment does not mark an effective normative distinction in the ECHR scheme, so far as the strength and immovability of these prohibitions are concerned. The article 15 nonderogation provision applies to both,<sup>113</sup> and the Court's comments about "special stigma" do not affect that.<sup>114</sup> One does not have to be a legal realist to reckon that since the normative consequences of the discrimination between torture and inhuman and degrading treatment are different between the ECHR and the American torture statute (with its background in the Convention Against Torture), any extrapolation of support from an approach taken under the former is likely to be suspect.

All of this goes to the general character of Bybee's analysis. Let us turn now to its detail. How, exactly, does Bybee propose to pin down a meaning for "severe pain or suffering"? It is all very well to talk about "requisite intensity," but how are we to determine the appropriate measure of severity? With a dictionary in hand, Bybee essays a proliferation of adjectives—"grievous," "extreme," and the like.<sup>115</sup> But they all seem to defy operationalization in the same way: The intensity, the severity, and the agonizing or excruciating character of pain are all subjective and, to a certain extent, inscrutable phenomena.<sup>116</sup> One thing Bybee said, in an

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110. 25 Eur. Ct. H.R. (ser. A) at 58–59. The European Commission of Human Rights resembles an investigating magistracy for the European Court of Human Rights. Its report is presented to the Court before the Court makes a final determination.

111. Dissenting Judge Zekia said this was an issue on which the Court should have deferred to the factfinder (that is, the Commission), especially when its finding was uncontested by the parties. See *id.* at 99 (separate opinion of Zekia, J.).

112. *Id.* at 67 (majority opinion).

113. See *supra* note 35.

114. 25 Eur. Ct. H.R. (ser. A) at 66. Indeed, had the Court been confronted with the situation Bybee thinks he faces—a situation in which there is a weaker prohibition on abuse that is merely inhuman, degrading, and cruel than there is on torture—I think it is unlikely that the Court would have rejected the Commission's characterization of the five techniques as torture.

115. Bybee Memorandum, *supra* note 21, at 5.

116. See Strauss, *supra* note 78, at 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.").

attempt to give the definition of torture a somewhat less phenomenological basis, 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.”<sup>117</sup> But that is not going to give him the distinction he wants. Presumably that is 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 involves drawing on statutes governing medical administration, where Bybee said that attempts to define the phrase “severe pain” had already 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—[(i)] placing the health of the individual . . . [ ] in serious jeopardy, (ii) serious impairment to bodily functions, or (iii) serious dysfunction of any bodily organ or part.” Id. § 1395w-22(d)(3)(B) (emphasis added). Although these statutes address a substantially different subject from Section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain.<sup>118</sup>

From this, Bybee concluded that severe 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.<sup>119</sup>

It is hard to know where to start in criticizing this analysis. One could comment on 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 antitorture statute (with the purposes characteristically associated with statutes of that kind). Never mind that the latter provision is intended to fulfill our international obligations under the Convention, while the former addresses the resource problems of our quite peculiar healthcare regime. Bybee argues that the medical administration statute can still cast some light on the definition of torture.

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117. Bybee Memorandum, *supra* note 21, at 5.

118. Id. at 5–6 (citation omitted).

119. Id. at 6.

Even that glimmer of light flickers out when we consider a couple of glaring defects of basic logic in the detail of the analysis itself. First, the healthcare provision that Bybee refers to uses certain conditions—(i) to (iii) in the excerpt above—to define the phrase “emergency condition,” not to define “severe pain.”<sup>120</sup> The medical administration statute says that severe symptoms (including severe pain) add up to an emergency condition if any of the three conditions are satisfied.<sup>121</sup> These conditions provided Bybee with his formulations about organ failure and death, but since the antitorture statute does not use the term “emergency condition,” the logic of their use in the healthcare statute makes them utterly irrelevant to the definition of severe pain, there or anywhere else.<sup>122</sup> Second, Bybee’s analysis reverses the causality implicit in the medical administration statute: That statute refers to the likelihood that a severe condition will *lead to* organic impairment or dysfunction if left untreated,<sup>123</sup> whereas what Bybee infers from the healthcare statute is that pain counts as severe only if it is associated with (naturally read as “caused by”) organic impairment or dysfunction.<sup>124</sup> To sum up: Bybee takes a definition of “emergency condition” (in which severe pain happens to be mentioned), reverses the causal relationship required between the emergency condition and organ failure, and concludes—on a matter as important as the proper definition of torture—that the law does not prohibit anything as torture unless it causes the same sort of pain as organ failure.

The quality of Bybee’s legal work here is a disgrace when one considers the service to which this analysis is being put. Bybee is an intelligent man, these are obvious errors, and the Department of Justice—as the executive department charged with special responsibility for the integrity of the legal system—had a duty to take special care with this most important of issues. Bybee’s mistakes distort the character of the legal prohibition on torture and create an impression that there is more room for the lawful infliction of pain in interrogation than a casual acquaintance with the antitorture statute might suggest. Fortunately, someone in the Administration felt that he had gone too far: This part of Bybee’s memorandum was not incorporated into the Haynes memorandum (although most of the rest of it was),<sup>125</sup> and much of the Bybee approach to the

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120. 42 U.S.C. § 1395w-22(d)(3)(B) (2000). David Luban has reached similar conclusions about Bybee’s analysis; see Luban, *supra* note 25 (manuscript at 26–27).

121. § 1395w-22(d)(3)(B).

122. Using these conditions to define “severe pain” would be like taking the following statement—“A dog (particularly a large dog) is a Dalmatian if it has a white coat with black spots”—to imply that the definition of “large dog” required a white coat and black spots. I am grateful to Bill Dailey for this analogy.

123. § 1395w-22(d)(3)(B).

124. Bybee Memorandum, *supra* note 21, at 6.

125. For the Haynes memorandum, see *supra* note 96.

definition of torture appears to have been rejected by the Administration in its most recent deliverances on the subject.<sup>126</sup>

## II. LEGAL ABSOLUTES

### A. *Legal Contingency: Is Nothing Sacred?*

I now want to step back from all this and ask: What is it about these definitional shenanigans that seems so disturbing? After all, we know there is an element of contingency and manipulation in the definition of any legal rule. As circumstances change, amendments in the law or changes of interpretation seem appropriate.<sup>127</sup> Legal prohibitions are not set in stone. Changing the definitions of offenses or reinterpreting open-ended phrases is part of the normal life of any body of positive law. Why should the law relating to torture be any different?

Well for one thing, we seem to be dealing in this case with not just fine tuning, but a wholesale attempt to gut our commitment to a certain basic norm. As I mentioned earlier, the Bybee memorandum maintains that none of the legislation enacted pursuant to the Convention Against Torture can be construed as applying to interrogations authorized under the President's Commander-in-Chief powers.<sup>128</sup> It does not matter what the legislative definition of torture is—those who act under Presidential authority in time of war cannot be construed as covered by it, and any attempt to extend prohibitions on torture to modes of interrogation authorized by the President would be unconstitutional.<sup>129</sup> This is not just tinkering with the details of positive law: It amounts to a comprehensive assault on our traditional understanding of the whole legal regime relating to torture. Even so, we still have to acknowledge that the life of the law is sometimes to change or reinterpret whole paradigms (particularly in constitutional law, where we suddenly decide that a whole area of law-making thought out of bounds is in bounds or vice versa).<sup>130</sup> Why is it so shocking in this instance?

126. See Neil A. Lewis, U.S. Spells Out New Definition Curbing Torture, *N.Y. Times*, Jan. 1, 2005, at A1.

127. Cf. Jeremy Waldron, *Security and Liberty: The Image of Balance*, 11 *J. Pol. Phil.* 191, 192–94 (2003) [hereinafter Waldron, *Security and Liberty*] (discussing the appropriateness of striking a new balance between security and liberty after 9/11).

128. See Bybee Memorandum, *supra* note 21, at 31–36 (“Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign.”).

129. See *id.* at 35 (“Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.”).

130. See, for example, the discussion in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 861–64 (1992) (citing *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), as examples of cases that overruled whole swathes of existing constitutional doctrine).

The question can be generalized. Law in all its features and all the detail of its terms and application is contingent on politics and circumstances—that is the lesson of legal positivism. Nothing is beyond revision or repudiation. Why then do we have this sense that something *sacred* is being violated in the Bybee memorandum, in John Yoo's arguments, or in the proposal Alan Dershowitz invites us to consider? Can a provision of positive law be sacred, in anything approaching a literal sense, so that it is wrong to even touch or approach its formulation?<sup>131</sup> Is there a literal meaning of "sacred" in this secular age?

Some among the drafters of the European Convention on Human Rights seemed to think so. I am not usually one for citing legislative history, but in this case, it is instructive. The following motion was proposed in the *travaux préparatoires* for the ECHR in 1949 by a United Kingdom delegate, a Mr. F.S. Cocks:

The 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>132</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 them by torture is a crime against high heaven and the holy spirit of man. I say that it is a sin against the Holy Ghost for which there is no forgiveness.<sup>133</sup>

Mr. Cocks'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.<sup>134</sup> And you can see their point. It is all very well to talk about "sin against the Holy Ghost" and "offences

131. In conversation, Martha Minow suggested this version of the question I am asking.

132. 2 Council of Eur., Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights 36–38 (1975) [hereinafter *Travaux Préparatoires*].

133. *Id.* at 40. I would like to acknowledge Edward Peters, *Torture* 145–46 (expanded ed. 1996) for this reference.

134. 2 *Travaux Préparatoires*, *supra* note 132, at 40–42.

against heaven and humanity,”<sup>135</sup> but these are not exactly legal ideas, and it is unlikely that they resonate even with my good-hearted readers, let alone the steely-eyed lawyers in the Justice Department.

So, can we make sense—without resorting to religious ideas—of the idea of a noncontingent 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 indispensability of certain legal norms. We have already considered the distinction between *mala in se* and *mala prohibita*.<sup>136</sup> There is H.L.A. Hart’s idea of “the minimum content of natural law”—certain kinds of rules that a legal system could not possibly do without, given humans as they are and the world as it is.<sup>137</sup> Less philosophically, we understand that there are things that in theory lawmakers might do but are in fact very unlikely to do. As Leslie Stephen put it, “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>138</sup>

There are also various legal ways to diminish the vulnerability of a norm to revision, redefinition, or repeal. One possibility is that a rule might be entrenched in a constitution as proof against casual or bare majoritarian alteration. A second is that a provision of international law might acquire the status of *jus cogens*, as proof against the vagaries of consent that dominate treaty-based international law. A third possibility is that a human rights norm might be associated with an explicit nonderogation clause as proof against the thought that it is acceptable to abandon rights-based scruples in times of emergency. In fact, there have been attempts in all three of these ways to insulate the prohibition against torture against the contingency of positive law: The Eighth Amendment to the U.S. Constitution might be taken as an example of the first, the identification of international norms against torture as *jus cogens*<sup>139</sup> is an ex-

135. The references are to Mark 3:29 and Luke 12:10. These passages seem to indicate that the sin against the Holy Ghost is a form of blasphemy or denial, but I take it that what Cocks is getting at is the unforgivability of certain sins.

136. See *supra* text accompanying notes 50–52.

137. H.L.A. Hart, *The Concept of Law* 193–200 (2d ed. 1994). Hart famously illuminated this concept with the following example:

[S]uppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace . . . . In such circumstances (the details of which can be left to science fiction) rules forbidding the free use of violence . . . 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.

H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *Harv. L. Rev.* 593, 623 (1958).

138. Leslie Stephen, *The Science of Ethics* 137 (2d ed. 1907).

139. See *In re Estate of Ferdinand E. Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“[T]he right to be free from official torture is fundamental and universal,

ample of the second, and of course the nonderogation provisions of the European Convention on Human Rights in relation to article 3 of that Convention offer a fine example of the third.<sup>140</sup> But all of these are themselves positive law devices, and they too are subject to manipulation. Constitutions can be reinterpreted: For example, the Eighth Amendment prohibition on cruelty is construed nowadays as limited only to punishment imposed as part of the criminal process.<sup>141</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; Judge Bybee says that there can be no legislative constraints on the President's ability to authorize torture; and the English Court of Appeal recently determined that the prohibition in the Convention Against Torture on using information obtained by torture (in this case for the purpose of determining whether an individual's detention as a terrorist suspect was justified) applies only to information that has been extracted by torture conducted by agents of the detaining state.<sup>142</sup> In the end, a legal prohibition is only as strong as the moral and political consensus that supports it.

And there is the difficulty. The moral and political consensus is weak and uneasy. In these troubled times, it is not hard to make the idea of an

a right deserving of the highest status under international law, a norm of *jus cogens*." (quoting *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992)).

140. See European Convention on Human Rights, *supra* note 37, arts. 3, 15. Article 7 of the Covenant also explicitly states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," and article 4(2) of the Covenant just as explicitly states that "[n]o derogation" from article 7 is permitted. ICCPR, *supra* note 27, arts. 4(2), 7.

141. See *Ingraham v. Wright*, 430 U.S. 651, 671 & n.40 (1977). Compare this holding with John Yoo's denial in an interview with Neal Conan on National Public Radio that indefinite detention at Guantánamo Bay is regarded by the administration as "punishment." *Talk of the Nation* (NPR radio broadcast June 28, 2004). I am grateful to Carol Sanger for this reference.

142. The relevant holding was:

[W]ere the Secretary of State to rely before [the Special Immigration Appeals Commission] on a statement which his agents had procured by torture, or which had been procured with his agents' connivance at torture, SIAC should decline to admit the evidence. . . .

. . . .

But I am quite unable to see that any such principle prohibits the Secretary of State from relying . . . on evidence coming into his hands which has or may have been obtained through torture by agencies of other states over which he has no power of direction.

*A v. Sec'y of State for the Home Dep't* (No. 2), [2004] EWCA (Civ) 1123, [2005] 1 W.L.R. 414, 501–03 (Laws, L.J.), *aff'd* in part and *rev'd* in part, [2004] UKHL 56, [2005] 2 W.L.R. 87. This despite the simple and unconditional nature of article 15 of the Convention Against Torture, which states: "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." Convention Against Torture, *supra* note 32, art. 15.



absolute prohibition on torture, or any absolute prohibition, look silly, as a matter of moral philosophy. I do not mean that everyone is a consequentialist. There are good deontological accounts of the rule against torture, but most of them stop short of absolutism.<sup>143</sup> The principle defended by deontologists almost always turns out to be wobbly when sufficient pressure is applied. Even among those who are not already Bentham-style consequentialists, most are moderates in their deontology: They are willing to abandon even cherished absolutes in the face of what Robert Nozick once called “catastrophic moral horror.”<sup>144</sup> For a culture supposedly committed to human rights, we have 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 we 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 those in our position cannot afford to be made to look ridiculous.

### B. *The Dershowitz Strategy*

This tendency is exacerbated by the way we pose the question of torture to ourselves. Law school and moral philosophy classes thrive on hypotheticals that involve 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:<sup>145</sup> a little bit of pain from the needles for him versus a hundred thousand people saved from nuclear incineration.<sup>146</sup> Of course after September 11, 2001, the hy-

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143. See, e.g., Thomas Nagel, *Autonomy and Deontology*, in *Consequentialism and Its Critics* 142, 156–67 (Samuel Scheffler ed., 1988) (arguing that human tendency to intuitively recoil from anything like the deliberate infliction of torture cannot be explained simply by the amount of pain that would be involved, and is based instead on concerns about our agency); David Sussman, *What’s Wrong with Torture?*, 33 *Phil. & Pub. Aff.* 1, 2–3 (2005) (pointing out logical step between showing inherent wrongness of torture and showing that what is inherently wrong may never in any circumstances be done).

144. Robert Nozick, *Anarchy, State, and Utopia* 30 n.\* (1974); see also Sanford H. Kadish, *Torture, the State and the Individual*, 23 *Isr. L. Rev.* 345, 346 (1989) (“The use of torture is so profound a violation of a human right that almost nothing can redeem it—almost, because one can not rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person . . .”).

145. Samuel Scheffler has suggested to me in conversation that there is a distinction between hypothetical cases that are designed to test philosophically what our views (about torture, for example) are based on, and hypothetical cases like the ones posed by Alan Dershowitz, which are designed to tempt us away from moral absolutes.

146. See Dershowitz, *Why Terrorism Works*, *supra* note 18, at 132. It is a tradition reaching back to Jeremy Bentham, who wrote:

Suppose . . . a suspicion is entertained . . . that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which if 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

potheticals are beginning to look a little less fantastic. Professor Dershowitz asks: What if on September 11 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>147</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? That is the question that Dershowitz and others regard as a useful starting point in our thinking about torture. The answer it is supposed to elicit is that torture can never be entirely out of the question, if the facts are clear and the stakes are high enough.

Should it worry us that once one goes down this road, the justification of torture—indeed, the justification of *anything*—is a matter of simple 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."<sup>148</sup> The tactics used to discredit absolute prohibitions on torture are tactics that can show in the end, "to borrow the formula of Dostoevsky's Ivan Karamazov, . . . [that] everything is permitted."<sup>149</sup> Dershowitz concedes the point, acknowledging that there is something disingenuous about his own suggestion that judicial torture warrants would be issued to authorize nothing but *nonlethal* torture.<sup>150</sup> If the number of lives that can be saved is twice the number necessary to justify nonlethal torture, why not justify lethal torture or torture with *unsterilized* needles? Indeed, why just torture? Why not judicial rape warrants? Why not terrorism itself? The same kind of hypotheticals will take care of these inhibitions as well.

Still, this concern alone does not dispose of Dershowitz's question. Might we be willing to allow the authorization of torture at least in a "ticking bomb" case—make it a ticking nuclear bomb in your hometown, if you like—where we are sure that the detainee we are proposing to torture has information that will save thousands of lives and will give it up only if subjected to excruciating pain?

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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 practising or about to be practised, should refuse to do so?

Twining & Twining, *supra* note 8, at 347 n.3 (quoting Bentham Manuscripts, University College London Collection, box 74b, 429 (May 27, 1804)). Bentham refers to the antitorture sentiment in the face of this sort of example as the "blind and vulgar humanity" of those who "to save one criminal, should determine to abandon 100 innocent persons to the same fate." *Id.* The same passage is also quoted in Dershowitz, *Why Terrorism Works*, *supra* note 18, at 143.

147. Dershowitz, *Why Terrorism Works*, *supra* note 18, at 143–45.

148. Kreimer, *supra* note 7, at 306.

149. *Id.*

150. Dershowitz, *Why Terrorism Works*, *supra* note 18, at 146.

For what it is worth, my own answer to this question is a simple “No.” I draw the line at torture. I suspect that almost all of my readers will draw the line *somewhere*, to prohibit *some* actions even under the most extreme circumstances—if it is not torture of the terrorist, they will draw the line at torturing the terrorist’s relatives, or raping the terrorist, or raping the terrorist’s relatives, all of which can be posited (with a logic similar to Dershowitz’s) to be the necessary means of eliciting the information. Then the boot is simply on the other foot: Why is it so easy to abandon one absolute (against torturing terrorists) while remaining committed to other absolutes (against, for instance, raping terrorists’ relatives)? We can all be persuaded to draw the line somewhere, and I say we should draw it where the law requires it, and where the human rights tradition has insisted it should be drawn.

But in any case, one’s answer is less important than one’s estimation of the question. An affirmative answer is meant to make us feel patriotic and tough-minded. But the question that is supposed to elicit this response is at best silly and at worst deeply corrupt. It is silly because torture is seldom used in the real world to elicit startling facts about particular ticking bombs; it is used by American interrogators and others to accumulate lots of small pieces of relatively insignificant information which may become important only when accumulated with other pieces of similar information elicited by this or other means. And it is corrupt because it attempts to use a farfetched scenario, more at home in a television thriller than in the real world,<sup>151</sup> deliberately to undermine the integrity of certain moral positions.<sup>152</sup>

Some replies to Dershowitz’s question—and to my mind, they are quite convincing—say that even if the basic fact situation he posits is no longer so fantastic in light of the bizarre horrors of September 11, nevertheless the framing of the hypothetical *is* still farfetched, inasmuch as it asks us to assume that torture warrants will work exactly as Professor Der-

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151. Kent Greenawalt tells me that the Fox television series *24* sometimes made use of Dershowitz-type scenarios to present acts of torture in a heroic light. See also Teresa Wiltz, *Torture’s Tortured Cultural Roots*, Wash. Post, May 3, 2005, at C1 (“If you’re addicted to Fox’s ‘24,’ you probably cheered on Jack Bauer when, in a recent episode, he snapped the fingers of a suspect who was, shall we say, reluctant to talk. . . . Torture’s a no-brainer here. Jack’s got to save us all from imminent thermonuclear annihilation.”). For an example of the use of Fox’s *24* to elicit support for the torture of terrorist suspects by United States interrogators, see Cal Thomas, *Restrictions Won’t Win War on Terror for Us*, S. Fla. Sun-Sentinel, May 4, 2005, at 25A.

152. Luban has developed an exemplary diagnosis of arguments of this kind:

The idea is to force the liberal prohibitionist to admit that yes, even he or even she would agree to torture in at least this one situation. Once the prohibitionist admits that, . . . all that is left is haggling about the price. No longer can the prohibitionist claim the moral high ground; . . . [s]he’s down in the mud with them, and the only question left is how much further down she will go.

Luban, *supra* note 25 (manuscript at 12).

showitz says they should work.<sup>153</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 stipulates) 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,<sup>154</sup> that the existence of a law allowing torture in some cases will not change the office politics of police and security agencies to undermine and disempower those who argue against torture in other cases, and so on.

Professor Dershowitz has ventured the opinion 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>155</sup> This takes optimism to the point of irresponsibility. 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 enthusiasts who are prepared to “push the envelope,” trespassing into territory that goes beyond what is legally permitted.<sup>156</sup> In addition, there will always be some depraved individuals who act in a way that is simply abusive *relative to whatever authori-*

153. The best version of this answer comes from Henry Shue, who points out that precious few real-world cases have the clean precision of the philosopher’s hypothetical; the philosophers’ cases 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. Henry Shue, *Torture*, 7 *Phil. & Pub. Aff.* 124, 141–43 (1978); see also Waldron, *Security and Liberty*, *supra* note 127, at 206–08.

154. See Kreimer, *supra* note 7, at 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.” (footnote omitted)); see also Luban, *supra* note 25 (manuscript at 15–16) (“Should we create a professional cadre of trained torturers? That means a group of interrogators who know the techniques, who have learned to overcome their instinctive revulsion against causing physical pain, and who acquire the legendary surgeon’s arrogance about their own infallibility.”).

155. This view was expressed in a recent newspaper article:

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 Defence or Chief Justice would ever have given written authorisation to beat or sexually humiliate low-value detainees.

Alan Dershowitz, *When Torture Is the Least Evil of Terrible Options*, *Times Higher Educ. Supplement* (London), June 11, 2004, at 20.

156. See Kreimer, *supra* note 7, at 322–23 (“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. . . . The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.”).

zation is given. There is, as Henry Shue notes, “considerable evidence of all torture’s metastatic tendency.”<sup>157</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. Indeed, it is already expanding. The torture at Abu Ghraib 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 characteristics 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>158</sup> If ever there were 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>159</sup>

Considerations like these might furnish a pragmatic case for upholding the rule against torture as a legal absolute, even if we cannot make a case in purely philosophical terms for a moral absolute.<sup>160</sup> However, I do not want to stop there. Though I think the pragmatic case for a legal absolute is exactly right, in the rest of this Article I want to explore an additional idea. This is the idea that certain things might just be 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 rule against torture plays an important emblematic role so far as the spirit of our law is concerned.

157. Shue, *supra* note 153, at 143.

158. 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. See, e.g., Scott Higham et al., *A Prison on the Brink*, *Wash. Post*, May 9, 2004, at A1 (“The photographs featuring piles of naked Iraqis seem as though they were taken from a pornographic magazine.”). Is it asking too much to expect that those who “defend to the death” our right to suffuse society with pornographic imagery might acknowledge this as one of its not-entirely-harmless effects? See Susan Brison, *Torture, or “Good Old American Pornography?”*, *Chron. Higher Educ.* (Wash., D.C.), June 4, 2004, at B10 (“[T]he similarities between American-style torture and hard-core porn are difficult not to notice . . . [so] why should we be so shocked when torture takes this form?”).

159. Cf. Waldron, *The Law*, *supra* note 81, at 102–03 (suggesting that even in a utilitarian context, inhibitions imposed by rights can be justified by contemplating kinds of circumstances in which officials might be tempted to violate them).

160. Cf. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 *Minn. L. Rev.* 1481, 1492–511 (2004) (advocating pragmatic, non-deontological prohibition on torture).

## III. LEGAL ARCHETYPES

A. *Repugnance to Law*

Why does the prospect of judicially authorizing torture shock the conscience of a scrupulous lawyer? Is it simply that the unthinkable has become thinkable? Or is it something about the specific effect *on law*—perhaps a systemic corrupting effect—of this abomination becoming one of the normal items on the menu of practical consideration?

Maybe there are certain things we can imagine justifying in theory but whose permissibility would have such an impact on the rest of the law that it would be a strong or conclusive reason for not permitting them. An analogy I have found helpful in thinking about this is the argument about slavery in *Somerset's Case*,<sup>161</sup> made famous in recent jurisprudence by its discussion in Robert Cover's book *Justice Accused*.<sup>162</sup> James Somerset, an African slave belonging to a resident of Virginia, 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 [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 [sic] existence here. . . . I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices.<sup>163</sup>

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

The 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>164</sup>

Lord Mansfield was evidently not denying that there could be a valid law in England establishing slavery. Though he drew on the fact that natural law prohibits slavery, his position was not the classic natural law doctrine *lex iniusta non est lex*—that such an edict would be too unjust to deserve the status of “law.” If Parliament established slavery, then slavery

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161. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

162. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 16–17, 87–88 (1975).

163. *Somerset*, 98 Eng. Rep. at 500.

164. *Id.* at 510.

would be the law, and English lawyers would just have to put up with the traumatic shock this would deal to the rest of their principles about liberty. The prospect of that shock, though, is one of the things that convinced Lord Mansfield that nothing short of explicit parliamentary legislation could be permitted to require this. The affront to liberty implicit in a person's legal confinement on the basis that he is another man's chattel is "[s]o high an act of dominion" that nothing but an explicit enactment would do to legitimate it.<sup>165</sup> That is why any attempt to bring it—or its effects, so far as liberty is concerned—in by the back door (as a matter of comity or the principles of conflicts of laws) would have to be resisted.

Something analogous is true of torture. There is no question 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 urging—would be contrary to “the genius and spirit” of our law.<sup>166</sup> For in the heritage of Anglo-American law, there is a long tradition of rejecting torture and of regarding it as alien to our jurisprudence. True, torture warrants were issued under Elizabeth I and James I, but they were issued in the exercise of prerogative power, not by the courts.<sup>167</sup> 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>168</sup>

Actually, a case can be made that torture is now to be regarded as alien to *any* system of law. It may once have been intimately bound up with the civilian law of proofs,<sup>169</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>170</sup> Be that as it may, torture is certainly seen by most jurists—or has been

165. *Id.*

166. *Id.* at 500.

167. I shall say more about this distinction in *infra* Part IV.A.

168. 4 Blackstone, *supra* note 52, at \*326.

169. See John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* 3 (1977) (noting that “torture was an incident of the legal systems of all the great states of continental Europe”).

170. Peters, *supra* note 133, at 75; 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.”).

seen by most jurists until very recently—as inherently alien to *our* legal heritage.

Thus American judges have always been anxious to distance themselves from what Justice Stevens has referred to as “the kind of custodial interrogation that was once employed by the Star Chamber [and] by ‘the Germans of the 1930’s and early 1940’s.’”<sup>171</sup> Or, as Justice Black put it in 1944:

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>172</sup>

Justice Black saw torture as characteristic of tyrannical, not free, 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 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>173</sup>

Torture may be something that happens elsewhere in the world, but not in a free country, or (what used to be referred to as) a Christian country,<sup>174</sup> or at any rate, 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>175</sup>

In Part III.D, I shall pursue the threads of these pervasive concerns more extensively, but first I want to say something more abstract about the model of law that I am assuming when I say that torture is incompatible with the spirit of our legal system. This will involve a brief diversion into the arcana of modern analytical jurisprudence.

171. *Chavez v. Martinez*, 538 U.S. 760, 788 (2003) (Stevens, J., dissenting in part) (quoting *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting)).

172. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944).

173. *Chambers v. Florida*, 309 U.S. 227, 236–38 (1940).

174. The availability of torture under Muslim governments was historically cited as a ground for the practice of allowing consular officers to deal with American sailors or merchants charged or embroiled in disputes while in foreign ports. See *In re Ross*, 140 U.S. 453, 462–63 (1891).

175. *Chambers*, 309 U.S. at 237.



*B. Positivism and Legal Archetypes*

One of the things that people have consistently found wrong with the jurisprudence of legal positivism is that it views law simply as a heap or accumulation of rules, each of which might be amended, repealed, or reinterpreted with little or no effect on any of the others.<sup>176</sup> This way of viewing law attracts two sorts of criticisms. First, it fails to give adequate consideration to things other than rules—background principles, policies, purposes, and the like, which pervade the law as a whole even if they are not explicitly posited by piecemeal enactments. Second, the positivist picture does not give enough attention to the importance of structure and system in the law—the way various provisions, precedents, and doctrines hang together, adding up to a whole that is greater than the sum of its parts.

The first was of course Ronald Dworkin's criticism,<sup>177</sup> which he outlined as the basis of a new jurisprudence in which law is understood to include not just rules, but also principles, policies, and other sorts of norms and reasons which operate quite unlike rules. These Dworkinian elements operate more like moral considerations but are distinctively legal, being emergent features of actual legal systems and varying perhaps from country to country in a way that moral considerations do not.<sup>178</sup> Policies, principles, and the like operate as background features which work behind the legal rules: pervading doctrine, 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 theoretical claims I want to advance in this Article is that the prohibition on torture operates not only as a rule, but also like one of the background features that Dworkin has identified.

On the second criticism—that positivism does not give enough attention to structure and system—what I have in mind is not global holism at the level of the entire corpus juris, but more local holisms in particular areas of law.<sup>179</sup> A very easy example would be the way in which the separate provisions of a single statute work together, united by their contribution to a common statutory purpose. A statute—even a complex statute—is not just a heap of little laws. It operates as an integrated whole, from which we understand both the overarching aim of the statute and

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176. See, e.g., Richard H. Fallon, Jr., Reflections on the Hart and Wechsler Paradigm, 47 *Vand. L. Rev.* 953, 965 (1994) (detailing the “anti-positivist principle”). Admittedly, this is something of a caricature of legal positivism as a philosophical theory. For a positivist's discussion of the interconnectedness of norms in a legal system, see Joseph Raz, *Practical Reason and Norms* 107–48 (Oxford Univ. Press 1999) (1975); see also Jeremy Waldron, “Transcendental Nonsense” and System in the Law, 100 *Colum. L. Rev.* 16, 24–26 (2000).

177. See Ronald Dworkin, *Taking Rights Seriously* 22–31 (1977) [hereinafter Dworkin, *Taking Rights Seriously*].

178. See Larry Alexander & Ken Kress, *Against Legal Principles*, 82 *Iowa L. Rev.* 739, 744–45 (1997) (distinguishing moral and legal principles).

179. See Ronald Dworkin, *Law's Empire* 250–54 (1986) [hereinafter Dworkin, *Law's Empire*] (discussing “local priority”).

the organization of the elements that go into achieving that aim. That, as I said, is an easy example. But it is also not hard to understand how different statutes might work together, or how an array of different precedents and doctrines work together to embody a common purpose or legal policy. Think of the way rules governing contract formation come together with rules about consideration, duty, breach, damages, and liability to add up to a more or less coherent package of market freedom and contractual responsibility. What we might regard as distinct legal provisions interact to constitute a unified realm of legal meaning and purpose, a structured array of norms with a distinctive spirit of its own.

My emphasis here on local structure has something in common with Langdellian formalism.<sup>180</sup> But I do not mean to suggest that there is anything natural or given about the cohering of laws in these various areas. Formalists like C.C. Langdell believed contract law was in and of itself a structure of reason, or that it embodied the nostrums of laissez-faire economics.<sup>181</sup> Modern formalists like Ernest Weinrib believe tort law necessarily embodies the spirit of Aristotelean corrective justice.<sup>182</sup> I do not take such a view. The spirit of a cluster of laws is not something given; it is something we create, albeit sometimes implicitly. It emerges from the way in which, over time, *we* treat the laws *we* have concocted. We begin to see that the norms and precedents we have established hang together in a certain way. We begin to see that together the provisions embody a certain principle, our seeing them in that way becomes a shared and settled background feature of the legal landscape, and we begin to construct legal arguments that turn on their coherence and their embodiment of that principle.

Let us return for a moment to the easy example—the single statute comprising hundreds of provisions. Sometimes in a complex statute there is a section explicitly stating the statute's purpose. In other cases, the purpose is implicit and we have to infer it from our reading of the statute as a whole. The same two possibilities arise with regard to larger clusters of law. Sometimes we have to infer the underlying principle or policy, for instance, in the way Dworkin suggests in his theory of interpretation.<sup>183</sup> Sometimes, however—and this is where I go beyond Dworkin—there is one provision in the cluster which by virtue of its force, clarity, and vividness expresses the spirit that animates the whole area of law. It becomes a sort of emblem, token, or icon of the whole: I

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180. For a discussion of Langdellian formalism, see generally Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1 (1989).

181. See Neil Duxbury, Patterns of American Jurisprudence 25–32 (1995) (outlining tensions between purist and laissez-faire versions of legal formalism in Harvard jurisprudence around 1890–1920).

182. See Ernest J. Weinrib, The Idea of Private Law 134–36 (1995); Ernest J. Weinrib, Understanding Tort Law, 23 Val. U. L. Rev. 485, 526 (1989).

183. Dworkin, Law's Empire, *supra* note 179, at 45–46, 225–75.

shall say it becomes an *archetype* of the spirit of the area of law in question.<sup>184</sup>

The term “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>185</sup> For Carl Jung, an archetype is an image, theme, or idea that haunts and pervades a mind or haunts and pervades our collective consciousness: a sort of “myth motif.”<sup>186</sup> My use of “archetype” is rather straightforward in contrast to these esoteric bodies of thought. It is closer to Jung’s than Locke’s in the (crude) sense that I envision 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, it is closer to Locke’s than to Jung’s in that my usage repudiates any idea that a given archetype is inevitable or predetermined.

When I use the term “archetype,” I mean a particular provision in a system of norms which has a significance going beyond its immediate normative content, a significance stemming from the fact that it sums up or makes vivid to us the point, purpose, principle, or policy of a whole area of law. Like a Dworkinian principle, the archetype performs a background function in a given legal system. But archetypes differ from Dworkinian principles and policies in that they *also* operate as foreground provisions. They work in the foreground as rules or precedents, but in doing so, they sum up the spirit of a whole body of law that goes beyond what they might be thought to 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, and publicly, establishing the significance of that area for the entire legal enterprise.

I will say more about the way the rule against torture operates as an archetype in our law in Part III.D. But it may help us get our bearings at this stage if I mention some other examples of legal archetypes—provi-

184. I am not the first to use the phrase “legal archetype,” though its meaning is not usually elaborated as I have elaborated it. See Karl Kirkland, *Efficacy of Post-Divorce Mediation and Evaluation Services*, 65 Ala. Law. 187, 188 (2004) (“The best interests standard exists independently of our work as a . . . legal archetype that can always be utilized as a ‘true North’ type objective standard to guide through individual issues.”); see also N.E. Simmonds, *Law as a Moral Idea*, 55 U. Toronto L.J. 61, 66 (2005) (discussing archetypes of the rule of law).

185. See John Locke, *An Essay Concerning Human Understanding* 376–77 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

186. See C.G. Jung, *Memories, Dreams, Reflections* 392 (Aniela Jaffé ed., Richard Winston & Clara Winston trans.) (1961) (“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.”).

sions or precedents which do this double duty of operating as rules or requirements, as well as emblems or icons of whole areas of legal principle or policy.

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. Habeas corpus is also archetypal of our legal tradition’s emphasis on liberty and freedom from physical confinement.<sup>187</sup> It is also archetypal of the law’s opposition to arbitrariness in regard to actions that have an impact on that right. This is an aspect of habeas corpus that has received much comment: It is referred to as “the bulwark of liberty”<sup>188</sup> and “the crystalization [sic] of the freedom of the individual,”<sup>189</sup> and its constant use is seen as a way of “slowly educating the bench, the bar, police, prosecutors and the mass of citizens to the highest traditions of Anglo-American law.”<sup>190</sup> To say that habeas corpus is archetypal is not to say that it is absolute or comprehensive in its coverage. The Great Writ, as we all know, is subject to suspension and may be limited in its application. Calling it an archetype is without prejudice to all of that: Archetypes stand for general principles or policies in the law, and principles or policies may differ in their weight.<sup>191</sup>

Another example might be the way in which the Second Amendment’s protection of the right of the people to bear arms is archetypal of a general attitude toward gun control. True, the direct impact of the constitutional provision is limited so far as the validity of gun control statutes is concerned: Second Amendment challenges to weapons possession convictions are almost always denied.<sup>192</sup> However, to the extent that the law relating to weapons possession is more permissive here than in most other countries, the Second Amendment operates as an archetype of the general spirit of such permissiveness. Though any repeal or truncation of the Amendment would not immediately affect the constitu-

187. See George Anastaplo, *Constitutionalism, The Rule of Rules: Explorations*, 39 *Brandeis L.J.* 17, 95 (2000), which states:

That a considerable liberty is taken for granted by the Constitution may be seen in its assurances with respect to habeas corpus . . . . It may be seen as well in the spirit of liberty which pervades the system, making much of a people’s freely choosing what they will have done for them, by whom, and upon what terms.

188. S.G.F., *The Suspension of Habeas Corpus During the War of the Rebellion*, 3 *Pol. Sci. Q.* 454, 454 (1888).

189. Wm. W. Grant, Jr., *Suspension of the Habeas Corpus in Strikes*, 3 *Va. L. Rev.* 249, 249 (1916).

190. Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 *Yale L.J.* 50, 66 (1956).

191. See Dworkin, *Taking Rights Seriously*, *supra* note 177, at 26.

192. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1087 (9th Cir. 2002) (holding that Second Amendment imposes no limitation on state’s ability to enact legislation regulating or prohibiting the possession or use of dangerous weapons such as assault weapons); *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (holding that prosecution for possessing firearm while subject to non-abuse order entered in divorce action did not violate Second Amendment).

tional validity of most gun control legislation, it would undermine the shared sense of a general policy in the law that is tolerant of the possession of firearms. In a recent book, David Williams invoked something very like this idea of an archetype to explain the importance of the Amendment.<sup>193</sup> Besides their direct legal impact, Williams argues, constitutional provisions also furnish “large mythic stories addressed primarily to the citizenry as a whole and designed to explain to them their fundamental civic morality.”<sup>194</sup> Williams separates the legal and iconic characters of constitutional provisions more sharply than I want to: I am interested in the way legal icons or archetypes function (in a Dworkinian fashion) in the law, as well as in their “folkloric” reception or popular understanding. But I think both are important in considering legal archetypes. Certainly both are important in considering the archetypal status of the prohibition on torture.

Precedents are sometimes archetypes. The best example is the most obvious. In itself, *Brown v. Board of Education*<sup>195</sup> is authority for a fairly narrow proposition about segregation in schools, and its immediate effect in desegregation was notoriously slow and limited.<sup>196</sup> But its archetypal power is staggering: 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 forms of discrimination and badges of racial inferiority wherever they crop up in American law or public administration.<sup>197</sup>

Ronald Dworkin famously distinguished between the “enactment force” and the “gravitational force” of precedents.<sup>198</sup> The enactment force is the rule laid down in a particular case that stare decisis might command other courts to follow.<sup>199</sup> But the gravitational force is more diffuse and extensive: “Judges and lawyers do not think that the force of precedents is exhausted, as a statute would be, by the linguistic limits of some particular phrase. . . . [T]he earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit.”<sup>200</sup> While it is true that this gravitational force accumu-

193. David C. Williams, *The Mythic Meanings of the Second Amendment: Taming Political Violence in a Constitutional Republic* (2003).

194. *Id.* at 4–5. Williams is particularly interested in the fact that there are two myths, not one, associated with the Second Amendment—a revolutionary states’ militias myth and an individual frontiersman myth—and these compete for the iconic force of the Amendment itself. I am indebted here to Stuart Banner, *The Second Amendment, So Far*, 117 *Harv. L. Rev.* 898, 909 (2004) (reviewing Williams, *supra* note 193).

195. 347 U.S. 483 (1954).

196. See James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* 78–85 (2002).

197. See Jack M. Balkin, *Brown as Icon*, in *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision* 3, 3–4 (Jack M. Balkin ed., 2001).

198. See Dworkin, *Taking Rights Seriously*, *supra* note 177, at 111.

199. *Id.*

200. *Id.*

lates as the significance of a precedent develops through a line of cases, nevertheless it is possible that an early member of the relevant series of cases can become the center of that gravitational force, and thus acquire iconic significance. It may become an archetype because it was seen at the time as a test case, it was widely regarded as a striking victory, or because it seemed to epitomize more clearly than subsequent or earlier cases what was at stake in this area of the law. *Brown* has all these features and it is, so to speak, the archetype of archetypes, so far as case law is concerned.

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 inquiring into the adequacy of consideration is archetypal of contract law's commitment to market-based notions of fairness; *Donoghue v. Stevenson*<sup>201</sup> is archetypal in the English law of negligence; and so on.

### C. *What Is the Rule Against Torture Archetypal of?*

My aim in this Part has been to argue that, individually or collectively, the various prohibitions on torture amount to a legal archetype, and that this ought to affect our view of what is at stake when we consider amending them, limiting their application, or defining them out of existence. But what are these provisions archetypal of? What is the policy, principle, or spirit that this archetype embodies and conveys? I do not want to say that it is archetypal of a general hostility to torture—that is a matter of its direct content. Its archetypal character goes beyond this to a more abstract principle or policy implicit in our law.

The rule against torture is archetypal of a certain policy having to do with the relation between law and force, and the force with which law rules. The prohibition on torture is expressive of an important underlying policy of the law, which we might try to capture in the following way: Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts. If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects. The idea is that even where law has to operate forcefully, there will not be the connection that has existed in other times or places between law and brutality. People may fear and be deterred by legal sanctions; they may dread lawsuits; they may even on occasion be forced by legal means or legally empowered officials to do things or go places against their will. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like

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201. [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (holding drink manufacturer liable for distress caused to café customer by presence of dead snail in bottle, despite absence of contract between customer and manufacturer).

dumb animals or treated as bodies to be manipulated. Instead, there will be an enduring connection between the spirit of law and respect for human dignity—respect for human dignity even in extremis, where law is at its most forceful and its subjects at their most vulnerable. I think the rule against torture functions as an archetype of this very general policy. It is vividly emblematic of our determination to sever the link between law and brutality, between law and terror, and between law and the enterprise of breaking a person's will.

No one denies that law has to be forceful and final. The finality of law makes it important for law to prevail in the last analysis, and, as Max Weber puts it, “the threat of force, and in the case of need its actual use . . . is always the last resort when others have failed.”<sup>202</sup> But forcefulness can take many forms, and—as I have already mentioned in my discussion of compelled testimony<sup>203</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 distinguish from torture for the purpose of paying lip service to the prohibitions.<sup>204</sup> Neither ordinary legal sanctions and incentives nor actual physical control and confinement work like that. 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, that he is coerced. But in these cases force and coercion do not work by reducing him to a quivering mass of “bestial, desperate terror,”<sup>205</sup> the aim of every torturer (and interrogator who would inflict cruel, degrading, and inhuman treatment while calling it not quite torture).<sup>206</sup> So when I say that the prohibition on torture is an archetype of our determination to draw a line between law and savagery or brutality, I am not looking piously to some paradise of force-free law, but rather to the well-understood idea that law can be forceful without compromising the dignity of those whom it constrains and punishes.<sup>207</sup>

202. 1 Max Weber, *Economy and Society* 54 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978) (1968).

203. See *supra* notes 90–93 and accompanying text.

204. Nor does all legal forcefulness involve the interrogator's enterprise of inducing the subject's regression into an infantile state, where the elementary demands of the body supplant almost all adult thought.

205. Hannah Arendt, *The Origins of Totalitarianism* 441 (new ed. 1973).

206. Cf. Austin Sarat & Thomas R. Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *The Fate of Law* 209, 268–69 (Austin Sarat & Thomas R. Kearns eds., 1993) (claiming 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. See Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 *J. Ethics* 5, 10–16 (2004).

207. Those, like Sarat and Kearns, who maintain dogmatically that law is always violent and that the most important feature about it is that it works its will in “a field of pain and death,” Sarat & Kearns, *supra* note 206, at 209–12 (quoting Robert Cover,

That our law keeps perfect faith with this commitment may be doubted. Defendants are sometimes kept silent and passive in American courtrooms by the use of technology which enables the judge to subject them to electric shocks if they misbehave.<sup>208</sup> Reports of prisoners being herded with cattle prods emerge from time to time.<sup>209</sup> Conditions in our prison are well known to be de facto terrorizing, even if they are not officially approved or authorized, and we know that prosecutors freely make use of defendants' dread of this brutalization as a tactic in plea bargaining.<sup>210</sup> Some would also say that the use of the death penalty represents a residuum of savagery in our system that shows the limits of our adherence to the principle I have discussed.<sup>211</sup>

All this can be conceded. Now, those who oppose these kinds of brutality and abuse sometimes do so simply on moral grounds: They mobilize the standard moral outrage that one would expect such practices to evoke. But often they oppose and criticize these practices using moral resources drawn from within the legal tradition—in many cases constitutional resources, but also a broader and more diffuse sense that abuse of this kind is an affront to the deeper traditions of Anglo-American law. I believe that the familiar prohibition on torture serves as an archetype of those traditions, and it is that archetype that I am trying to bring into focus in this Article.

#### D. *The Rule Against Torture as an Archetype in American Law*

How do we know that something is an archetype? In this section, I will first discuss this question in general terms, and then address the way the prohibition on torture operates as the archetype of a more general policy pervading American law.

To begin, a word about what we are looking for when we search for evidence of a provision's archetypal status. When I say that the prohibition against torture is archetypal in regard to a given body of law, I do not mean that that body of law is primarily or even mainly concerned with

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Violence and the Word, 95 *Yale L.J.* 1601, 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.

208. See, e.g., Harriet Chiang, *Justices Limit Stun Belts in Court*, *S.F. Chron.*, Aug. 23, 2002, at A7; William Glaberson, *Electric Restraint's Use Stirs Charges of Cruelty to Inmates*, *N.Y. Times*, June 8, 1999, at A1.

209. See, e.g., *37 Prisoners Sent to Texas Sue Missouri*, *St. Louis Post-Dispatch*, Sept. 18, 1997, at 3B ("Missouri prisoners alleging abuse in a jail in Texas have sued their home state and officials responsible for running the jail where a videotape showed inmates apparently being beaten and shocked with stun guns."); Mike Bucsko & Robert Dvorchak, *Lawsuits Describe Racist Prison Rife with Brutality*, *Pittsburgh Post-Gazette*, Apr. 26, 1998, at B1.

210. See Dershowitz, *Why Terrorism Works*, *supra* note 18, at 147–49.

211. Cf. Sarat & Kearns, *supra* note 206, at 221–23 (noting that "law authorizes itself and its bloodletting as a lesser or necessary evil and as a response to our inability to live a truly free life").



torture. It may have relatively little to do with torture, or it may be concerned with the regulation of a wide range of conduct in which torture does not figure with any particular prominence. The claim that I am looking to support is more complex. It has two aspects: first, that the body of law in question is pervaded by a certain principle or policy, and second, that the prohibition against torture is archetypal of that policy or principle.

A claim of the first sort is not easy to verify. It was part of Ronald Dworkin's original argument against modern positivism that there can be no litmus test for recognizing legal principles of the type that an H.L.A. Hart-type "rule of recognition" might provide.<sup>212</sup> A rule of recognition tests for the pedigree of a putative legal norm: How was it enacted, and by whom?<sup>213</sup> But such a test of pedigree will not work for the more diffuse principles and policies that we and Dworkin are interested in:

The origin of these as legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.

. . .

True, if we were challenged to back up our claim that some principle is a principle of law, we would mention any prior cases in which that principle was cited, or figured in the argument. We would also mention any statute that seemed to exemplify that principle . . . . Unless we could find some such institutional support, we would probably fail to make out our case . . . .

Yet we could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle . . . . We argue for a particular principle by grappling with a whole lot of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedent, the relation of all these to contemporary moral practices, and hosts of other such standards.<sup>214</sup>

As for the second, it too can be difficult to substantiate. The claim that a given provision is archetypal of a certain policy or principle is, in part, a subjective one. Of course, some of the examples I mentioned earlier—habeas corpus<sup>215</sup> and *Brown v. Board of Education*<sup>216</sup>—are clear instances of uncontested archetypes. But it is not only a matter of the impression one gets. We may also find evidence to the extent that courts'

212. See Dworkin, *Taking Rights Seriously*, supra note 177, at 39–45.

213. *Id.* at 40.

214. *Id.* Whether or not these considerations provide the basis for a refutation of Hart's theory of legal recognition is not something we shall consider here. For a sample of the gallons of ink that have been spilled in that controversy, see Joseph Raz, *Legal Principles and the Limits of Law*, in Ronald Dworkin and *Contemporary Jurisprudence* 73 (Marshall Cohen ed., 1984).

215. See supra text accompanying notes 187–191.

216. See supra text accompanying notes 195–197.

citations or elaborations of the principle or policy in question are accompanied by references to the alleged archetype—perhaps as rhetoric or image—even when the archetype’s immediate function is not in play. So, I turn now to a number of areas of American law where, it seems to me, the prohibition on torture has been cited as epitomizing a more pervasive policy of nonbrutality.

1. *Eighth Amendment Cases.* — 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 toward the use of torture, which was regarded as incompatible with the liberties of Englishmen.<sup>217</sup> The drafters’ primary goal was to “proscribe ‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.”<sup>218</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>219</sup> “Wanton infliction of physical pain” is a formula that is sometimes used,<sup>220</sup> often in a way that indicates reference to a continuum on which torture is conceived as the most vivid and alarming point.<sup>221</sup> We see this, for example, in what has been said in our courts about prison rape,<sup>222</sup> about the withholding of medical treatment from prisoners,<sup>223</sup> and about the use of flogging, hitching posts, and

217. See *Ingraham v. Wright*, 430 U.S. 651, 665 (1977) (“The Americans who adopted [this] language . . . in framing their own State and Federal Constitutions . . . feared the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured.”).

218. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting Anthony Granucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839, 841 (1969)).

219. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879).

220. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (acknowledging “wanton infliction of physical pain” standard); *Furman v. Georgia*, 408 U.S. 238, 392–93 (1971) (Burger, J., dissenting) (same); *Kent v. Johnson*, 821 F.2d 1220, 1229 (6th Cir. 1987) (denying that embarrassment of body search rose to level of “wanton infliction of physical pain”).

221. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 380 (E.D. Ark. 1970) (“The term [cruel and unusual punishment] cannot be defined with specificity. It is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes, or likes to think that it becomes, more humane.”).

222. See, e.g., *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting) (“[F]ailure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity.”).

223. See, e.g., *Estelle v. Gamble*, which states:

An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical torture or a lingering death, the evils of most immediate concern to the drafters of the Amendment.

429 U.S. at 103 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

other forms of corporal punishment in our prisons.<sup>224</sup> In a similar way, judicial resistance in recent years to the use of corporal punishment in prisons has used the idea of torture as a reference point, even though corporal punishment itself is not necessarily identified as torture.<sup>225</sup>

2. *Procedural Due Process.* — Consider also the role of the prohibition on torture in epitomizing the constitutional requirements of procedural due process. Reference to torture is common in the jurisprudence of due process and self-incrimination. Principles of procedural due process are expressed in sayings such as “[t]he rack and torture chamber may not be substituted for the witness stand,”<sup>226</sup> and the privilege against self-incrimination, we are told, “was designed primarily to prevent ‘a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.’”<sup>227</sup> Here, as with Eighth Amendment jurisprudence, the point is to remind us not that torture is prohibited, but to use our clear grip on that well-known prohibition to illuminate and motivate other prohibitions that are perhaps less extreme but more pervasive and important in the ordinary life of the law.<sup>228</sup>

The connection between this use of the torture archetype and the nonbrutality principle is particularly clear in the opinion of Justice Frankfurter in *Rochin v. California*.<sup>229</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’s vomiting brought up

224. In a recent decision, the Supreme Court condemned the practice of handcuffing prisoners to hitching posts as a form of punishment, formal or informal, for disciplinary infractions, citing precedent stating that “[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess.” *Hope v. Pelzer*, 536 U.S. 730, 737 n.6 (2002) (quoting *Hope v. Pelzer*, 240 F.3d 975, 979 (11th Cir. 2001)).

225. See *Jackson v. Bishop*, 404 F.2d 571, 577–79 (8th Cir. 1968) (finding prison use of whipping strap unconstitutional); see also the excellent discussion in Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. Pa. J. Const. L. 617, 647–59 (2003).

226. *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

227. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (quoting *Ullmann v. United States*, 350 U.S. 422, 428 (1956)); cf. *United States v. Balsys*, 524 U.S. 666, 701–02 (1998) (Ginsburg, J., dissenting) (“The privilege against self-incrimination, ‘closely linked historically with the abolition of torture,’ is properly regarded as a ‘landmar[k] in man’s struggle to make himself civilized.’” (alteration in original) (quoting Erwin N. Griswold, *The Fifth Amendment Today* 7 (1955))).

228. As Justice Murphy stated in an opinion:

The constitutional privilege against self-incrimination . . . grows out of the high . . . 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 . . . Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.

*United States v. White*, 322 U.S. 694, 698 (1944).

229. 342 U.S. 165 (1952).

two morphine capsules he had swallowed when he first saw the detectives. The morphine was introduced into evidence, and the suspect was convicted of unlawful possession. The Supreme Court reversed the conviction, holding that “force so brutal and so offensive to human dignity” was constitutionally prohibited and that there was little difference between forcing a confession from a suspect’s lips and forcing a substance from his body.<sup>230</sup> Justice Frankfurter said famously of Mr. Rochin’s treatment: “They are methods too close to the rack and the screw . . . .”<sup>231</sup> Referring to some earlier decisions about the use of coerced confessions, he went on to talk in general terms about the principle at stake in the condemnation of the coercion in this case:

These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. . . .

To attempt in this case to distinguish what lawyers call “real evidence” from verbal evidence is to ignore the reasons for excluding coerced confessions. . . . Coerced confessions offend the community’s sense of fair play and decency. So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, 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>232</sup>

Once again, we do not need to define Mr. Rochin’s treatment as torture in order to see how the prohibition on torture is crucial to the Supreme Court’s invocation of a more general nonbrutality principle in condemning this apparently novel form of coercion. In recent years, the Court has repeated this approach, holding that “[d]etermining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate’s choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not.”<sup>233</sup> My guess is that if the prohibition on torture itself becomes

230. *Id.* at 174.

231. *Id.* at 172. The whole passage reads:

[T]he proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

*Id.*

232. *Id.* at 173–74.

233. *McKune v. Lile*, 536 U.S. 24, 41 (2002).

shaky or uncertain as a legal standard, we will have to find new points of orientation to help us in our application of whatever is left of the non-brutality principle articulated in *Rochin*.

3. *Substantive Due Process*. — The importance of the prohibition on torture for the jurisprudence of *substantive* due process is a little less clear. In a rather confusing set of opinions in *Chavez v. Martinez*, a plurality on 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.<sup>234</sup> There was considerable disagreement about the facts in *Chavez*, but there seemed to be a consensus that the Court's reliance in other abuse 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>235</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>236</sup> So I think one can say at least that if there is anything to the idea of substantive due process, the claim that torture for any purpose is unconstitutional comes close to capturing the minimum.

Seth Kreimer has taken all this a little further with the suggestion that the prohibition on torture should be understood as connected with the constitutional protection of bodily integrity and autonomy interests.<sup>237</sup> One of the reasons physical torture is constitutionally out of the question, Kreimer says, is that the Constitution protects bodily integrity against invasion, and physical torture always involves such an invasion.<sup>238</sup> Indeed, he cites antislavery provisions as relevant in this regard:

In American law before the Civil War, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master's "uncontrolled authority"; physical assault could yield no legal redress. . . . A constitutional prohibition of slavery brings with it a presumption that the bodies of citizens are subject to neither the "uncontrolled authority" of the state nor that of any private party.<sup>239</sup>

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234. 538 U.S. 760, 773 (2003).

235. *Id.* In addition, Justice Stevens noted that the type of brutal police conduct involved "constitutes an immediate deprivation of the prisoner's constitutionally protected interest in liberty." *Id.* at 784 (Stevens, J., concurring in part and dissenting in part).

236. *Id.* at 789–90 (Kennedy, J., concurring in part and dissenting in part).

237. See Kreimer, *supra* note 7, at 294–95.

238. See *id.* at 295–96; see also, e.g., *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) ("Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.").

239. Kreimer, *supra* note 7, at 295–96 (footnote omitted).

Likewise, with autonomy, Kreimer argues that torture is constitutionally suspect for the same reason all assaults on autonomy are suspect:

The pain of torture by design negates the vision of humanity that lies at the core of a liberal democracy. Justice Kennedy recently set forth the constitutional importance of the “autonomy of self” in *Lawrence v. Texas*. Torture seeks to shatter that autonomy. . . . [T]he agony of torture is designed to make choice impossible . . . [and] to induce the subject to abandon her own volition and become the instrument of the torturer by revealing information. Such government occupation of the self is at odds with constitutional mandate.<sup>240</sup>

Now the immediate point of Kreimer’s discussion is to refute Alan Dershowitz’s suggestion that any constitutional prohibition on torture is quite limited in operation and that a proposal for judicial torture warrants may not pose any great constitutional difficulty.<sup>241</sup> Kreimer’s purpose is to highlight the resources available in our constitutional tradition for attacking the use of torture that Dershowitz is contemplating. But it is worth also considering how the Kreimer argument might be pushed in the opposite direction, and that is what I am doing here. The constitutional resources that might be used by Kreimer to oppose torture might also be understood as constitutional resources whose security depends upon the integrity of the prohibition on torture. Undermine that integrity, and our conception of the constitutional scheme as something which as a whole protects dignity, autonomy, and bodily liberty begins to unravel.

#### E. *Undermining an Archetype*

I have said that the prohibition on torture is a legal archetype, which means that, in some sense, *other law* depends on its integrity. But in what sense does other law depend on the integrity of this prohibition? What sort of hypothesis am I propounding when I talk about the impact on the rest of our law of undermining current restrictions on the deliberate infliction of pain as an aid to interrogation? Is it a prediction? Or does it involve some other sort of concern about law’s character? In the last few sections, I have spoken loosely about something like a domino effect, an unraveling of surrounding law once the torture prohibition is tampered with. But what exactly is this domino effect, this unraveling, supposed to involve?

It sounds like some sort of slippery slope argument, and you may think it needs to be treated with all the caution that such arguments deserve.<sup>242</sup> I did use something like a slippery slope argument in Part II.B,

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240. *Id.* at 298–99 (footnotes omitted).

241. Cf. Dershowitz, *Why Terrorism Works*, *supra* note 18, at 135.

242. For excellent discussions of the workings of slippery slope arguments in law, see generally Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 *UCLA L. Rev.* 539 (2003) (providing general

when I argued for a pragmatic absolute.<sup>243</sup> But the archetype idea is the reverse of a slippery slope argument. It is sometimes argued that if we relax some lesser constitutional inhibition, we will be on the downward slide towards an abomination like torture. But I am arguing in the other direction: Starting at the bottom of the so-called slippery slope, I am arguing that if we mess with the prohibition on torture, we may find it harder to defend some arguably less important requirements that—in the conventional mode of argument—are perched above torture on the slippery slope. The idea is that our confidence that what lies at the bottom of the slope (torture) is wrong informs and supports our confidence that the lesser evils that lie above torture are wrong too. Our beliefs—that flogging in prisons is wrong, that coerced confessions are wrong, that pumping a person's stomach for narcotics evidence is wrong, that police brutality is wrong—may each be uncertain and a little shaky, but the confidence we have in them depends partly on analogies we have constructed between them and torture or on a sense that what is wrong with torture gives us some insight into what is wrong with these other evils. If we undermine the sense that torture is absolutely out of the question, then we lose a crucial point of reference for sustaining these other less confident beliefs.

I have sometimes been asked whether the case I am making is an empirical one. I think it is an empirical case in part, and it is open in principle to empirical refutation. Presented with solid evidence that a legal system that permitted torture was nevertheless able to maintain the rest of the adjacent law about nonbrutality intact over the long or medium term, I would have to abandon my concern about the systemic effects of messing with these provisions. Of course, the empirical argument in either direction is complicated. It is complicated first by the fact that we cannot assume stability or any particular trajectory for the rest of our law absent any assault on the prohibition on torture; we may be at a loss to say what would have happened had the torture prohibition not been undermined, and thus at a loss to determine how far the assault on the prohibition has caused us to deviate from that baseline. Second, it is possible that the very factors that led us to undermine the prohibition on torture may also have led us to undermine the adjacent law, in which case it will be hard to show that it was the undermining of the prohibition as such that had the deleterious effect. Actual causation, baselines, and null hypotheses in this area are notoriously difficult to establish.

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theory for understanding and evaluating slippery slope arguments); Frederick Schauer, *Slippery Slopes*, 99 *Harv. L. Rev.* 361 (1985) (distinguishing slippery slope arguments from other forms of argument); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 *Harv. L. Rev.* 1026 (2003) (providing framework for analyzing and evaluating slippery slope risks by focusing on concrete means through which one decision might possibly help cause another); Eric Lode, *Comment, Slippery Slope Arguments and Legal Reasoning*, 87 *Cal. L. Rev.* 1469 (1999) (arguing that slippery slope arguments can play valuable role in legal reasoning).

243. See *supra* text accompanying notes 156–160.

The difficulties are compounded by the fact that the specific mechanism suggested here has to do with the role of argument. My claim assumes that the life of the law depends, in large part, on argumentation. It assumes that argument is not (as some Legal Realists suggested) just decoration in the law<sup>244</sup> but a medium through which legal positions are sustained, modified, and elaborated. Above all, it assumes that whether a given argument works or has a chance of success in sustaining a legal position depends on what decisions have already been made in the law. That last point is very important. In law, we do not just argue pragmatically for what we think is the best result; we argue by analogy with results already established, or we argue for general propositions on the basis of existing decisions that already appear to embody them. Philosophical defenses of this mode of argumentation can be given—as they have been in Dworkin's work on integrity, for example.<sup>245</sup> But whether one finds this jurisprudence convincing or not, there is no doubt as a matter of fact that this is how legal argumentation does take place, and how arguments achieve their effect in preventing or promoting legal change.

One other point needs to be mentioned. Critics of slippery slopes and other similar models of argumentation sometimes say that the slide from one position to another can always be prevented provided the person evaluating the arguments can tell a good argument from a bad one and distinguish between positions that are superficially similar.<sup>246</sup> That may be true of some philosophically sophisticated individuals. But in legal systems, we evaluate arguments together and we have to concern ourselves with the prospects for socially accepted arguments and socially convincing distinctions.<sup>247</sup> In general, law makes available an institutional matrix for the presentation and evaluation of arguments, a social way of presenting and evaluating arguments that is supposed to affect what actually happens at the level of the whole society. We are not dealing, then, with any simple empirical prediction; any estimation of likelihoods must take all this complexity into account.

But the presence of complexity and methodological difficulty is not a reason for discounting or ignoring the hypothesis we are considering,

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244. See, e.g., Jerome Frank, *Law and the Modern Mind* 111 (Peter Smith 1970) (1930) (noting that judges' explanations for conclusions do not reflect how decisions were actually made).

245. Dworkin, *Law's Empire*, *supra* note 179, at 151–224.

246. See Lode, *supra* note 242, at 1486–87.

247. Rizzo and Whitman describe the debate as follows:

The process by which arguments are accepted and decisions made is a social one that derives from the decisions of many individuals. No single decisionmaker can control the evolution of the discussion. The person who makes [a slippery slope argument] does not necessarily claim that the listener himself will be the perpetrator of the future bad decision. Rather, he draws attention to the structure of the discussion that will shape the decisions of many decisionmakers involved in a social process.

Rizzo & Whitman, *supra* note 242, at 571 (footnote omitted).



nor should we be in the business of presuming that the archetype effect will not accrue unless there is clear and easily discernable evidence that it will. We could as easily and appropriately work with the opposite presumption. If it is said that we do not or cannot know what the effect on the rest of the legal system of our messing with the prohibition on torture will be, then given what we know *might* be at stake, we have reason to approach the matter with much more caution than the Bush Administration lawyers have been displaying.

In any case, the claim of this Article goes beyond a purely empirical projection of the likelihood that one type of legal change will lead to another. There is also a more qualitative concern about the *corruption* of our legal system that results from undermining the prohibition on torture. Consider analogous concerns about the corruption of an individual: Suppose an individual, previously honest, is offered a bribe. Friends may warn him against the first act of dishonesty, not just for itself, but because of what it is likely to do to his character. Part of that concern is about how this change in his character will affect his future decisions. But corruption is more than just an enhanced probability of future dishonest acts. It involves a present, inherent loss: Now the man no longer has the sort of character that is set against dishonesty; he no longer has the standing to condemn and oppose dishonesty that an honest man would have.

Or suppose—in a worse case, but one more analogous to the torture possibility—that someone has decided that in office he will accept bribes but that in other areas of his personal and professional life he will maintain honesty, and not steal or cheat on his taxes. He may think that he can maintain this firewall between one sort of dishonesty and others, but the cost to him is that he must maintain it artificially. He no longer refrains from stealing for the reasons that are common to the condemnation of stealing and bribery; he refrains from stealing because even though it is like the acts he is willing to commit, he has simply determined that his dishonesty will go thus far and no further. That is a moral loss attendant on his corruption: an inability now to follow the force of a certain sort of reason, an attenuation of moral insight so far as bribery, stealing, and other forms of dishonesty are concerned.

The damage done to our system of law by undermining the prohibition on torture is, I think, just like this. 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 to enable our officials to inflict pain on them during questioning, or if we were to set up a Dershowitz regime of judicial torture warrants, maybe only a few score detainees would be affected in the first instance. But the character of our legal system would be corrupted. We would be moving from a situation in which our law had a certain character—a general virtue of nonbrutality—to a situation in which that character would be compromised or corrupted by the permitting of this most brutal of practices. We would have

given up the linchpin 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 the use of brutal tactics will also be permitted to agents of the law.” In other words, the repudiation of brutality would become a *technical* matter—“Sometimes it is repudiated, sometimes not”—rather than a shining issue of principle.

Of course the present (or pre-9/11) character of our legal system is imperfect, just as the honesty of any given individual is imperfect. There were already pockets of brutality in our law—capital punishment, on some accounts; police brutality of the Rodney King variety; and the regular leverage of prison rape and other phenomena by prosecutors in the course of plea bargaining—and we see from Alan Dershowitz’s example that their existence is already exploitable for an argument by analogy in favor of torture.<sup>248</sup> Our general commitment to the nonbrutality principle is not so secure that we can assume it will remain intact if we add one more set of deviations. In any case, it is not just one more set of deviations. The archetypal character of the prohibition on torture means that it plays a crucial and highly visible role in regard to the principle.

As we have seen, the prohibition on torture is a point of reference to which we return over and over again in articulating legally what is wrong with cruel punishment or distinguishing a punishment that is cruel from one that is not: We do not equate cruelty with torture, but we use torture to illuminate our rejection of cruelty. And the same is true of procedural due process constraints, certain liberty-based constraints of substantive due process, and our general repudiation of brutality in law enforcement. So, in order to see what might go wrong as a result of undermining the prohibition on torture, we have to imagine Eighth Amendment jurisprudence without this point of reference—arguing about cruelty without the assumption that torture, at any rate, is wholly out of the question. Or we have to imagine Fifth Amendment jurisprudence without this point of reference, where arguments about coerced confessions and self-incrimination must be made against the background of an assumption that torture is sometimes legally permissible. The halting and hesitant character of such argumentation would itself be a blight on our law, in addition to the actual abuses that would result. Or rather, the two would not be separated: Because law is an argumentative practice, the empirical consequences for our law would be bound up with the corruption of our ability to make arguments of a certain kind, or to assert principles which put torture unequivocally beyond the pale and used that to provide a vivid

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248. Dershowitz, *Why Terrorism Works*, supra note 18, at 147–49.

and convincing basis for the elaboration of a general principle of nonbrutality.

#### IV. THE STATE

##### A. “Engine of State” and the Rule of Law

I have been talking mostly about law, and the effect that a legalization of torture—even the narrowest authorization—would have on the law. But the legal world can sometimes seem a little too cozy and self-contained, whereas the exigencies that have led some U.S. officials to consider the possible use of torture must be addressed in the real world. In this final Part, I shall broaden the perspective and look at the relation between law and the practices of the state, and also the relation between American law and the way that the international community is grappling with these issues. In other words, this Part will take us from a consideration of the place of the rule against torture in *our* law to its significance for “the rule of law,” in regard both to the way in which the United States confronts the world and to the international legal arena as such.

Let us first consider the relationship between law and state. 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 as an aspect of legal practice. It presents 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 counterinsurgency 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 legal heritage has not been entirely uncontaminated by torture. But to the extent that torture was authorized in England in earlier centuries, it was not used as part of the judicial process;<sup>249</sup> this contrasts with the Continent where torture was intimately bound up with the law of proofs.<sup>250</sup> So, for example, Blackstone observed that the rack in Tudor

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249. An exception was the use of *peine forte et dure*—physical coercion to induce a defendant to plead to an indictment. See Langbein, *supra* note 169, at 74–77.

250. The law of proofs governing judicial proceedings dictated that the court could not convict a person without either two eyewitnesses or his confession. *Id.* at 4–5. If there was only circumstantial evidence of a crime, the court could order torture to be used to secure a confession, subject to certain guidelines. *Id.*

Alan Dershowitz’s account of the relation between torture and the law of proofs comprehensively misreads Langbein’s account. Cf. Dershowitz, *Why Terrorism Works*, *supra* note 18, at 155–57. The law of proofs was not, as Dershowitz suggests, an aspect of Anglo-Saxon law. In fact, 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. See Langbein, *supra* note 169, at 73–74. And the introduction of trial by jury, with an

times, particularly under the first Queen Elizabeth, was “occasionally used as an engine of state, [but] not of law.”<sup>251</sup> And that is true too of most of what has been under discussion in this Article. The Yoo and Bybee memorandum address the issue of the legality of certain courses of action that might be undertaken by soldiers, military police, intelligence operatives, or other state officials and authorized at the highest level by the executive. But they are not proposing that torture be incorporated into criminal procedure. The suggestion that Professor Dershowitz raises, with its specific provision for judicial torture warrants, involves introducing torture into the fabric of the law. 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? Why be so preoccupied with the trauma to law of what is essentially a matter of power?

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 by American officials in holding cells in Iraq, Afghanistan, or Guantánamo Bay is done in relation to the waging of war in a state of emergency rather than as part of a legally constituted practice, the thought that torture (or something very like torture) is permitted would be a legally disturbing thought. For we know that, in general, there is a danger that abuses undertaken in extraordinary circumstances (relative to the administration of law and order at home) can come back to haunt or infect the practices of the domestic legal system. This concern was voiced by Edmund Burke in his apprehensions about the effect on England of the unchecked abuses of Warren Hastings in India,<sup>252</sup> and it is also voiced by Hannah Arendt, who 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 mid-twentieth century Europe.<sup>253</sup> The warning has been sounded often enough: Do not imagine that you can maintain a firewall between what is done by your soldiers and spies

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entitlement to evaluate circumstantial evidence unconstrained by anything like the law of proofs, occurred in England centuries before the 1600s, *id.* at 78, which is when Dershowitz suggests it was introduced. See Dershowitz, *Why Terrorism Works*, *supra* note 18, at 157.

251. 4 Blackstone, *supra* note 52, at \*326.

252. See Edmund Burke, *Speech in General Reply [on the impeachment of Warren Hastings, Esq.]* (May 28, 1794), in 11 *The Works of the Right Honorable Edmund Burke* 157, 194–225 (rev. ed. 1867) (“[T]he House of Commons has already well considered what may be our future moral and political condition, when the persons who come from that school of pride, insolence, corruption, and tyranny are more intimately mixed up with us of purer morals. Nothing but contamination can be the result . . .”).

253. See Arendt, *supra* note 205, at 185–86, 215–16, 221.

abroad to those they demonize as terrorists or insurgents, and what will be done at home to those who can be designated as enemies of society.<sup>254</sup> You may say that there is a distinction between what we do when we are at war and what we do in peacetime, and we should not be too paranoid that the first will infect the second. Saying that may offer some reassurance about the prospect of insulating the engines of law from the exigencies of some wars. But is it really a basis for confidence in regard to the sort of war in which we are said to be currently involved—a war against terror as such, 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 legality has been made central. Maybe there are hard men in our intelligence agencies who are prepared to say, “Just torture them, get the information, and we will 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 accommodated *within the very legal framework that purports to prohibit it*. The American executive seems to be interested in the prospects for a regime of cruel and painful interrogation that is legally authorized or at least not categorically and unconditionally prohibited. This is partly because there is considerable concern among some officials about the possibility of war crimes or other prosecutions in respect of abuse during interrogations.<sup>255</sup> An effort is being made to see whether the law can be stretched or deformed to actually authorize this sort of thing. The Administration does not just take the prisoners to the waterboards; it wants to drag the law—our law—along with them. The effect on law, in other words, is unavoidable.

A third point addresses the issue of the rule of law—the enterprise of subjecting “the engines of state” to legal regulation and restraint. We hold ourselves committed to a general and quite aggressive principle of legality, which means that law does not just have a little sphere of its own in which to operate, but expands to govern and regulate every aspect of official practice. I think the central claim of this Article applies to that aspiration as well: That is, I think we should be concerned about the effect not just on American law but on the rule of law of a weakening or an undermining of the legal prohibition on torture. We have seen how

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254. Bear in mind also that some of the reservists involved in the abuse at Abu Ghraib were prison guards in civilian life. See Douglas Jehl & Eric Schmitt, In Abuse, a Portrayal of Ill-Prepared, Overwhelmed G.I.'s, *N.Y. Times*, May 9, 2004, § 1, at 1. It is of course disturbing to think that that explains their abusive behavior in Iraq; it is also disturbing to think about causation back in the opposite direction.

255. Cf. Susan Schmidt, FBI Chief Tells of Interrogation Suspicions, *Wash. Post*, May 21, 2004, at A19 (indicating concerns of FBI agents about possible involvement in brutal interrogations); R. Jeffrey Smith & Dan Eggen, New Papers Suggest Detainee Abuse Was Widespread, *Wash. Post*, Dec. 22, 2004, at A1 (reporting that military interrogators may have impersonated FBI agents at Guantánamo Bay).

the prohibition on torture operates as an archetype of various parts of American constitutional law and law enforcement culture generally. I believe it also operates as an archetype of the ideal we call the rule of law. That agents of the state are not permitted to torture those who fall into their 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.

True, we must acknowledge that the rule of law ideal has many meanings,<sup>256</sup> and I can imagine Alan Dershowitz saying that the formal regulation of torture might be as much a triumph for the rule of law as its prohibition.<sup>257</sup> I am not being sarcastic: I think 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 silence. I believe he thinks that scenario much worse for the rule of law than the judicial torture warrant regime he has in mind.<sup>258</sup>

But I think this is wrong. I think a case can be made that it is the prohibition on torture, not the existence of a system for the legal authorization of torture, which is really archetypal of the rule of law. At the beginning of the Article, I mentioned Judith Shklar's concern that torture had begun to flourish again in the twentieth century.<sup>259</sup> In the same passage she suggested that "acute fear" is once again becoming "the most common form of social control."<sup>260</sup> Modern states suffer from a standing temptation to try to get their way by terrorizing the populations under their authority with the immense security apparatus they control and the dreadful prospects of torture, disappearance, and other violence that they can deploy against their internal 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, not just courts, police, jailers, or prosecutors. In this way, *a state subject to*

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256. See Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *Law & Phil.* 137, 140–44 (2002) (outlining history of contestation of the rule of law).

257. For the opposite view, see Kadish, *supra* note 144, at 355–56.

258. See Dershowitz, *Why Terrorism Works*, *supra* note 18, at 150. See also the Israeli Landau Commission's recommendation of legal approval for "a moderate measure of physical pressure" in interrogation. Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, 23 *Isr. L. Rev.* 146, 184 (1989). The Commission insisted on "the truthful road of the rule of law," rejecting "the way . . . of the hypocrites: they declare that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface." *Id.* at 183–84.

259. See *supra* note 9 and accompanying text.

260. Shklar, *supra* note 9, at 27.

*law* becomes not just a state whose excesses are predictable or whose actions are subject to forms, procedures, and warrants; it becomes a state whose exercise of power is imbued with this broader spirit of the repudiation of brutality. That is 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.

This point can also be stated the other way around: To be willing to abandon the prohibition on torture or to define it out of existence is to be willing to sit back and watch the whole enterprise unravel. It is to be ready to contemplate with equanimity the prospect that the rule of law will no longer hold out the clear promise of nonbrutality—that the state, which it aims to control, will be permitted to operate toward some individuals who are wholly under its power with methods of brutality from which law itself recoils.

### B. *An Archetype of International Law*

I have said that the prohibition on torture is archetypal of our particular legal heritage, as well as a certain sort of commitment to the rule of law. Beyond that, one might ask about its archetypal status in international law, particularly in international humanitarian law and the law of human rights.

I think a case can be made, similar to the case I made in Parts III.C through III.E, that the prohibition on torture also operates as an archetype in these areas. Consider, for example, its prominence in the law relating to the treatment of prisoners in wartime. We implicitly understand that while prisoner-of-war camps are uncomfortable and the circumstances of the prisoners often straitened, there is something inherently unlawful about the torture of prisoners.<sup>261</sup> This is not just because of the stringency of the provision itself. Torture of prisoners threatens to undermine the integrity of the surrender/incarceration regime: If we

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261. When captured British airmen appeared on Iraqi television during the first Gulf War showing clear evidence of having been beaten, Allied outrage was immediate:

President Bush vowed today to hold President Saddam Hussein accountable for what he called “the brutal parading of allied pilots,” an act that he denounced as a “direct violation of every convention that protects prisoners.”

The videotapes of seven captured pilots praising Iraq with bruised faces and bloodshot eyes gave the war a hauntingly human face. The tapes [were] released by Iraq on Sunday and broadcast today in the United States . . .

The men gave robotic answers to Iraqi questions, and at least four of them denounced the war as “crazy.” Their bruised appearance, along with their stony eyes and the wooden delivery of their responses, led military analysts to believe that they were coerced.

Maureen Dowd, *Bush Calls Iraqis ‘Brutal’ to Pilots*, N.Y. Times, Jan. 22, 1991, at A10; see also John Bulloch et al., *When Will We Win?*, The Independent (London), Jan. 27, 1991, at 13 (“[B]y parading US and British pilots on Baghdad television, the argument for war crimes trials moves on to the agenda again, bringing with it the possibility of pursuing the war into Iraq after a withdrawal from Kuwait.”).

can torture prisoners, then we can do anything to them, and if we can do anything to them, then the willingness of defeated soldiers to surrender will be quite limited.<sup>262</sup> The whole enterprise of attempting to mitigate the horrors of war by making a provision for an *hors de combat* status for individual soldiers in the face of certain defeat depends on their confidence, underwritten by law, that surrender and incarceration is better than death in combat. But torture (or interrogation practices that come close to torture) threatens that confidence and thus the whole basis of the regime.

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 rights are subject to interpretation, as well as the limitation to meet "the just requirements of morality, public order and the general welfare in a democratic society."<sup>263</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>264</sup> People are willing to accept that the human rights regime does not unravel altogether when detention without trial is permitted, when habeas corpus is suspended, or when free speech 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, and that human rights law itself was entering a crisis.

But what if we are only proposing to violate not the rule against torture but only the international norm relating to cruel, inhuman, or degrading treatment? Can that be abandoned without wider damage to the human rights regime? I have serious doubts about this. For one thing, the Bush Administration has also been toying with the redescription of a

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262. This reasoning was simply expressed in an Army publication:

[T]actical rationale is being used to support legal principles; our service men and women are taught that these principles are absolute and may not be waived when convenient. . . . [A] lack of humane treatment may induce an enemy to fight to the death rather than surrender, thereby leading to increased friendly casualties. The instruction is candid, however, in admitting that humane treatment of enemy prisoners of war will not guarantee equal treatment for our captured servicemen, as we learned in World War II, Korea, and Vietnam; but it is emphasized that inhumane treatment will most assuredly lead to equivalent actions by the enemy.

W. Hays Parks, Teaching the Law of War, *Army Law.*, June 1987, at 4, 6.

263. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 29(2), U.N. Doc. A/810 (Dec. 12, 1948).

264. ICCPR, *supra* note 27, art. 4(1).



considerable amount of what was previously regarded as torture to recategorize as merely—merely!—“cruel, inhuman, and degrading treatment.” The human rights community is not easily fooled, and it would be an archetypal blow to its endeavor 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 may be vague, but it is not a technical term. And it is not just a pious aspiration: The word “inhuman” means much more than merely “inhumane.” “Inhuman treatment” means what it says, and its antonymic connection with the phrase “human rights” is not just happenstance. To treat a person inhumanly is to treat him in the way that no human should ever be treated. On this basis it would not be hard to argue that the prohibitions on inhuman treatment in the Universal Declaration of Human Rights, the Covenant, and the ECHR are as much a paradigm of the international human rights movement as the absolute prohibition on torture.

I said in Part III.E that dire predictions about the effect of undermining an archetype are partly empirical, but they also have partly to do with the sense of corruption and demoralization that the collapse of an archetype would induce. Archetypes make law visible, they dramatize its more abstract principles, and they serve as icons or symbols of its deepest commitments. By the same token, the demise of an archetype sends a powerful message about a change in the character of the relevant law. As Sanford Kadish has observed:

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. . . . [I]f 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 World War II 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>265</sup>

If in this way the rule against torture changes from a matter of shining principle in the “Global Bill of Rights” to become a technical matter—a maze of counterintuitive lawyers’ definitions, exceptions, and provisions for derogation—then we would lose our sense of international

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265. Kadish, *supra* note 144, at 352.

law's ability to confront the horrors of our time clearly and decisively. Law's mission in these areas is much more vulnerable to demoralization than it is in domestic law, where people have learned to live with a gap between legal technicality on the one hand and the clear demands of morality on the other.

We also need to consider the effect on the international human rights regime of the collapse of the archetype in relation to the *United States* in particular. That is, we need to consider the demoralizing impact of defection from the antitorture consensus by not just another rogue state but the world's one remaining superpower. An archetype can be the commitment embodied in a particular precedent as well as in a general rule. The expressed willingness of one very powerful state to subject itself to legal restraint where its interests are most gravely at stake sends a message that international law is to be taken seriously. But the abandonment of the archetype by such a state sends a message too—that international law may be of no account if even the most powerful regime, the one that can most afford to sustain damage, is willing to dispense with legal restraint for the sake of a tactical advantage.<sup>266</sup> Some may say gloomily that American moral leadership in humanitarian law and international law generally has already been squandered to such an extent that little further damage can be done. I suspect that is too pessimistic. The events of the last few years may be an aberration, and it is not unreasonable to think that the United States might still redeem the promise of its historic leadership position in human rights and the international rule of law.<sup>267</sup> But if it were to put itself so far beyond the pale of international humanitarian and human rights law as to permit torture or something like torture as a regular feature of state practice, then there might be no way back to that position of leadership.

So far in this Section I have considered the rule against torture as an archetype of the substantive law of human rights and the treatment of

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266. Marcy Strauss argues that:

[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 . . . 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.

Strauss, *supra* note 78, at 257. Sanford Levinson echoes this concern, worrying about: 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. . . . If we give up the no-torture taboo, then why shouldn't any other country in the world be equally free to proclaim its freedom from the solemn covenant entered into through the United Nations Convention? Levinson, *supra* note 24, at 2052–53 (citing conversation with Oona Hathaway).

267. See John F. Murphy, *The United States and the Rule of Law in International Affairs* 355–59 (2004) (concluding that United States is likely to accept more fully principles of international law in light of current scope of international problems).

prisoners. We may want to consider it also as an archetype of international law as such, or of the way international law operates. We know that the rule against torture functions as one of the most vivid modern exemplars of *jus cogens* in international law, that is, of the idea that some norms have a status which transcends the ordinary requirement of subscription to treaty as the basis of the bindingness of international law.<sup>268</sup> However, it is not the only exemplar. Traditionally, the paradigms of an offense prohibited by *jus cogens* were piracy and the slave trade; even if the rule against torture ceased to be regarded as *jus cogens*, these other rules would continue to afford clear examples of peremptory norms subject to universal jurisdiction.

Much more disturbing, however, is the way in which Bush Administration jurisprudence has threatened to undermine the delicate systematics of treaty-based international law. International law operates and can be enforced to a certain extent on its account and through its own institutions and agencies. But particularly in human rights law and humanitarian law, international covenants and conventions operate best when they are matched by parallel provisions of national constitutions and legislation. Indeed, as we saw in Part I.A, the Convention Against Torture requires those who are party to it to ensure that they have made legislative or other legal provisions to outlaw torture by their own governmental officials both at home and abroad. Without this convergence—or what Gerald Neuman has termed “dual positivization”<sup>269</sup>—the provisions of international law would be even more like the meaningless verbal flatulence their denigrators often accuse them of being.

But even with such convergence, there is still a danger to the legal regime. Suppose governments generally were to adopt the stance that Jay Bybee has urged for the United States—that in his Commander-in-Chief power, the U.S. President cannot possibly be subject to legislation mandated by international conventions, and that any such legislation would be unconstitutional.<sup>270</sup> After all, there is nothing unique to the American Constitution about this stance: The Commander-in-Chief authority in the United States is a power which, in American constitutional theory, every civilian government should have.<sup>271</sup> Such a stance might

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268. See *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet* (No. 3), [2000] 1 A.C. 147, 198 (H.L. 1999) (appeal taken from Q.B. Div'l Ct.) (U.K.) (stating that “[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed”); see also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582 (6th Cir. 1985) (noting “the general recognition since [1945] that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation”); *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.”).

269. See Neuman, *supra* note 54, at 1864.

270. See Bybee Memorandum, *supra* note 21, at 2.

271. See *The Federalist* No. 74, at 422 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

make it impossible for international law to regulate armed conflict at all: Certainly it would make its *ex ante* regulation very difficult and wholly dependent on the willingness of national executives to choose to limit the means used in interrogations conducted under their military or national security authority. Enforcement of international obligations would depend wholly on war crimes prosecutions after the fact, and the United States has already repudiated the jurisdiction that an International Criminal Court would have over such matters. Someone might respond to all this by saying: "Well, surely *every* provision of international law is hostage in the end to the consent of states to be bound by the relevant treaties." Maybe so. But the mode of operation of international law in matters like this has been for states to enter into treaty obligations *in advance and in general*, not for national executives to be able to pick and choose the constraints that they will and will not accept dependent on the context. Yet that is what the Bybee doctrine amounts to. If we accept that international law needs dual positivization of the sort that I have described, then we can see that the Administration's attitude toward torture might well deal a body blow to the normal mode of operation of human rights law.

#### CONCLUSION

Let me end with a few cautionary remarks about the concept of legal archetype that I have been using.

First, I do not 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. For example, if we start issuing torture warrants, it may be harder to hang on to a proper sense of the importance of the exclusionary rule for involuntary confessions. Or 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 is 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.

It is 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 for a corporation. Instead, it involves 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.

Second, I should not exaggerate the significance of something 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*<sup>272</sup> is or was archetypal of a certain approach to economic regulation which married the freedom-of-contract provisions of the U.S. Constitution to the dogmas of laissez-faire economics, and that archetype was discredited when the general legal doctrine was discredited.<sup>273</sup> Indeed, the shock to the system of disrupting or undermining an archetype may well be part of an effective strategy for necessary legal reform. 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 judgment 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 is 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 is 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, as well as the value of our loss 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 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

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272. 198 U.S. 45 (1905).

273. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392–93 (1937).

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>274</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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274. See, e.g., Sussman, *supra* note 143, at 1.