

Torture and Positive Law: Jurisprudence for the White House

Jeremy Waldron

Abstract

In recently published memoranda, Justice Department lawyers have suggested that it is not in all circumstances wrong or unlawful to inflict pain and suffering in the course of interrogating terrorist or military detainees. These suggestions force us to think afresh about the legal prohibition on torture. In this paper, I argue 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 non-brutality 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.

This is a long paper, but readers can gain access to the substance of its argument in three more or less free-standing parts:

- Beginning on p. 16, Part II of the paper (sections 5 and 6) considers issues about the definition of the word “torture.”
- Beginning on p. 32, Part III of the paper (sections 7 and 8) considers issues about the absoluteness of the prohibition on torture.
- Beginning on p. 41, Part IV of the paper (sections 9 through 13) considers the archetypal character of the prohibition on torture in American law; this part contains what I think is the paper’s most distinctive argument.

These parts of the paper are preceded in section 3 by a summary of the law relating to torture (pp. 9-12), and in section 2 by a brief review (pp. 5-9) of what has been said by three prominent jurists – Professor John Yoo, Professor Alan Dershowitz, and Judge Jay Bybee – to shake our conviction that torture (or something like it) should remain legally unacceptable.

The last part of the paper, Part V, beginning on p. 70, pursues the analysis developed in Part IV into the areas of state policy and international law.

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Part I: Introduction

1. Beginning with Abu Ghraib

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. I mean more than the Abu Ghraib nightmare itself – the photographs of sexual humiliation, the dogs, the hoods, the wires, the beatings.² I refer also to the emerging understanding 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.³

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.⁴ We know too that terrorist suspects, enemy combatants, and others associated with the Taliban and Al Qaeda held by the U.S. in the camps at Guantanamo Bay were being interrogated using physical and psychological techniques⁵ that had been outlawed after their use by British forces against

² James Risen, G.I.'s Are Accused of Abusing Iraqi Captives NY TIMES April 29, 2004, p. A15.

³ Peter Hermann, Army Sets First Court-martial in Abuses, BALTIMORE SUN, May 10, 2004, p. 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,” LA TIMES, May 3, 2004, p. A1: “Taguba found that military intelligence interrogators ... ‘actively requested that ... guards set physical and mental 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.’” Refer also to SEYMOUR HERSH _____

⁴ See Miles Moffeit, Brutal interrogation in Iraq: Five detainees' deaths probed, DENVER POST, May 19, 2004, p. A1: “Brutal interrogation techniques by U.S. military personnel are being investigated in connection with the deaths of at least five Iraqi prisoners.... 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.”

⁵ Raymond Bonna and others, Threats and Responses: Interrogations: Questioning Terror Suspects in a Dark and Surreal World, NY TIMES, March 9, 2003, p. 1. *Recent Red Cross report also (12/2004).*

terrorist suspects in Northern Ireland in the early 1970s (outlawed by the European Court of Human Rights)⁶ and outlawed after their use by security forces in Israel against terrorist suspects in the 1990s (outlawed by the Israeli Supreme Court).⁷

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.⁸ In 1911 the author of the article on “Torture” in the Encyclopedia Britannica wrote that “the whole subject is now one of only historical interest as far as Europe is concerned.”⁹ But it has come to life again. With the growth of the ethnic-loyalty state and the security state in the twentieth century, with the emergence of anti-colonial insurgencies and other intractable forms of internal armed conflict, and with the rise of terrorism, torture has returned and “flourished on a colossal scale.”¹⁰ Nor is it just a rogue-state third-world banana-republic phenomenon: the use of torture has in recent decades disfigured the security polices of France (in Algeria), Britain (in Northern Ireland), Israel (in the Occupied Territories), and now the United States (in Iraq, Afghanistan, and Cuba).

2. Three Jurists

⁶ Ireland v. United Kingdom 25 Eur. Ct. H.R. 1 (1977).

⁷ Public Committee Against Torture in Israel v. The State of Israel, H.C. 5100/94, 53(4) P.D. 817 (1999)

⁸ A recent article by Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror, 6 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 278 (2003), begins at p. 278 as follows: “There are some articles I never thought I would have to write; this is one.”

⁹ 23 [?] ENCYCLOPEDIA BRITANNICA 75 (11th edition, 1911) [*get exact reference from Barbara Black*]. See also William Twining, Bentham on Torture, 24 NORTHERN IRELAND LEGAL QUARTERLY 305 (1973), at p. 305.

¹⁰ Cf. Judith Shklar, The Liberalism of Fear in LIBERALISM AND THE MORAL LIFE (Nancy Rosenblum ed., 1989) 21, p. 27: “In Europe and North America torture had gradually been eliminated from the practices of government, and there was hope that it might eventually disappear everywhere. With the intelligence and loyalty requirements of the national warfare states that quickly developed [after 1914], torture returned and has flourished on a colossal scale. ... [A]cute fear has again become the most common form of social control.”

Perhaps what is remarkable is not that torture is used, but that it is being defended¹¹ (or something very close to it is being defended) and defended not just by the hard men of state security agencies but by some well-known American jurists and law professors. Here are three examples:

(i) Professor John Yoo now teaches law at the University of California at Berkeley. But 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 memo,¹² persuading the Bush administration to withdraw the administration's recognition of the rules imposed by the Geneva Conventions so far as the treatment of prisoners belonging to Al Qaeda and the Taliban was concerned. This pertains particularly to the issue of interrogation and torture. Despite the fact that the Geneva Conventions impose a prohibition on torture in relation to every single category of detainee they consider (civilians, POWs, captured insurgents, captured members of irregular forces), Professor Yoo argued that captured members of Al Qaeda and the Taliban were not protected by any such prohibition because the particular category of armed conflict in which they were involved was not explicitly mentioned in any of the Conventions under a description that the Bush administration would accept.¹³ Moreover Professor Yoo argued that the administration could not be constrained by any inference from the Conventions so far as torture was concerned, nor could it be constrained in this regard by ius cogens norms of customary international law.

(ii) Alan Dershowitz is a professor at Harvard Law School. In two well publicized books, Professor Dershowitz has argued that torture may be a not unacceptable method –

¹¹ Cf. Siderman de Blake v. Republic of Argentina 965 F.2d 699 C.A.9 (Cal.),1992, __: “That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it.”

¹² John Yoo and Robert J. Delahunty, Application of Treaties and Laws to Al Qaeda and Taliban Detainees, Memorandum for William J. Haynes, General Counsel, Department of Defense, January 9, 2002.

¹³This position was also urged by White House counsel Alberto Gonzalez, who characterized aspects of the Geneva Convention protections as “quaint” and “obsolete.” (See Julian Coman, Interrogation abuses were 'approved at highest levels', SUNDAY TELEGRAPH(LONDON), June 13, 2004, p. 26.) At the time of writing [December 2004], Gonzalez has been nominated by President Bush for the office of Attorney-General of the United States.

morally and constitutionally – for use by United States officials if it is needed to extract information from terrorists that may lead to the immediate saving of lives.¹⁴ He has in mind forms of non-lethal torture, such as (in his phrase) “a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life.”¹⁵ 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.

(iii) Jay Bybee was once a law professor at Louisiana State University and at the University of Nevada, and in March 2003 he was confirmed as a judge on the Ninth Circuit. Between 2001 and 2003 Judge Bybee was head of the Office of Legal Counsel in the Department of Justice, and in that capacity he put his name to a memorandum sent to the White House purporting to narrow the definition (or the administration’s understanding of the definition) of “torture” so that it does not cover all cases of the deliberate infliction of pain in the course of interrogation.¹⁶ 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. He also argued that legislation restricting the use of torture by U.S. forces under any definition might be unconstitutional as a restriction on the President’s power as Commander-in-Chief.

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 to an active doctrine of pre-emptive 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

¹⁴ ALAN DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE (2002), 470-7 and ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002) 132-63. See also, more recently, Alan Dershowitz, Tortured Reasoning in TORTURE: A COLLECTION (Sanford Levinson ed., 2004) 257.

¹⁵ DERSHOWITZ, WHY TERRORISM WORKS, 144.

¹⁶ Memo: “Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A,” from the Justice Department’s Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush. Dated August 1, 2002.

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 which we have occupied (allegedly in pursuit of 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 the 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 11.¹⁷ The various municipal and international law prohibitions on torture are set up precisely to address the circumstances in which 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 circumstances. 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 and fear 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 are undertaken by lawyers.¹⁸ Sure, our primary objection to torture ought to be articulated in regard to the immediate situation of those who are going to suffer the treatment that Dershowitz, Bybee, and Yoo 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

¹⁷ 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 on Human Rights and the Fight Against Terrorism in July 2002, which included a reaffirmation of the absolute prohibition of torture, saying that "[t]he use of torture or of inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of" (For this reference, I am grateful to Sanford Levinson, "Precommitment" and "Postcommitment": The Ban on Torture in the Wake of September 11 81 Texas Law Review 2013 (2003), at 2016.)

¹⁸ See also the expression of concern in Andrew Rosenthal, Legal Breach: The Government's Attorneys and Abu Ghraib, NY TIMES, December 30, 2004, p. __ Richard H. Weisberg, Loose Professionalism, Or Why Lawyers Take the Lead on Torture, unpublished manuscript on file with author. David Luban, Liberalism and the Unpleasant Question of Torture, unpublished manuscript on file with author, pp. 37-41.

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 and specifically about its place in our legal system.

In what follows I want to do several things. In Part II of the paper, 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 all 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.”

In Part IV of the paper, I want to explore the idea that narrowing or otherwise undermining the definition of torture might deal a body blow to the corpus juris, which goes beyond the immediate effects on the mentality of torturers and the terror and suffering of their victims. I will precede that discussion with some meditation in Part III on legal and moral absolutes. In both Part III and Part IV, I want to defend the proposition that torture is repugnant to the spirit of our law, and I want to consider the jurisprudence that might be necessary to make sense of that proposition.

Finally in Part V, I will extend the analysis to consider also the relation between prohibition on torture and the idea of the Rule of Law, specifically the idea of subjecting the modern state to legal control. And I will consider also the application of the argument in Part IV to the role played by the prohibition on torture in international law, and in particular the international law of human rights.

Part II: Definitions

3. 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 as “the Covenant”):

Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [...] ¹⁹

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,” but Article 4 also insists that no derogation from Article 7 may be made under that provision. The United States ratified the Covenant on _____, 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. ²⁰

The more specific international Convention against Torture (which I shall call “the Convention”) requires states to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,” ²¹ and to “ensure that all acts of torture are offences under its criminal law.” ²² Again there is a non-

¹⁹ *Formal citation.* There is also a provision in Article 7 prohibiting medical experimentation without consent.

²⁰ Citation

²¹ *Formal citation.* CONVENTION AGAINST TORTURE, Article 2 (1).

²² *Ibid.*, Article 4 (1) . The Convention also imposes requirements of non-refoulement of refugees likely to face torture (Article 3), requirements to ensure that officials are prohibited from using torture and that the prohibition is included in their training (Article 10), requirements promptly to investigate allegations of torture (Article 12), to protect complainants against further ill-treatment or retaliation (Article 13), and to

derogation provision (implying in effect that states must establish an absolute rather than a conditional ban on torture),²³ and again there is a similar reservation (relating not to torture, but to cruel, inhuman and degrading treatment) in the U.S. ratification of the Convention.²⁴ The Convention does what the Covenant does not do (and also what other regional human rights instruments such as the European Convention on Human Rights do not do),²⁵ namely, it attempts a definition of torture:

For the purposes of this Convention, 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.²⁶

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.

secure a right to redress and compensation for victims of torture (Article 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”(Article 15).

²³ Ibid., Article 2 (2): “No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

²⁴ Cite.

²⁵ The relevant provisions of the EUROPEAN CONVENTION ON HUMAN RIGHTS are as follows: Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 15: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation.... No derogation from ... Article 3 ... shall be made under this provision.”

²⁶ CONVENTION AGAINST TORTURE, Article 1 (1); however, Article 1 (2) says that this “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

In pursuance of its obligations under the Convention, the United States has enacted legislation forbidding torture outside the United States by persons subject to US jurisdiction.²⁷ The anti-torture statute²⁸ makes it an offense punishable by up to 20 years imprisonment to commit, conspire or attempt to commit torture (adding that this is punishable by death or life imprisonment if the victim of torture dies as a result). The statute defines torture as follows:

As used in this chapter, ... "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.²⁹

And there is an additional definition of "severe mental pain and suffering" in terms of "prolonged mental harm" resulting from the threat of death or physical torture or the use of mind-altering substances on oneself or others.³⁰

Finally, there are the Geneva Conventions, which deal with the treatment of various categories of vulnerable individuals in circumstances of armed conflict. The best known provision is Article 17 of the Third Geneva Convention which provides that "No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever."³¹ In addition the four Geneva Conventions share a common Article – Article 3 – which provides, among other things, that

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

²⁷It is assumed that ordinary provisions of criminal and constitutional law sufficiently prohibit torture within the United States.

²⁸18 USC 2340A. *Date?*

²⁹18 USC 2340 (1)

³⁰ *Ibid.*, (2).

³¹Citation

whatsoever with respect to the above-mentioned persons: ... violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; ... [and] outrages upon personal dignity, in particular humiliating and degrading treatment....³²

Common Article 3 applies to all the persons whom the Geneva Conventions protect, i.e. not just prisoners of war, but wounded soldiers, shipwrecked sailors, detained members of irregular forces, and so on,

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, in what follows, to “the prohibition on torture” (or “the rule against torture”), though sometimes one element in this interlocking set, sometimes another, will be most prominent.

4. Rules and Backgrounds *[omit?]*

I want to pause now and ask: how should we regard the prohibitory effect of these provisions? When we think about a legal prohibition we can think about it in one of two ways using the old distinction between mala prohibita and mala in se:

(i) On the mala prohibita approach, we may think about the text of the relevant 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 and impose parking fees. So now our freedom is limited. Those limits are defined by the regulations 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. Over-parking is a malum prohibitum offense: it consists in 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.

³²Citation.

(ii) The other approach is more like a mala 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.³³ 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 (i) and (ii) might seem to depend on 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 requirement.³⁴ But that need not be so. All we need in order to make sense of (ii) and distinguish it from (i), is that there is some normative background to the prohibition which the law can recognize. 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, to which the municipal legislature has some sort of obligation. Also the distinction between (i) and (ii) 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: don't park unsafely or inconsiderately, don't block access, and so on; these reasons do not evaporate when the explicit regulations are introduced.

In any case, I think it is obvious that the anti-torture statute³⁵ cannot be construed according to model (i). It does not represent the first introduction of a prohibition into an

³³For an excellent discussion of what this involves, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 281-90 (1980).

³⁴ See for example I BLACKSTONE, COMMENTARIES Ch. 2.: “[C]rimes and misdemeanors, that are forbidden by the superior laws, and therefore stiled 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.”

³⁵ 18 USC 2340. See above, text accompanying notes 28-30.

area that was previously unregulated, and in which everyone was at liberty to do what he liked. On the contrary, the statute fulfilled a treaty obligation that the US already had under the Convention, and it also applied and extended the spirit of existing criminal law and 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 area of freedom. Like all human rights instruments, they have what Gerald Neuman has called a suprapositive aspect: they are “conceived as reflections of nonlegal principles that have normative force independent of their embodiment in law, or even superior to the positive legal system.”³⁶ Though formally they are treaties and, as such, based on the actual consent of the states that are party to them, they also represent a consensual acknowledgment of deeper background norms.

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, it may be thought 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. So it may be thought that approach (i) is appropriate for that case, and that 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 memorandum³⁷ 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; when we run out of text, we revert to the default position, which is that we can do anything we like. Now – Yoo’s 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 Conventions

³⁶ See Gerald Neuman, Human Rights and Constitutional Rights: Harmony and Dissonance, 55 STANFORD LAW REVIEW 1863 (2003), 192.

³⁷ Supra note 13.

stipulate for persons protected by the prohibitions they have introduced. So – Yoo concludes – 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.

Yoo’s approach is wrong in two 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 (e.g. against 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.³⁸ That’s how lawyers generally proceed. (That’s 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.) But Professor Yoo proceeds as though the methods of analogy and 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 ius 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.³⁹ But such argument as he provides for this assertion relies on the mala prohibita approach, which (as we have already seen) is inherently inappropriate in this area.

³⁸ See the discussion of Wittgenstein and rule-following in Margaret Radin, Reconsidering the Rule of Law, 69 BOSTON UNIVERSITY LAW REVIEW 781 (1989). [*Also refs to Leiter and Moglen?*]

³⁹ *Cite to relevant passage of Yoo memorandum.*

5. 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,⁴⁰ or that we can recognize this evil using a sort of visceral “puke” test.⁴¹ 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.”⁴² 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 that there is far from a 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 set upon or put in fear of attack by dogs. Was this torture? Most commentators thought it was, but one or two American newspapers resisted the characterization, preferring the word “abuse.”⁴³ Some conservative commentators suggested that what happened was no

⁴⁰ This was what Justice Potter Stewart said, notoriously, about obscenity in Jacobellis v. Ohio 378 US 184 (1964)

⁴¹ Oliver Wendell Holmes once said that a law was unconstitutional unless it made him want to “puke.” (Letter to Harold Laski, October 23, 1906) in HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 (Mark DeWolfe Howe ed.), Vol. 2, p. 188. I am indebted for this reference to RICHARD POSNER, OVERCOMING LAW (1995), p. 192.

⁴² Hearing Before the Committee on Foreign Relations, United States Senate (101st Congress, Second Session) January 30, 1990 (Washington D.C.: U.S. Government Printing Office, 1990), p. 13.

⁴³ Geoffrey Nunberg, Don't Torture English to Soft-pedal Abuse, NEWSDAY, May 20, 2004, p. A50: “‘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.’”

worse than hazing.⁴⁴ I guess they wanted to convey the point 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.⁴⁵

Unlike the Covenant, the Convention against Torture and the American anti-torture statute offer more than just a term and an appeal to our intuitions. Their definitional provisions offer us ways of analyzing 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), with a certain mental element (intent), in certain circumstances (lack of consent). 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 statute and the Convention are the same: both, for example, distinguish torture from pain or suffering incidental to lawful sanctions. But debates about definition are likely to result from differences in the respective analyses: for example, the analyses of “mental torture” are slightly different.⁴⁶ 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 is said in what 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 anti-torture statute refer to the intentional infliction of severe pain or suffering. Since pain can be more or less severe, evidently the word “severe” is going to be a site for contestation as between

⁴⁴ Frank Rich, The War's Lost Weekend, NY TIMES, May 9, 2004, p. 2-1: “[A] former Army interrogation instructor, Tony Robinson, showed up on another 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 – that the abuse at Abu Ghraib was more like hazing than like torture – was seconded also by Rush Limbaugh. [*Citation.*]

⁴⁵ Similarly, Sir Gerald Fitzmaurice had asked this in his dissent in Ireland v. United Kingdom 25 Eur. Ct. H. R. 1(1977), at p. 21: if the 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?”

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, i.e. 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? Some theorists have not sought a restrictive definition of this kind. Jeremy Bentham worried about “the delusive power of words” in discussions of torture.⁴⁷ 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.⁴⁸

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. 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 ought not to meddle with, and having forbidden him in vain pinches him till he lays it down.”⁴⁹ 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 is, after all, a consequentialist and the currency of his consequentialism is pain as well as pleasure. He thinks the meanings of words should be adjusted to facilitate a substantive debate about which inflictions of pain are justified and which not, rather than assuming in advance that

⁴⁶ *Citations*. It is a weakness of this paper 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 paper; and this one is already too long.

⁴⁷ Jeremy Bentham, *Of Torture*, manuscript reproduced in Twining, *supra* note __, p. 308.

⁴⁸ *Ibid.*, p. 309.

⁴⁹ *Ibid.*, p. 310.

everything taken in by the term “torture” is necessarily illegitimate and then debating the definitional ramifications of that.⁵⁰

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.⁵¹

And 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.”⁵² 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 what they want is some sort of measure of severity, something to turn the existing vague standard into an operationalized rule. In section 6, we shall consider Jay Bybee’s attempt to provide just such a measure. But here I want to discuss the very idea of such precision.

⁵⁰ Bentham: “There is no approving [torture] in the lump, without militating against reason and humanity: nor condemning it without falling into absurdities and contradictions.” (cite)

⁵¹ Marcy Strauss, Torture, 48 NEW YORK LAW SCHOOL LAW REVIEW 203 (2003/2004)

⁵² *Ibid.*, p. 215. 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” (*ibid.*, p. 208 n16). But it’s silly to object to figurative uses. The same students who complain that Professor Strauss’s classes are “torture” will also say that her term-tests are murder, but that is not a ground for worrying about the legal definition of “murder.”

We should remember too 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. For example, in Terry v. Ohio, 392 U.S. 1 (1968), at 16: “[I]t is nothing less than sheer torture of the English language to suggest

What 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 a little bit below that number might seem to be excluded arbitrarily.⁵³ 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 is to chill that person's exercise of his 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?⁵⁴ 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 invoke the old principle that everything which is not expressly forbidden is permitted. But it is far from clear that this should be a principle applying to the state.⁵⁵ Indeed,

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.'"

⁵³ Cf. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARVARD LAW REVIEW 1685 (1976): "Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but not all of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of 'free will' directly to the facts of each case."

⁵⁴ I know there is a tradition of treating the state or its officials as individuals just like any other citizen: see A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION ____ (____). But this is generally in dispute. [*Ref to British literature on this - Jeffrey Jowell's book*]

⁵⁵ Cf. Bruce Harris, The Third Source of Authority for Government Action, 109 LAW QUARTERLY REVIEW 626 (1992).

constitutional doctrine often works the other way round: in the United States, everything which is not explicitly entrusted to the federal government is forbidden to it; it does not have plenary power.⁵⁶

However, although the prohibition on torture is intended in the first place 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 anti-torture statute purports to fulfill the United States' obligations under the Convention Against Torture by defining torture as an individual criminal offense. Many would say that inasmuch as 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.⁵⁷

Against all this, we need to remember that the charge of torture is unlikely to come "out of the blue" or to be entirely unanticipated by someone already engaged in the deliberate infliction of pain on prisoners: "I am shocked – shocked! – to find that 'water-boarding' or squeezing prisoners' genitals or setting dogs on them is regarded as torture." For remember we are talking about a particular element in the definition of torture: the severity element. The potential defendant we have to consider is one who already knows that he is inflicting considerable pain; that is his intention. It seems to me that the working definition of torture in this statute already gives him all the warning he needs that there is a huge risk in relying upon some casuistry about "severity" as a defense against allegations of torture.⁵⁸

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, it is evident

⁵⁶ Is the state entitled, as we sometimes think individuals are entitled (cf. F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (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*, 124 S.Ct. 2686 (U.S. Jun 28, 2004) at 2706: "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."

⁵⁷ Cf. *Staples v. United States*, 511 U.S. 600, 619 (1994) (lenity requires that "ambiguous criminal statute[s] ... be construed in favor of the accused").

⁵⁸ However, Gerald Neuman has argued forcefully (in a private communication to the author) that the concern for the individual is surely 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

from the tone and direction of the Bybee and Yoo memoranda that they are attempting to exploit this in the interests of state policy. They appeal to the principle of lenity, ostensibly in the interests of the individual soldier, but actually in order to foster a particular sort of definition which is more easily exploited in the interests of the state. 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 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 by the norm. 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.⁵⁹ 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 tax-payer who says, “I have an interest in arranging my affairs to lower my tax liability 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 round a bit and I need to know exactly how far I can go before it counts as domestic violence”; or the professor who says “I have an interest in flirting with my students and I need to know exactly how far I can go without falling foul of the sexual harassment rules.” There are some scales one really

⁵⁹Some material in this part of section 4 is adapted from Jeremy Waldron, Vagueness in Law and Language – Some Philosophical Perspectives, 82 CALIFORNIA LAW REVIEW 509 (1994).

shouldn't 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 and bright-line rules, analogous to the taxpayer's interest in pushing his entertainment deductions to the limit or the driver's interest in going at exactly 65 m.p.h.? 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 don't 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.⁶⁰

What is wrong with that argument? Well, it is true that all interrogation puts pressure on people to reveal what they would rather not reveal. But there are ways in which the law can pressure people while still respecting them as persons and without using any form of brutality. And it is quite wrong to suggest that these forms of respectful pressure are on the same scale as torture, just further down the line. So for example: a hostile witness under sub poena on the witness stand (in a case where there is no issue of self-incrimination) is pressured to answer questions truthfully and give information that he would rather not give. The examination or cross-examination may be 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.⁶¹ Even so, there is a difference of quality, not just a difference of degree, between the coercion posed by legally established penalties for non-compliance and the sort of force that involves using pain to twist the agency and break the will of the person being

⁶⁰ See Bradley Graham, Abuse Probes' Impact Concerns the Military; Chilling Effect on Operations Is Cited, WASHINGTON POST, August 29, 2004, p. A20.

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 non-lethal torture. Yet we continue to threaten and use the pain of imprisonment to loosen the tongues of reluctant witnesses.⁶²

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

Some have argued that 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.⁶³ 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 very small tilted chair (the Shabeh).⁶⁴

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

⁶¹ For a more complete account of coercion see Robert Nozick, Coercion in PHILOSOPHY, POLITICS AND SOCIETY 101 (4th series, ed. Peter Laslett, W.G. Runciman, and Quentin Skinner, 1972).

⁶² DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 147

⁶³ Acknowledgment to Jacob Levy and Melissa Williams in discussion.

⁶⁴ Cite to Black Book: Israel and Palestine.

to question whether that's a continuum an official has a legitimate reason for being on. The former choice – failing to provide a armchair or a cushion – is not.

If I am right about all this, then there is reason to entertain some suspicion about the attempts in recent Bush administration memoranda 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, this enterprise might represent 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.

6. The Bybee memorandum

I have talked a little about 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.⁶⁵ Now I want to focus on it more specifically. Its fifty pages give what some have described as the most lenient interpretation conceivable to the anti-torture convention and other anti-torture provisions.⁶⁶ (Though subsequently it was officially repudiated, in fact large sections of the Bybee memorandum were incorporated more or less verbatim into what is now known as the Haynes memorandum, produced by a working group set up in the Pentagon in January 2003 to reconsider interrogation methods.)⁶⁷

According to Jay Bybee, it is plain that the relevant legal provisions prohibit as torture "only extreme acts" and penalize as torture "only the most egregious conduct."

⁶⁵ Memo: "Re: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A," from the Justice Department's Office of Legal Counsel for Alberto R. Gonzales, counsel to President Bush. Dated August 1, 2002. (Hereinafter cited as "Bybee memorandum.")

⁶⁶ References.

⁶⁷ William J. Haynes II, Action memo: "Counter-Resistance Techniques," (for Secretary of Defense, from General Counsel of the Department of Defense), November 27, 2002. For discussion of the relation between the Bybee and the Haynes memoranda, see Herman Schwartz, Judgeship Nominees: Twisting the Law on Interrogating Detainees, NEWSDAY, August 18, 2004, p. A39.

He notes that the American ratification of the Convention Against Torture was accompanied by the following understanding

The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering⁶⁸

In discussions at the time, it was suggested that the word “torture” should be “reserved for extreme deliberate and unusually cruel practices, for example, sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain.”⁶⁹ Administration officials added that such “rough treatment as generally falls into the category of ‘police brutality,’ while deplorable, does not amount to ‘torture.’”⁷⁰ Although it is conceded that this sort of brutality might amount to “inhuman treatment,” Bybee noted that the US made a reservation to that part of the Convention Against Torture too, saying that the prohibition on inhuman treatment does not apply to the extent that it purports to prohibit anything permitted by the U.S. Constitution as currently interpreted.⁷¹ 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.”⁷²

It is clear, then, what sort of continuum Bybee thinks interrogators should be on, in relation to which they have an interest in knowing the precise location of a torture threshold. It is not a continuum of pressure, nor is it a continuum of unwelcome penalties,

⁶⁸ Bybee memorandum, p. 16 (citing S. Treaty Doc. 100-20 at 4-5). See supra, text accompanying note 20.

⁶⁹ Bybee memorandum, pp. 16-17 (citing S. Exec. Rep. No. 101-30, at 14 (1990)).

⁷⁰ These comments came in the comments that accompanied the Administration's recommendation of the treaty to the Senate-- U.S. Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 138 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990)

⁷¹ Bybee memorandum, p. 17 (citing S. Treaty Doc. 100-20 at 15-16).

⁷² Cite

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?” If we cannot answer this, Bybee fears, our interrogators may be chilled from any sort of deliberate infliction of pain on detainees. And that, he implies, would be a bad thing. Or, he notes, interrogators are not very strongly or categorically prohibited from working somewhere along a continuum of inhuman and degrading treatment, and the question is where precisely on that continuum of inhumanity and degradation, do they cross the line into torture. People need to have a sense of where that line is, Bybee suggests, for if they did not, they might be chilled from any sort of infliction of degradation or from any sort of inhumane treatment. And we don’t want that to be chilled, or at any rate we don’t want that to be chilled as much as torture is.

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 (ECHR), even though the ECHR does not apply to the United States. The leading case is one I have already mentioned – Ireland v. United Kingdom (1977),⁷³ in which the European Court of Human Rights assessed methods of interrogation used by the British in Northern Ireland. 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. In holding that the use of these methods did not constitute torture, the Court observed:

it appears ... that it was the intention that the Convention, with its distinction between “torture” and “inhuman or degrading treatment”, should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.⁷⁴

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

⁷³ Ireland v. United Kingdom 25 Eur. Ct. H.R. 1 (1977).

⁷⁴ *Ibid.*, para 168.

extreme version of the second.⁷⁵ (This is important because, as I said at the outset, the methods condemned in Ireland v. UK are very similar to the methods that were being used in Guantanamo Bay at the time Bybee wrote his memorandum.)⁷⁶

However, Bybee failed to mention two things about this decision. He failed to mention that in Ireland v. UK, the European Commission of Human Rights⁷⁷ concluded that the five techniques, in combination, were torture and not just inhuman or degrading treatment. Both parties to the suit and a minority of judges on the Court accepted this determination.⁷⁸ More important, 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 since the Court determined that their application treated the suspects in an inhuman and degrading manner, they were prohibited nonetheless. 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 is concerned. The Article 15 non-derogation provision applies to both,⁷⁹ and the Court's comments about "special stigma" do not affect that.⁸⁰ 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 as between the ECHR and the American torture statute (together with its background in the Convention Against Torture), any extrapolation of support from an approach taken under the former is likely to be suspect.

⁷⁵ Bybee memorandum, p. 29.

⁷⁶ See above note 6, and accompanying text.

⁷⁷ The European Commission of Human Rights is like an investigating magistracy for the European Court of Human Rights. Its report is presented first to the Court, and then the Court makes a final determination.

⁷⁸ Dissenting Judge Zekia said this was an issue on which the Court should have deferred to the fact-finder (i.e., the Commission), especially when its finding was uncontested by the parties.

⁷⁹ See note 25 above.

⁸⁰ Indeed, had the Court been confronted with the situation Bybee thinks he is confronted with – a situation in which there is a weaker prohibition on abuse that is merely 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

All that 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 – “excruciating,” “agonizing” and the like. But they all seem to defy operationalization in the same way: the intensity, the severity, the agonizing or excruciating character of pain are all subjective and to a certain extent inscrutable phenomena.⁸¹ One thing Bybee said, in an 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.”⁸² 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 – placing the health of the individual ... (i) 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

⁸¹ Cf Strauss, op. cit., p. 211: “Defining torture based on the degree of pain is also fruitless. The amount of physical abuse that causes ‘significant’ pain cannot be measured objectively, and would provide little guidance to interrogators.”

⁸² Bybee memorandum, p. 5.

a substantially different subject from §2340, they are nonetheless helpful for understanding what constitutes severe pain.⁸³

From this, Bybee concluded that “physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of body function, or even death.”⁸⁴

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 anti-torture statute (with the purposes characteristically associated 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 health care regime. Bybee thinks the medical administration statute can still cast some light on the definition of torture.

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 statutory provision that Bybee quotes uses conditions (i) through (iii) to define the phrase “emergency condition,” not to define “severe pain.”⁸⁵ The medical administration statute says that severe symptoms (including severe pain) add up to an emergency condition if conditions (i), (ii) or (iii) are satisfied. But since the anti-torture statute doesn’t use the term “emergency condition,” conditions (i) to (iii) are irrelevant to its interpretation.⁸⁶ Secondly, 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

⁸³ Ibid., pp. 5-6.

⁸⁴ Ibid., p. 6.

⁸⁵ David Luban has reached similar conclusions about Bybee’s analysis in Liberalism and the Unpleasant Question of Torture, unpublished manuscript (on file with author), p. 26.

⁸⁶ Bill Dailey has argued in conversation that Bybee may have read the parenthetical phrase “(including severe pain)” in the medical legislation as an appositive to the phrase “acute symptoms of sufficient severity” so that the former phrase takes its meaning from the way the latter phrase is defined. I find this a contorted and unconvincing reading.

impairment or dysfunction if left untreated, whereas what Bybee infers from it is that pain counts as severe only if it is associated with (which is naturally read as “caused by”) organic impairment or dysfunction.

The 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 mistakes, 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 care with this most important of issues. Bybee’s mistakes distort the character of the legal prohibition on torture and strive to create an impression in his audience that there is more room for the lawful infliction of pain in interrogation than a casual acquaintance with the anti-torture statute might suggest. Whether this distortion was deliberate I would not care to say. Fortunately someone in administration felt that he had gone too far: this part of Bybee’s memorandum was not incorporated into the Haynes memorandum which took on board most of the rest of it, and much of the Bybee approach to the definition of torture appears to have been rejected by the administration in its most recent deliverances on the subject.⁸⁷

⁸⁷ For the Haynes memorandum, see note 69 above. See also Neil A. Lewis, Justice Dept. Toughens Rule on Torture, THE NEW YORK TIMES, January 1, 2005, p. ___.

Part III: Absolutes

7. 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.⁸⁸ Legal prohibitions are not set in stone. Changing the definition 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.⁸⁹ It doesn't 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; any attempt to extend prohibitions on torture to modes of interrogation authorized by the President would be unconstitutional.⁹⁰ This is not just tinkering with the detail 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

⁸⁸ See also the discussion in Jeremy Waldron, Security and Liberty: the Image of Balance, 11 JOURNAL OF POLITICAL PHILOSOPHY 191 (2003).

⁸⁹ Bybee memorandum, op. cit., p. 35-6: "Section 2340A may be unconstitutional if applied to interrogations undertaken of enemy combatants pursuant to the President's Commander-in-Chief powers. We find that in the circumstances of the current war against al-Qaeda and its allies, prosecution under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional infringement of the President's authority to conduct war."

⁹⁰ Bybee memorandum, p. 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."

whole area of law-making thought out-of-bounds is in-bounds or vice versa).⁹¹ Why is it so shocking in this instance?

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’s 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 memo or 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?⁹² Is there a literal meaning of “sacred” in this secular age?

Some among the drafters of the European Convention 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. Cocks:

[T]he Consultative Assembly takes this opportunity of declaring that all forms of physical torture ... are inconsistent with civilized society, are offences against heaven and humanity, and must be prohibited. It declares that this prohibition must be absolute, and that torture cannot be permitted for any purpose whatsoever, neither for extracting evidence, for saving life nor even for the safety of the State. It believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain⁹³

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

⁹¹ See for example the discussion in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) at 861-6 of cases like West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) which overruled whole swathes of existing constitutional doctrine.

⁹² Martha Minow suggested this version of the question I am asking.

⁹³ THE COUNCIL OF EUROPE, COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Vol. II (August-November 1949) (The Hague: Martinus Nijhoff, 1975), pp. 36-40.

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 it is a sin against the Holy Ghost for which there is no forgiveness.⁹⁴

Mr. Cock's fellow delegates applauded his sentiments – nobody disagreed with his fierce absolutism on this issue – but they thought this was inappropriate to include in their report. And you can see their point. It's all very well to talk about “the sin against the Holy Ghost”⁹⁵ and “crimes against high heaven and humanity,” but these are not exactly legal ideas, and it's unlikely that they resonate even with my good-hearted readers let alone steely-eyed lawyers in the Justice Department.

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

There are some fairly well-known ways of conceiving the indispensability of certain legal norms. We have already considered the distinction between mala in se and mala prohibita.⁹⁶ There is H.L.A. Hart's idea of “the minimum content of natural law” – certain kinds of rule that a legal system couldn't possibly do without, given humans as they are and the world as it is.⁹⁷ Less philosophically, we understand that there are things that in theory law-makers might do but are in fact very unlikely to do: “If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed

⁹⁴ Ibid., p. ____ . (I would like to acknowledge EDWARD PETERS, TORTURE ____ (1985) for this reference.)

⁹⁵ The reference is to Mark 3: 29 and Luke 12: 10; but those passages seem to indicate that the sin against the Holy Ghost is a form of blasphemy or denial.

⁹⁶ See above section 4, text accompanying notes 33-4.

⁹⁷ See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARVARD LAW REVIEW 593 (1958): “[S]uppose that men were to become invulnerable to attack by each other, were clad perhaps like giant land crabs with an impenetrable carapace... 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.” See also H.L.A. HART, THE CONCEPT OF LAW, pp. 193-9.

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.”⁹⁸

There are also various legal ways to diminish the vulnerability of a norm to revision, redefinition or repeal: (i) A rule might be entrenched in a constitution as proof against casual or bare majoritarian alteration. (ii) A provision of international law might acquire the status of ius cogens, as proof against the vagaries of consent that dominate treaty-based international law. (iii) A human rights norm might be associated with an explicit non-derogation clause as proof against the thought that it is alright to abandon rights-based scruples in times of 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 (i), the identification of international norms against torture as ius cogens is an example of (ii),⁹⁹ and of course the non-derogation provisions of the European Convention on Human Rights in relation to Article 3 of that Convention offer a fine example of (iii).¹⁰⁰ 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 not to cover any maltreatment that is not imposed as punishment in the context of the criminal process.¹⁰¹ 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

⁹⁸ Cf. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Liberty Fund edition, 1982), p. 33 (quoting STEPHEN, SCIENCE OF ETHICS 143).

⁹⁹ Ninth circuit In re Estate of Ferdinand E. Marcos 25 F.3d 1467, 1475 (9th Cir. 1994): "The right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of jus cogens. The crack of the whip, the clamp of the thumb screw, the crush of the iron maiden, and, in these more efficient modern times, the shock of the electric cattle prod are forms of torture that the international order will not tolerate."

¹⁰⁰ ECHR Article 15. (See supra note 25). Also Article 7 of the Covenant explicitly states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," but Article 4.2 of the Covenant also, and just as explicitly, states that "[n]o derogation" from Article 7 is permitted.

¹⁰¹ Ingraham v. Wright 430 U.S. 651 (1977), which holds that this prohibition applies only to "punishment imposed as part of the criminal process." (Cf. also John Yoo's denial that indefinite detention at Guantanamo Bay violates the Eighth Amendment since it is not regarded by the administration as "punishment." (CS's report of NPR interview)

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 (e.g., 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.¹⁰² In the end, a legal prohibition is only as strong as the moral and political consensus that supports it.

And there's the difficulty. In these troubled times, it is not hard to make the idea of an absolute prohibition on torture, or any absolute prohibition, look silly, as a matter of moral philosophy. I don't mean that everyone is a consequentialist. There are good deontological accounts of the rule against torture, but they stop short of absolutism:¹⁰³ 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."¹⁰⁴ For a culture supposedly committed to human rights, we have amazing

¹⁰² A and others v. Secretary of State for the Home Department, [2004] All ER (D) 62 (Aug), Court of Appeal, 11 August 2004. The relevant holding was: "The Secretary of State could not rely on a statement which his agents had procured by torture, or with his agent's connivance at torture. He was not, however, precluded from relying ... on evidence coming into his hands which had or might have been obtained through torture by agencies of other states over which he had no power of direction." (This despite the simple and unconditional nature of CONVENTION AGAINST TORTURE, Article 15: "Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.") *House of Lords decision pending*

¹⁰³ See, e.g., Thomas Nagel, Autonomy and Deontology, in CONSEQUENTIALISM AND ITS CRITICS (Samuel Scheffler ed. 1988), 142 at 156-67, and a fine new paper by David Sussman, What's Wrong with Torture? forthcoming in PHILOSOPHY AND PUBLIC AFFAIRS. But as Sussman points out (*ibid.*, p. ___) giving an account of inherent wrongness of torture is one thing, giving an account which shows that what is inherently wrong may never in any circumstances be done is another. "Inherently" does not mean the same as "absolutely."

¹⁰⁴ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, p. 30n.: "The question of whether these side constraints are absolute, or whether they may be violated in order to avoid catastrophic moral horror, and if the latter, what the resulting structure might look like, is one I hope largely to avoid." See also Sanford H. Kadish, Torture, the State and the Individual, 23 ISRAEL LAW REVIEW 345 (1989), at 346: "The use of torture is so profound a violation of a human right that almost nothing can redeem it – almost, because one cannot rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person..." (my emphasis).

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 men in our position cannot afford to be made to look ridiculous.

8. The Dershowitz strategy

This tendency is exacerbated by the way we pose the question of torture to ourselves. Law school classes 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:¹⁰⁵ a little bit of pain from the needles for him versus a hundred thousand people saved from nuclear incineration.¹⁰⁶ Of course after September 11, 2001, the hypotheticals are beginning to look a little less fantastic. Dershowitz asks: “[W]hat 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

¹⁰⁵ *But acknowledge Sam Scheffler's point -- in conversation at Berkeley -- that there is a distinct between hypothetical cases that are designed to test, philosophically, what our views are based on, and hypothetical cases (like Dershowitz's) which are designed to tempt us away from moral absolutes.*

¹⁰⁶ See DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 132. It's a tradition reaching back to Jeremy Bentham, who writes in a passage quoted in DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 143):

Suppose ... a suspicion was entertained ... that at this very time a considerable number of individuals are actually suffering, by illegal violence inflictions equal in intensity to those which 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 superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was being practiced, should refuse to do so?

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

the information that would allow the target buildings to be evacuated?¹⁰⁷ How could anyone object to the use of torture if it were dedicated specifically to saving thousands of lives in a case like this?¹⁰⁸

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.¹⁰⁹ 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.”¹¹⁰ 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 non-lethal torture.¹¹¹ If the number of lives that can be saved is twice that of the number necessary to justify non-lethal torture, why not justify lethal torture or torture with unsterilized needles? 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, a mere expression of this concern does not answer Dershowitz’s question. Should we not be willing to allow the authorization of torture at least in a “ticking bomb” case – make it a ticking nuclear bomb in your home town, if you like – where we are sure that the detainee we are proposing to torture has the information that will save thousands of lives and that he will give it up only if subjected to excruciating pain?

One set of replies to this question – and to my mind, they are quite convincing replies – say that even if the basic fact-situation is no longer so fantastic (in light of the bizarre horrors of September 11), nevertheless the framing of the hypothetical is still far-

¹⁰⁷ DERSHOWITZ, WHY TERRORISM WORKS, op. cit., p. 477. [?? check page number]

¹⁰⁸ Luban, op. cit., p. 12, 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.”

¹⁰⁹ Kreimer, op. cit., 306

¹¹⁰ Kreimer, op. cit., 306.

¹¹¹ DERSHOWITZ, WHY TERRORISM WORKS, op. cit., 146.

fetched, inasmuch as it asks us to assume that torture warrants will work exactly as Professor Dershowitz says they should work.¹¹² The hypothetical asks us to assume that the power to authorize torture will not be abused, that intelligence officials will not lie about what is at stake or about the availability of the information, that the readiness to issue torture warrants in one case (where they may be justified by the sort of circumstances Dershowitz cites) will not lead to their extension to other cases (where the circumstances are somewhat less compelling), that a professional corps of torturers will not emerge who stand around looking for work,¹¹³ 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.¹¹⁴ 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 who are prepared to “push the

¹¹² The best version of this answer comes from Henry Shue, Torture, 7 PHILOSOPHY AND PUBLIC AFFAIRS 124 (1978) 124, at p. 14, 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. See also the discussion in Waldron, Security and Liberty, op. cit., 206-8.

¹¹³ Kreimer, op. cit., 322: “Modern regimes seem to find that torture is most effectively deployed by a corps of trained officers who can dispense it with cold and measured precision, and such bureaucrats will predictably seek outlets for their skills.” See also Luban, op. cit., p. 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.”

¹¹⁴ Alan Dershowitz, When Torture Is The Least Evil Of Terrible Options, THE TIMES HIGHER EDUCATION SUPPLEMENT, June 11, 2004, p. 20: “Abu Ghraib occurred precisely because US policy consisted of rampant hypocrisy: our President and Secretary of Defense publicly announced an absolute prohibition on all torture, and then with a wink and a nod sent a clear message to soldiers to do what you have to do to get information and to soften up suspects for interrogation. Because there was no warrant – indeed no official authorization for any extraordinary interrogation methods – there were no standards, no limitations and no accountability. I doubt whether any President, Secretary of Defense or Chief Justice would ever have given written authorization to beat or sexually humiliate low-value detainees.”

envelope” trespassing into territory that goes beyond what is legally permitted.¹¹⁵ Moreover there will always be individuals who act in a way that is simply abusive relative to whatever authorization is given them. There is, as Henry Shue notes, “considerable evidence of all torture’s metastatic tendency.”¹¹⁶ 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.¹¹⁷ If ever there was a case for Augustinian suspicion of the idea that basic human depravity can be channeled to social advantage, this is it. Remember too that we are not asking whether these motives can be judicially regulated in the abstract. We are asking whether they can be regulated in the kind of circumstances of fear, anger, stress, danger, panic and terror in which, realistically, the hypothetical case must be posed.¹¹⁸

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.¹¹⁹ 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 paper I want to

¹¹⁵ Cf. Kreimer, *op. cit.*, 322-3: “Some officials will tend to view their legally permitted scope of action as the starting point from which to push the envelope in pursuit of their appointed task. ... The wider the scope of legally permitted action, the wider the resulting expansion of extralegal physical pressure.”

¹¹⁶ Shue, *op. cit.*, p. 143.

¹¹⁷ Incidentally, it is worth noting the role that the pornographic character of modern American culture played in determining the sort of images and tableaux that seemed appealing to the torturers at Abu Ghraib. (Is it asking too much to expect that those who “defend to the death” our right to suffuse society with pornographic imagery might acknowledge this as one of its not-entirely-harmless effects?)

¹¹⁸ See also the discussion in JEREMY WALDRON, *THE LAW* (1990), 102-3.

explore an additional idea. This is the idea that certain things might be just repugnant to the spirit of our law, and that torture may be one of them. Specifically I want to make and explore the claim that the rule against torture plays an important emblematic role so far as the spirit of our law is concerned.

Part IV: Archetypes

9. Repugnance to Law

Why does the prospect of judicially authorizing torture (whether it is called “torture” or not) 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 more systemic corrupting effect – of this abomination’s 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,¹²⁰ made famous in recent jurisprudence by its discussion in Robert Cover’s book Justice Accused.¹²¹ James Somerset was an African slave belonging to a resident of Virginia, who was brought to England by his master in 1769. Somerset made a bid for freedom, running away from his master, but was apprehended and detained aboard ship for a voyage to Jamaica (where his master proposed to resell him). A writ of habeas corpus was brought on Somerset’s behalf, and of course counsel for the detainers argued that the English courts were required to recognize Somerset’s slave status and his master’s property rights as a matter of private international law. Counsel for the petitioner, though, opposed that argument in terms that I want to draw on. He asked:

¹¹⁹ Cf. Oren Gross, Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience 88 MINNESOTA LAW REVIEW 1481 (2004).

¹²⁰ Somerset v. Stewart 1 Lofft’s Rep. 1; 98 Eng. Rep. 499. (1772)

¹²¹ ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) 16-17 and 87-8.

[S]hall an attempt to introduce perpetual servitude here to this island [Great Britain] hope for countenance? ... [T]he laws, the genius and spirit of the constitution, forbid the approach of slavery; will not suffer it's existence here. ... I mean, the proof of our mild and just constitution is ill adapted to the reception of arbitrary maxims and practices.¹²²

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

[T]he state of slavery is of such a nature that it is incapable of being introduced on any reasons ... but only by positive law. ... It is so odious, that nothing can be suffered to support it, but positive law.¹²³

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 “law.” If Parliament established slavery, then slavery 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 “so high an act of dominion” that nothing but an explicit enactment would do to legitimate it. That is why any attempt to bring it in by the back door – or to bring in its effects so far as liberty is concerned – would have to be resisted.

Something analogous is true of torture. There is no question but that it could be introduced into our law, directly by legislation, or indirectly by so narrowing a 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. For there is in the heritage of Anglo-American law, a long tradition of rejecting torture and of regarding it as alien to

¹²² Somerset v. Stewart, op. cit., at ___.

¹²³ Ibid., p. 17.

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.¹²⁴ 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.¹²⁵

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,¹²⁶ 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."¹²⁷ Be that as it may, torture is certainly seen by most jurists – or has been 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 they refer to as "the kind of custodial interrogation that was once employed by the Star Chamber, by the Germans of the 1930's and early 1940's."¹²⁸

There have been, and are now, certain foreign nations with governments ... which convict individuals with testimony obtained by police organizations possessed of

¹²⁴ I shall say more about this distinction in section 14 below.

¹²⁵ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, cite. Vol. ___, 257-8).

¹²⁶ See JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF : EUROPE AND ENGLAND IN THE ANCIEN RÉGIME (1977).

¹²⁷ EDWARD PETERS, TORTURE 75 (expanded ed. 1996). 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.").

¹²⁸ *Chavez v. Martinez*, 123 S. Ct. 1994, 2012 (2003) (Stevens, J., dissenting in part).

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.¹²⁹

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

Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.... The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other 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.¹³⁰

Torture may be something that happens elsewhere in the world, but not in a free country, or not in (what used to be referred to as) a Christian country,¹³¹ or at any rate, not under

¹²⁹ Ashcraft et al. v. State of Tennessee, 322 U.S. 143 (1944)

¹³⁰ Chambers v. Florida 309 US 227 (1940) at 236-38.

¹³¹ The availability of torture under Muslim governments used to be 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 Ross v. McIntyre, 140 U.S. 453 (___) at 462-3

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to ... assist in adjusting their disputes ... goes back to a very early period ... In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen, and to sit in judgment upon them when charged with public offenses. After the rise of Islamism, and the spread of its followers over western Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all ... proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of ... the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments [to] withdraw the trial of their subjects ... from the arbitrary and despotic action of the local officials.

the law of a country like ours. Our constitutional arrangements are spurred precisely by the desire to set the face of our law against such “ancient evils.”¹³²

In section 13, 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.

10. Positivism and Legal Archetypes

One of the things that people have found consistently 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 effect on any of the others.¹³³ This way of viewing law attracts two sorts of criticisms. First, it does not give enough attention to the importance of structure and system in the law, i.e. to the way various provisions, precedents, and doctrines hang together, adding up to a whole that is greater than the sum of its parts. Secondly, the positivist picture fails to give adequate consideration to things other than rules – background principles, policies, purposes, and the like, which pervade the law even if they are not explicitly posited.

The latter was of course Ronald Dworkin's criticism,¹³⁴ outlined by him 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; only they are distinctively legal, being emergent features of actually existing legal systems and varying from country to country in a way that moral considerations do not.¹³⁵ Policies, principles and so on operate as background features; they do their work behind the legal rules, pervading doctrine, filling in gaps, helping us with hard cases, providing touchstones for

¹³² Chambers v. Florida 309 US 227 (1940) at 236.

¹³³ See, e.g., Richard H. Fallon, Reflections on the Hart and Wechsler Paradigm, 47 VANDERBILT LAW REVIEW 953, at 953 (1994). Admittedly this is something of a caricature of legal positivism as a philosophical theory. For a positivist's discussion of the inter-connectedness of norms in a legal system, see JOSEPH RAZ, PRACTICAL REASON AND NORMS (New edition, 1999), 107 ff. See also Jeremy Waldron, Transcendental Nonsense and System in the Law, 100 COLUMBIA LAW REVIEW 16 (2000) 16 at pp. __

¹³⁴ See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) __ .

¹³⁵ Kenneth Kress and Larry Alexander, Against Legal Principles, in 82 IOWA LAW REVIEW 739 (1997).

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 paper is that the prohibition on torture operates not only as a rule, but also just like one of those background features that Dworkin has identified.

On the first 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.¹³⁶ 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 is not just a heap of little laws. It operates as an integrated whole and the purpose of the whole statute explains what is being aimed at and also how the enterprise of aiming at that goal or purpose is organized. That, as I said, is an easy example. But it is not hard to understand also 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.¹³⁷ But I do not want to be read as suggesting that there is anything natural or given about the cohering of laws in these various areas. Langdell believed contract law was in and of itself a structure of reason, while some of his followers thought the law of contract embodied the nostrums of laissez-faire economics.¹³⁸ Modern formalists like Ernest Weinrib believe tort law necessarily embodies the spirit of Aristotelean corrective justice.¹³⁹ I do not take such a view. The spirit of a cluster of laws is not something

¹³⁶ See RONALD DWORKIN, *LAW'S EMPIRE* (1986), pp. 250-4 on “local priority.”

¹³⁷ Cite to C.C. Langdell, and to Tom Grey, Langdell's Orthodoxy, 45 *UNIVERSITY OF PITTSBURGH LAW REVIEW* 1 (1989).

¹³⁸ See the discussion in NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 25-32 (1995)

¹³⁹ See Ernest J. Weinrib, Understanding Tort Law 23 *Valparaiso University Law Review* 485 (1989) and ERNEST J. WEINRIB *THE IDEA OF PRIVATE LAW* (1995).

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 together the provisions and precedents in question 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 embodying 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, e.g. in the way Dworkin suggests in his theory of interpretation.¹⁴⁰ 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 shall say it becomes an archetype of the spirit of the area of law in question.¹⁴¹

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.¹⁴² 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.”¹⁴³ My use of “archetype” is rather straightforward in contrast to these esoteric bodies of thought. It is closer to

¹⁴⁰DWORKIN, *LAW’S EMPIRE*, op. cit., Chs. 2 and 7.

¹⁴¹ The phrase “legal archetype” is not original with me, though its meaning is not usually elaborated as I have elaborated it. See Karl Kirkland, *Efficacy of Post-divorce Mediation and Evaluation Services*, 65 ALABAMA LAWYER 187 (2004), at 188: “The best interests standard exists independently of our work as a ... legal archetype that can always be utilized as a “true North” type objective standard to guide through individual issues.”

¹⁴² JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Nidditch edition) 376-7 (Book II, Ch. 31, section 3).

¹⁴³ Jung conceived of the archetypes as autonomous structures within the collective unconscious. They were pre-existent, self-generating “forces of nature.” In CARL JUNG, *MEMORIES, DREAMS, REFLECTIONS* 392-3 (19__), he wrote: “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....”

Jung's than to Locke's in the following (crude) sense: I am talking about the archetype as something shared by the participants in a given legal system, not just as a feature of an individual mind. On the other hand, my usage closer to Locke's than to Jung's in repudiating any 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 do foreground work as rules or precedents; but in doing that work they sum up the spirit of a whole body of law that goes beyond what they 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 that also operates in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, publicly, establishing the significance of that area for the entire legal enterprise.

I will say more about the way the rule against torture operates as an archetype in our law in section 12. But it may help us get our bearings at this stage if I mention some other examples of legal archetypes, i.e. provisions or precedents which do this double duty of operating themselves as rules or requirements but also 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 the whole orientation of our legal tradition towards liberty, in the physical sense of freedom from confinement.¹⁴⁴ It is archetypal too of law's set against arbitrariness in regard to actions that impact upon the rights of the subject. This is an aspect of Habeas Corpus that has often been commented

¹⁴⁴George Anastaplo, Constitutionalism, the Rule of Rules: Explorations 39 BRANDEIS LAW JOURNAL 17 (2000-2001), at __: "That a considerable liberty is taken for granted by the Constitution may be seen in its assurances with respect to habeas corpus, to bills of attainder, to the crime of treason, to religious tests, and to 'Indictment, Trial, Judgment and Punishment, according to Law.' 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."

on; it is referred to as “the bulwark of liberty”¹⁴⁵ and “the crystallization of the freedom of the individual”¹⁴⁶ 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.”¹⁴⁷ 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.¹⁴⁸ What is necessary for an archetype is that a foreground provision of the law do this sort of double duty, in regard to its own immediate normative effect and with regard to a broader principle – of whatever strength and extent – that it seems to epitomize.

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 towards 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.¹⁴⁹ However, to the extent that the law relating to weapons possession is more permissive here than the gun control law of 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 change the constitutional 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 has invoked something very like this idea

¹⁴⁵The Suspension of Habeas Corpus During the War of the Rebellion, 3 POLITICAL SCIENCE QUARTERLY 454 (1888), at p. 454.

¹⁴⁶W.W. Grant, Suspension of the Habeas Corpus in Strikes, 3 VIRGINIA LAW REVIEW 249 (1916), at p. 249.

¹⁴⁷Louis H. Pollak, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 YALE LAW JOURNAL 50 (1956), at p. 66.

¹⁴⁸Cf. DWORKIN, TAKING RIGHTS SERIOUSLY, op. cit., 26.

¹⁴⁹See, most recently, U.S. v. Emerson, 270 F.3d 203 (5th Cir.(Tex.) Oct 16, 2001) and Silveira v. Lockyer, 312 F.3d 1052, (9th Cir.(Cal.) Dec 05, 2002).

of an archetype to explain the importance of the Amendment.¹⁵⁰ 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.”¹⁵¹ Williams separates the legal character from the iconic character 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 the “folk-logic” reception or popular understanding of the law. 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 Education¹⁵² is authority for a fairly narrow proposition about segregation in schools, and its immediate effect in desegregation was notoriously slow and limited.¹⁵³ But its archetypal power is staggering and in the years since 1954 it has become an icon of the law’s commitment to demolish the structures of de jure (and perhaps also de facto) segregation, and to pursue and discredit forms of discrimination and badges of racial inferiority wherever they crop up in American law or public administration.¹⁵⁴ Ronald Dworkin famously distinguished between the “enactment force” and the “gravitational force” of precedents.¹⁵⁵ The enactment force is the rule laid down in a particular case that stare decisis might command other courts to follow. 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

¹⁵⁰ DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC (2003).

¹⁵¹ *Ibid.*, pp. 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 a review of Williams’s book by Stuart Banner, The Second Amendment, So Far, 117 *HARVARD LAW REVIEW* 898 (2004), at p. 909.

¹⁵² 349 U.S. 294 (1954)

¹⁵³ See JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2002)

¹⁵⁴ See, e.g., Jordan Steiker, American Icon: Does It Matter What the Court Said in Brown?, 81 *TEXAS LAW REVIEW* 305 (2002)

some particular phrase . . . [T]he earlier decision exerts a gravitational force on later decisions even when these later decisions lie outside its particular orbit.”¹⁵⁶ While it is true that this gravitational force accumulates 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 may acquire iconic significance in relation to the gravitational force. It may become an archetype because it was seen at the time as a test case or 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. Stevenson¹⁵⁷ is archetypal in the English law of negligence; and so on.

Finally a couple of foreign examples (though my first example – Habeas Corpus – also applies throughout the Anglo-American legal world, not just in the United States). The Canadian Charter of Rights and Liberties contains a clause that allows the national and provincial legislatures to legislate “notwithstanding” the operative sections of the Charter.¹⁵⁸ Canadian constitutional lawyers tell us two things about this provision. First, it is very rarely invoked;¹⁵⁹ and secondly that nevertheless it captures a very important

¹⁵⁵ DWORKIN, TAKING RIGHTS SERIOUSLY, 110 ff.

¹⁵⁶ *Ibid.*, p. 111.

¹⁵⁷ Donoghue v. Stevenson [1932] A.C. 562 (H.L.).

¹⁵⁸ Canadian Charter of Rights and Freedoms, sect. 33: “(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.”

¹⁵⁹ See Tsvi Kahana, The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practice of Section 33 of the Charter, 44 CAN. PUB. ADMIN. 255 (2001). It has mostly been invoked in the very controversial context of Quebecois resistance to more general constitutional demands.

part of the spirit of Canadian constitutionalism, namely a commitment to democratic dialogue between the legislatures and the courts.¹⁶⁰ In this case, the “notwithstanding” clause is archetypal of the commitment to dialogue, and repealing it might have a substantial and extensive effect on the spirit of dialogue even though the clause is not widely used. I don’t mean to suggest that all archetypes have this characteristic of not being widely used in relation to their direct legal impact. I mean simply that an archetype is a provision which both has its own direct legal effect and which also epitomizes something in, on, or around the law that goes beyond the ambit of its own provisions.

A final example, even less familiar to American audiences, comes from my native New Zealand. Considered in itself the Treaty of Waitangi¹⁶¹ signed in 1840 by representatives of the British Crown and Maori chiefs has limited and disputable significance. But it is now the keystone to a whole area of “Treaty law” that goes beyond the text of the Treaty itself, and includes numerous more recent statutes, precedents, findings, and settlements. Modern Treaty law embodies an attitude towards race relations and historic injustice in New Zealand that is no older than 1975.¹⁶² But we would be making a mistake if we thought that the 1840 Treaty itself could be discarded without loss or “read down” in a radical or destructive way. The Treaty of Waitangi is important not just for the understanding of its own provisions but as an epitomizing emblem of a whole range of legal commitments. Take it away, or read it out of existence, and those commitments would take on a different and more fragile and fragmented character.

11. What is the rule against torture archetypal of?

My aim in this part of the paper has been to argue that, individually or collectively, the various prohibitions on torture that we discussed in section 3 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

¹⁶⁰See, e.g., Peter Hogg and Allison Bushell, The Charter Dialogue between Courts and Legislatures, Or Maybe the Charter of Rights Isn’t Such a Bad Thing After All, 35 OSGOODE HALL LAW JOURNAL 75 (1997).

¹⁶¹For the text and recent effect of the treaty, see <http://www.waitangi-tribunal.govt.nz/about/treatyofwaitangi/>

¹⁶² See Treaty of Waitangi Act 1975 and New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (Court of Appeal).

provisions archetypal of? What is the policy, principle, or spirit of an area of law that this archetype embodies and conveys? I don't 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 some 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 with law's forcefulness with regard to the persons it 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 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 literally forced against their will by legal means or by legally empowered officials to do things or go places they would not otherwise do or go to. But even when this happens, they will not be herded like cattle or broken like horses; they will not be beaten like dumb animals or treated just 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, even in situations 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 trying to break a person's will.

No one denies that law has to be forceful and final. The finality of law means that it is 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.”¹⁶³ But forcefulness can take many forms, and – as I already

¹⁶³ MAX WEBER ECONOMY AND SOCIETY (Guenther Roth and Claus Wittich eds., 1978), p. 54.

mentioned in my discussion of compelled testimony¹⁶⁴ – not all of it involves the sort of savage breaking of the will that is the aim of torture and the aim too of many of the cruel, inhuman, and degrading methods that the Bush administration would like to distinguish from torture for the purpose of maintaining lip service to the prohibition.¹⁶⁵ The force of ordinary legal sanctions and incentives does not work like that, nor does the literal force of physical control and confinement. 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,”¹⁶⁶ which is the aim of every torturer (and the aim of those interrogators who would inflict cruel, degrading and inhuman treatment which they say does not quite amount to torture).¹⁶⁷ So: when I say that the prohibition on torture is an archetype of our determination to draw a line between law and savagery or between law and brutality, I am not looking piously to some sort paradise of force-free law. I am looking rather to the well-understood idea that law can be forceful without compromising the dignity of those whom it constrains and punishes.¹⁶⁸

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

¹⁶⁴ See above note 61 and accompanying text.

¹⁶⁵ Nor does all legal forcefulness involve the torturer’s enterprise (and the enterprise of those who use the cruel, inhuman, and degrading methods that the administration would like to distinguish from torture) of inducing a regression of the subject into an infantile state, where the elementary demands of the body supplant almost all adult thought.

¹⁶⁶ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (New edition, 1973) 441.

¹⁶⁷ Austin Sarat and Thomas Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in *THE FATE OF LAW* (Austin Sarat and Thomas Kearns eds., 1993) claim that “force is disdainful of reason” and that it “tends to short-circuit the pathways of rational agency.” But this is too quick. Sometimes coercion works by constraining choices rather than eliminating agency. For a discussion, see Jeremy Waldron, *Terrorism and the Uses of Terror*, 8 *JOURNAL OF ETHICS* (2004) 5, at 10-16.

¹⁶⁸ Those – like Sarat and Kearns, *op. cit.* – who maintain dogmatically that law is always violent and that the most important feature about it is that it works its will, in Robert Cover’s phrase, “in a field of pain and death” (Cover, *Violence and the Word*, 95 *YALE LAW JOURNAL* 1601 (1986) will be unimpressed by the distinctions I am making. For them, law’s complicity with torture in the cases I have discussed, is just business as usual.

technology which enables the judge to subject them to electric shocks if they misbehave.¹⁶⁹ Reports of prisoners being “herded” with cattle prods emerge from time to time.¹⁷⁰ Conditions in our prison are de facto terrorizing and well-known to be so, even if they are not officially approved or authorised; and we know that prosecutors feel free to make use of defendants’ dread of this brutalization as a tactic in plea-bargaining.¹⁷¹ Some would say too 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 that I am talking about.¹⁷²

All this can be conceded. Now, those who oppose these various 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 – constitutional resources in many cases, but also a broader and more diffuse sense that there is an affront to the deeper traditions of Anglo-American law in abuse of this kind. 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 paper.

12. The rule against torture as an archetype in American law

In this section, I would like to offer a preliminary account of the way in which the prohibition on torture – or rather the interlocking set of prohibitions that I outlined in section 3 – operates as an archetype of a more general policy pervading American law. I shall give examples mainly from constitutional law, showing in particular the status of

¹⁶⁹ See, e.g., Harriet Chiang, Justices Limit Stun Belts in Court, SAN FRANCISCO CHRONICLE, August 23, 2002, p. A7 and William Glaberson, Electric Restraint's Use Stirs Charges of Cruelty to Inmates, NY TIMES, June 8, 1999, p. A1.

¹⁷⁰ See, e.g., 37 Prisoners Sent to Texas Sue Missouri, St. Louis Post-Dispatch (Missouri), September 18, 1997, p. 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,” and Mike Bucsko and Robert Dvorchak, Lawsuits Describe Racist Prison Rife with Brutality, PITTSBURGH POST-GAZETTE, April 26, 1998, p. B1.

¹⁷¹ Refer to Dershowitz.

¹⁷² See AUSTIN SARAT, _____. When I presented an earlier version of this paper in New Zealand, I was asked by a member of the audience whether there was any relation between recent American willingness to countenance the use of torture and the USA’s outlier status on the death penalty. Certainly, in Europe and elsewhere, the prohibition on torture and repudiation of the death penalty are seen as part of the same enterprise, and related to the general anti- brutality policy mentioned earlier.

this archetype in relation to Eighth Amendment and Due Process concerns. I shall also say something which is a little less formal about the relation between this archetype and other features of our legal and law enforcement culture, particularly the campaign that has been waged – relatively successfully in recent years – to eliminate police brutality as a normal incident of law enforcement behavior in the United States.

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 don't mean that that body of law is primarily or even mainly concerned with 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 principles in the law of the type that an H.L.A. Hart-type "rule of recognition" might provide. A rule of recognition tests for the pedigree of a putative legal norm: how was it enacted and by whom? But such a test of pedigree will not work for the more diffuse principles and policies that Dworkin and we 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. Their continued power depends upon this sense of appropriateness being sustained. ... 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 the principle was cited, or figure 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.¹⁷³

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: this is how it strikes the jurist. In some instances, it may be clear that this is not just how it strikes one author, but that this is how it strikes everyone: we all think of this as an archetype. Some of the examples I mentioned earlier – Habeas Corpus and Brown v Board of Education – are clear instances of uncontested archetypes. But it is not only a matter of the impression one gets. We can give the claim that a certain provision is archetypal a slightly more substantial cast, to the extent that citations or elaborations by courts of the principle or policy in question are sometimes or characteristically accompanied by references to the alleged archetype – perhaps as rhetoric or as 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 features in this way in epitomizing a more pervasive policy of non-brutality.

(i) It has been said of the constitutional prohibition on cruel and unusual punishment that the original impetus for the Eighth Amendment came from the Framers' repugnance towards the use of torture, which was regarded as incompatible with the liberties of Englishmen.¹⁷⁴ The primary concern of the drafters was to proscribe “‘torture[s]’ and other ‘barbar[ous]’ methods of punishment.”¹⁷⁵ Even for those sentenced to death, the Court has held for more than a century that " punishments of torture . . . and

¹⁷³ DWORKIN, TAKING RIGHTS SERIOUSLY, p. 40. Whether or not these considerations provide the basis for an interesting criticism 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 (Marshall Cohen ed., 1983), 73.

¹⁷⁴ Ingraham v. Wright, 430 U.S. 651 (1977), at 665 (Powell J., for the Court): “The Americans who adopted the language of this part of the English Bill of Rights in framing their own State and Federal Constitutions 100 years later 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.” See also Estelle v. Gamble, 429 U.S. 97 (1976), at p. 102.

all others in the same line of unnecessary cruelty, are forbidden."¹⁷⁶ “Wanton infliction of physical pain” is a formula that is commonly used,¹⁷⁷ and it is used in a way that indicates reference to a continuum on which torture is conceived as the most vivid and alarming point.¹⁷⁸ We see this, for example, in what has been said in our courts about prison rape¹⁷⁹ about the withholding of medical treatment from prisoners,¹⁸⁰ and about the use of flogging, hitching posts, and other forms of corporal punishment in our prisons.¹⁸¹ In a similar way, judicial resistance in recent years to the use of corporal punishment in

¹⁷⁵ In re Kemmler, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death.”). See also Granucci, Nor Cruel and Unusual Punishment Inflicted: The Original Meaning, 57 CALIFORNIA LAW REVIEW 839 (1969), at p. 842

¹⁷⁶ Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

¹⁷⁷ See e.g. Furman v. Georgia, 408 U.S. 238, at 392 and Kent v. Johnson, 821 F.2d 1220 ((Mich.) 1987), at p. 1229.

¹⁷⁸ Also Holt v. Sarver 309 F.Supp. 362, at 380 [rest of cite?] - discussing meaning of “cruel and unusual punishment”: “The term 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. Generally speaking, a punishment that amounts to torture, or that is grossly excessive in proportion to the offense for which it is imposed, or that is inherently unfair, or that is unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity is a ‘cruel and unusual’ punishment.”

¹⁷⁹ U.S. v. Bailey, 444 U.S. 394 (1980), at pp. 423-4 (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. Prisoners must depend, and rightly so, upon the prison administrators for protection from abuse of this kind.”

¹⁸⁰ Estelle v. Gamble, 429 U.S. 97 (1976), at 103: “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,’ [citation omitted] the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”

¹⁸¹ In a recent decision, the Supreme Court has condemned the practice of handcuffing prisoners to hitching posts as a form of punishment, formal or informal, for disciplinary infractions, citing a Fifth Circuit observation 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.” Gates v. Collier, 501 F.2d 1291 (5th Cir.1974), 1306, cited in Hope v. Pelzer, 536 U.S. 730 (2002), at p. 737.

prisons has used the idea of torture as a reference point, even though corporal punishment is not identified necessarily as torture.¹⁸²

(ii) 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 by saying things like “[t]he rack and torture chamber may not be substituted for the witness stand,”¹⁸³ 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.’”¹⁸⁴ Here – as with the Eighth Amendment jurisprudence – the point is not to remind us 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.¹⁸⁵

The connection between this use of the torture archetype and the non-brutality principle is particularly clear in the opinion of Justice Frankfurter in Rochin v. California (1952).¹⁸⁶ 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 two morphine capsules he had swallowed when he first saw the detectives.

¹⁸² See Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (prison use of strap for whipping unconstitutional). See also the excellent discussion in Edward Rubin and Malcolm Feeley, Judicial Policy Making and Litigation Against the Government 5 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 617 (2003).

¹⁸³ Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

¹⁸⁴ Pennsylvania v. Muniz, 496 U.S. 582, 596, citing Ullmann v. United States, 350 U.S. 422, (1956). Consider also this from U.S. v. Balsys, 524 U.S. 666 701-2 (1998), Justice Ginsburg, 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.’” (citing E. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955)).

¹⁸⁵ See also United States v. White 322 U.S. 694(1944) 697-8: “[T]he 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.”

¹⁸⁶ 342 U.S. 165 (1952)

The morphine was introduced into evidence, and the suspect was convicted of unlawful possession. The Supreme Court reversed the conviction, holding that “[f]orce so brutal and so offensive to human dignity”¹⁸⁷ 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. Justice Frankfurter said famously of Mr. Rochin's treatment, "These ... are methods too close to the rack and the screw."¹⁸⁸ 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.¹⁸⁹

Once again, we don’t need to define Mr. Rochin’s treatment as torture in order to see how the prohibition on torture is key to the Supreme Court’s invocation of this more general non-brutality principle to condemn this apparently novel form of coercion. In recent years, the Court has repeated this approach: “Determining what constitutes

¹⁸⁷ Ibid., p. 174.

¹⁸⁸ 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.” Ibid., p. 172.

¹⁸⁹ Ibid, at pp. 173-4

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.”¹⁹⁰ My guess is that if the prohibition on torture itself becomes 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.

(iii) 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 (2003),¹⁹¹ 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. 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.”¹⁹² 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.”¹⁹³ So I think one can say at least this: if there is anything to the substantive due process idea, 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.¹⁹⁴ One of the reasons physical torture is constitutionally out of the question, Kreimer says, is that the constitution

¹⁹⁰ McKune v. Lile, 536 U.S. 24, 26 (2002)

¹⁹¹ 123 S. Ct. 1994 (2003)

¹⁹² *Ibid.*, Justice Thomas at ___ . Also Justice Stevens said the type of brutal police conduct involved “constitutes an immediate deprivation of the prisoner’s constitutionally protected interest in liberty.” (cite)

¹⁹³ Cite

¹⁹⁴ Seth F. Kreimer, Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror 6 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 278 (2003).

protects bodily integrity against invasion¹⁹⁵ and physical torture always involves such an invasion. Indeed he cites anti-slavery 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. Indeed, the standard form of a legal suit for freedom was an action for battery against the purported master. 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.¹⁹⁶

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. [citation omitted] Torture seeks to shatter that autonomy. Torture's evil extends beyond the physical; extreme pain totally occupies the psychic world; the agony of torture is designed to make choice impossible. Effective torture is intended 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.¹⁹⁷

Now the immediate point of Kreimer's discussion is to refute Alan Dershowitz's suggestion that any constitutional prohibition on torture is actually quite limited in its operation and that Dershowitz's own proposal for judicial torture warrants may not pose

¹⁹⁵ See, e.g. Cruzan v. Director of Minnesota Department 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." – cited by Kreimer, op. cit., at p. 296.

¹⁹⁶ Ibid., 295-6.

¹⁹⁷ Ibid., 298-9.

any great constitution difficulty.¹⁹⁸ 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 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.

(iv) It is not only in the decisions of the courts that we find an array of doctrines and principles epitomized by the prohibition on torture. We find it also in regard to the general culture of law enforcement. "The third degree" used to be a pervasive feature of the culture of policing. The fact that it has now largely disappeared from the culture of policing represents an enormous change in the culture of policing.¹⁹⁹ It is not just a matter of changes in positive law or in the regulations with which police behavior is disciplined. To eliminate this sort of violence (once it is established), you need to change the entire basis on which police officers are trained to respond (and hold themselves and each other ready to respond) in dangerous or threatening situations. It is a matter of changing a whole ethos – patterns of training, supervision, camaraderie, peer support, conceptions of good and bad policing as shared among low-ranking officers, and the expectations of the public. Moreover it can not be done piecemeal: it requires a broad-fronted transformation of attitude, impulse, and expectation. You can't just have a bit of restraint here and a bit of abuse there; the prohibition needs to be incorporated into whole training and peer relations and supervision and disciplinary regimen.

Now we know that the shift away from police brutality is imperfect and cases of abuse still surface from time to time. Still, what is remarkable is the scale of the change and the way it has been incorporated into the ethos of policing generally. As an established and respectable practice in police culture, the third degree has been

¹⁹⁸ Cf. DERSHOWITZ _____, p. __

¹⁹⁹ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 93 (1967): "[T]oday the third degree is almost nonexistent...." On the huge cultural changes that were necessary to eliminate coercion in police station houses, see JAMES FYFE AND JEROME SKOLNICK, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE (1993).

eliminated, and we have moved onto a whole new footing so far as interrogations are concerned.²⁰⁰ This has not been easy, and we have to consider whether this hard-won achievement might begin to unravel, if officers are expected once again to become familiar – at first-hand or by having to turn a blind eye – with the techniques of abusive interrogation. We know that already unease is recorded among FBI officers about interrogations conducted by Department of Defense officials, and there are disturbing reports too of Department officials masquerading as FBI officers in torture sessions, to lessen the chance that the FBI will pursue investigation of reported abuses.²⁰¹ This is how the contagion and the unraveling begin.

I mentioned earlier that American officials argued at the time of the ratification of the Convention Against Torture that such "rough treatment as generally falls into the category of 'police brutality,' while deplorable, does not amount to 'torture'."²⁰² Even if they are right about that, the very considerable reduction in police brutality may not be so easily separable from the widespread abhorrence of torture. The mentality that assumes that torture is way out of bounds may be crucial for the permanent suppression of police brutality. And so there are serious questions about how much of that we will be able to hang on to if torture secures any sort of authorized foothold in the practice of law enforcement.

13. 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 that looks 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?

²⁰⁰(Refer also to the care taken with videotaping interrogations etc. Miranda warnings etc.)

²⁰¹ Neil A. Lewis and David Johnston, New F.B.I. Files Describe Abuse of Iraq Inmates, NY TIMES, December 21, 2004, p. ___.

²⁰² See above text accompanying note 70.

It sounds like some sort of “slippery slope” argument and you may think it needs to be treated with all the caution that “slippery slope” arguments deserve.²⁰³ I did use something like a slippery slope argument in section 8, when I argued for a pragmatic absolute.²⁰⁴ 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 – these beliefs may each of them 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.

The case I am making is in part an empirical one, 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 non-brutality 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 sense 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 not been undermined and thus at a loss to determine how far the assault on the

²⁰³See e.g., Frederick Schauer, Slippery Slopes, 99 HARVARD LAW REVIEW 361 (1985). For full discussion of the form of argument, see Eugene Volokh, The Mechanisms of the Slippery Slope 16 HARVARD LAW REVIEW 1026 (2003), Mario J. Rizzo and Douglas Glen Whitman, The Camel’s Nose is in the Tent: Rules, Theories, and Slippery Slopes 51 UCLA LAW REVIEW 539 (2003), and Eric Lode, Slippery Slope Arguments and Legal Reasoning 87 CALIFORNIA LAW REVIEW 1469 (1999).

²⁰⁴ See supra text accompanying note 119.

prohibition has caused us to deviate from that baseline. And it is complicated, secondly, by the possibility that the very factors that led us to undermine the prohibition on torture may have also 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.

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, but a medium through which legal positions are sustained, modified, and elaborated.²⁰⁵ 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 don't 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).²⁰⁶ But whether one finds that jurisprudence convincing or not, there is no doubt as a matter of fact that this is how legal argumentation does take place and this is how arguments have whatever effect they have in preventing or promoting legal change.

One other point needs to be mentioned also. Critics of "slippery-slope" 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. 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.²⁰⁷ In

²⁰⁵ See, e.g. JEROME FRANK, LAW AND THE MODERN MIND (1930) __.

²⁰⁶ DWORKIN, LAW'S EMPIRE, op. cit., Chs. 5-6.

²⁰⁷ Cf.. Rizzo and Whitman, op. cit., pp. 570-1: "The process by which arguments are accepted and decisions made is a social one that derives from the decisions of many individuals. No single decision maker 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.

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. Any estimation of empirical likelihoods, then, must take all this complexity into account.

We are not dealing then with any simple empirical prediction. But the presence of complexity and methodological difficulty is not a reason for discounting or ignoring the hypothesis we are considering, nor should we be in the business of presuming that the archetype-effect will not accrue unless there is clear and simplistically-discernable evidence that it will. We could as easily and as 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 will be of our messing with the prohibition on torture, 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 are currently displaying.

In any case the claim of this paper 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 as a result of 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 is concern about the effect on future decisions of this man via the change in his character that this decision has led to. 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 dishonest that an honest man would have.

Or suppose – 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 etc. He may think that he can maintain this firewall between one sort of dishonesty and other sorts, but the cost to him is that he has to 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

Rather, he draws attention to the structure of the discussion that will shape the decisions of many decisionmakers involved in a social process.”

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 while questioning them, 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 non-brutality – 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 lynch-pin of the modern doctrine that law will not operate savagely or countenance brutality. We would no longer be able to state that doctrine in any categorical form. Instead we would have to say, more cautiously and with greater reservation: “In most cases the law will not permit or countenance brutality, but since torture is now permitted in a (hopefully) small and carefully cabined class of cases, we cannot rule out the possibility that in other cases 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’s repudiated, sometimes it’s not”) rather than a shining issue of principle.

Of course the present character (or the 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, residual police brutality of the Rodney King variety, and the regular “leverage” of prison rape and other unlawful 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.²⁰⁸ Our general commitment to the non-brutality 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 high-visibility role in regard

²⁰⁸ DERSHOWITZ, WHY TERRORISM WORKS, op. cit., pp. 147-9

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 how to tell a punishment which is cruel from one which is not: we don't 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 with 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; we have to imagine arguing about coerced confessions and self-incrimination 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 resulted. 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 and convincing basis for the elaboration of a general principle of non-brutality.

Part V: The State

14. “Engine Of State” and the Rule Of Law

I have been arguing that the prohibition on torture is a legal archetype emblematic of our determination to break the connection between law and brutality and to reinforce its commitment to human dignity even when law is at its most forceful and its subjects are at their most vulnerable. But in its modern revival, torture does not present itself 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 counter-insurgency purposes, rather than (say) police, prosecutors or agents of a court seeking to obtain information which can then be put to some forensic use.

For the most part, this has been true throughout our tradition. Our 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;²⁰⁹ this contrasts with the Continent where torture was intimately bound up with the law of proofs.²¹⁰ So, for example, William Blackstone observed that the rack in Tudor times, particularly under the first Queen Elizabeth, was "occasionally used as an engine of state, [but] not of law."²¹¹ And that is true too of most of what has been under discussion in this paper. The Yoo and Bybee memoranda address the issue of the legality of certain courses of action that might be undertaken by soldiers, military police, intelligence operatives or other state officials and authorised at the highest level by the executive. But they are not proposing that torture be incorporated into criminal procedure in the way that it was, for example in the law of proofs in Continental Europe until the eighteenth century. I guess the suggestion that Professor Dershowitz raises can be read as a way of introducing torture into the fabric of the law, with its specific provision for judicial torture warrants. But even Dershowitz is primarily concerned with judicial authorization of state torture for state purposes, not judicial authorization of state torture as a mode of input into the criminal process.

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

Well, one point is that "engines of state" and "engines of law" are not so widely separated as the Blackstone observation might lead us to believe. Even if one were to take the view that what is done by American officials in holding cells in Iraq, Afghanistan, or Guantanamo Bay is done in relation to the waging of war in a state of emergency rather than as part of a legally constituted practice, still 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

²⁰⁹ Exception: peine fort et dur to induce a defendant to plead to an indictment. [?]

²¹⁰ Alan Dershowitz's account of the relation between torture and the law of proofs is garbled and comprehensively misreads John Langbein's account (in LANGBEIN, *op. cit.*). The law of proofs was not, as Dershowitz suggests it was (DERSHOWITZ, *WHY TERRORISM WORKS*, *op. cit.*, p. 155), an aspect of Anglo-Saxon law. Contrary to what Dershowitz suggests (*ibid.*, p. 157), the torture warrants which Langbein says were issued in England in the sixteenth and seventeenth centuries had nothing to do with the law of proofs. And the introduction of trial by jury, with an entitlement to evaluate circumstantial evidence unconstrained by anything like the law of proofs, occurred in England centuries before the 1600s, which is when Dershowitz suggests it was introduced (*ibid.*, p. 157).

²¹¹ BLACKSTONE, *COMMENTARIES*, Vol IV, p. 267

circumstances (extraordinary 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 a concern voiced by Edmund Burke in his apprehensions about the effect on England of the unchecked abuses of Warren Hastings in India,²¹² and it is voiced too – though as sad diagnosis – by Hannah Arendt, as she offers the tradition of racist and oppressive administration in the African colonies as part of her explanation of the easy acceptance of the most atrocious modes of oppression in mid-twentieth century Europe.²¹³ The warning has been sounded often enough: “Don’t imagine that you can maintain a firewall between what is done by your soldiers and spies abroad to those they demonize as terrorists or insurgents, and what will be done at home to those who can be designated as enemies of society.”²¹⁴ 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 shouldn’t 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 (whenever they can get away with it): “Just torture them, get the information, and we’ll sort out the legal niceties later.” But even if this is happening, a remarkable feature of the modern debate is that an effort is also being made to see whether something like torture can be 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 pain interrogation that is legally authorized or at

²¹² Cite to Burke and also to CONOR CRUISE O’BRIEN, THE GREAT MELODY

²¹³ Cite to ARENDT, op. cit., pp. ___

²¹⁴ Bear in mind also that some of the reservists involved in the abuse at Abu Ghraib were prison guards in civilian life. 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.

least not categorically and unconditionally prohibited.²¹⁵ An effort is being made to see whether the law can be stretched or deformed to actually permit and authorize this sort of thing. They don't just take the prisoners to the waterboards; they want 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 what Blackstone called “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 doesn't 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 paper applies to that aspiration as well: that is, I think we should be concerned about the effect on the Rule of Law of a weakening or an undermining of the legal prohibition on torture. We have seen how the prohibition on torture operates as an archetype of various parts of American constitutional law and of 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 will not be permitted to torture those who fall into its hands seems an elementary incident of the Rule of Law as it is understood in the modern world. If this protection is not assured, then the prospects for the Rule of Law generally look bleak indeed.

True, we must acknowledge that the Rule of Law ideal has many meanings,²¹⁶ 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.²¹⁷ 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, torture conducted beneath legal notice and with law's complicity or silence. I believe he thinks that that is much worse for the Rule of Law than the judicial-torture-warrant regime he has in mind.²¹⁸

²¹⁵ Should we be pleased that the Bush administration cares enough about legality to embark on this debate? Or should we be appalled? Is it a tribute to law? Or is it an affront (like trying to get an honorable father's favor for a thoroughly disreputable friend)?

²¹⁶ See Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? 21 LAW AND PHILOSOPHY, 137 (2002).

²¹⁷ I can imagine Professor Dershowitz even seeing it as an achievement. What greater tribute could there be to the Rule of Law than that it is capable of regularizing the abomination of torture rather than leaving it beyond the pale of legal regulation? For the opposite view, see Kadish, *op. cit.*, 355.

²¹⁸ See DERSHOWITZ, WHY TERRORISM WORKS, 150. See also the insistence on “the truthful road of the rule of law” by the Israeli Landau Commission, rejecting “the way .. of the hypocrites: the declare

Nevertheless, a case can be made that it is the prohibition which is really archetypal in this regard. Think back to Judith Shklar's concern, mentioned at the very beginning of this paper, about the danger that "acute fear" will again become "the most common form of social control."²¹⁹ States in the twentieth century (and now apparently also in the twenty-first century) suffer from a standing temptation to try and get their way by terrorizing the populations under their authority with the immense security apparatus they control and the dreadful prospects of torture, 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 and not just the practices of courts, police, jailers, prosecutors etc. In this way, a state subject to law becomes not just a state whose excesses are predictable or a state 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 be stated also the other way round: to be willing to abandon the prohibition on torture or to define it out of existence is to be willing – among other things – to sit back and watch how much of that enterprise unravels. It is to be contemplate with equanimity the prospect that the ideal of the Rule of Law will no longer hold out this clear promise: that the state that it aims to control will be permitted in some areas and to at least a certain extent to operate towards individuals who are wholly within its power with methods of brutality that law itself recoils from.

that they abide by the rule of law, but turn a blind eye to what goes on beneath the surface" – Report of Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (1987), 23 ISRAEL LAW REVIEW 146 (1989), at 183-4. (The Landau Commission recommended legal approval for "a moderate measure of physical pressure" in interrogation: *ibid.*, p. 184).

²¹⁹Shklar, Liberalism of Fear, *op. cit.*, *supra* note 11, p. 27.

15. An Archetype of International Law

I have said that the prohibition on torture is archetypal of our particular legal heritage, and that it is also archetypal of a certain sort of commitment to the Rule of Law. Beyond that, we may ask about its archetypal status in international law, particularly international humanitarian law and the law of human rights.

I think a case can be made, similar to the case I made in sections 10 through 12, 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. The rule against the torture of prisoners may not be the best known of the Geneva Convention provisions. (That honor probably belongs to the image of a prisoner's having an obligation to disclose only his "name, rank, and number.") But if it is less prominent in the public imagination, it is only because it is more taken for granted. 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.²²⁰ And 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 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.²²¹ The

²²⁰ When captured British airmen appeared on Iraqi television during the first Gulf War showing clear evidence of having been beaten, allied outrage was immediate. See Maureen Dowd, War in the Gulf: the Oval Office; Bush Calls Iraqis 'Brutal' to Pilots, NY TIMES, January 22, 1991, p. A10: "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.' Iraq released videotapes on Sunday in which seven men identified as allied pilots gave robotic answers to Iraqi questions. ... Several of the pilots' faces appeared bruised in the tapes, which were broadcast today in the United States. The appearance of the men, along with the wooden delivery of their responses, led military analysts to believe that the pilots were coerced." See also John Bulloch, Donald Macintyre, and others, Crisis in the Gulf, THE INDEPENDENT (LONDON), January 27, 1991, p. 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."

²²¹ W. Hays Parks Teaching the Law of War, [1987] ARMY LAWYER (Department of the Army Pamphlet 27-50-174), 4, at pp. 5-6: "[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."

whole enterprise of attempting to mitigate the horrors of war by making 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 and subject also to limitation to meet “the just requirements of morality, public order and the general welfare in a democratic society.”²²² 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.²²³ People are willing to accept that the human rights regime does not unravel altogether when detention without trial is permitted or 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, 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? Maybe that can be abandoned without wider damage to the human rights regime? I have serious doubts about this. For one thing, the administration has also been toying with the redescription of a considerable amount of what was previously regarded as torture to re-categorize 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:

²²² Universal Declaration of Human Rights Art. 29(2).

²²³ Covenant on Civil and Political Rights, Art. 4(1).

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 prohibition on inhuman treatment (for example, in the UDHR, the Covenant, and ECHR) is as much a paradigm of the international human rights movement as the absolute prohibition on torture.

I said in section 13 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. ... If any state is free of the restraint whenever it is satisfied that the stakes are high enough to justify it, then the ground gained since WWII threatens to be lost. ... Lost would be the opportunity immediately to condemn as outlaw any state engaging in these practices. Judgment would be a far more complicated process of assessing the proffered justification and delving into all the circumstances.²²⁴

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 matter of counterintuitive lawyers’ definitions and a maze of exceptions and provisions for derogation – then we would lose our sense of international law’s ability to confront the horrors of our time

²²⁴ Kadish, *op. cit.*, 354.

clearly and decisively. Law's mission in these areas is much 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 anti-torture consensus, by not just another rogue state but the world's one remaining super-power. 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.²²⁵ 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

²²⁵ Cf. Strauss, *op. cit.*, __: “[O]nce the United States employs torture, it is likely that such practices would spread worldwide. At a minimum, the nation would lose its ability to condemn torture or other unacceptable acts of cruelty perpetrated in other parts of the world. Even if we could assure the world that torture would be utilized only in extreme circumstances, any moral leadership would be destroyed.” See also Levinson, *op. cit.*, at p. 2053, who quotes Oona Hathaway as offering “in conversation” a special reason for the United States, above all other countries, to adhere absolutely to the rule against torture:

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

favor of the international rule of law.²²⁶ 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 prisoners. We may want to consider it also as an archetype of international law as such, as an archetype of the way in which international law operates. We know that the rule against torture functions as one of the most vivid modern exemplars of ius 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.²²⁷ However, it is not the only exemplar. Traditionally, the paradigms of an offense prohibited by ius cogens were piracy and the slave trade; even if the rule against torture ceased to be regarded as ius 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 threatens 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 section 3, the Convention Against Torture requires those who are party to it to ensure that they have made legislative or other legal provision to outlaw torture by their own governmental officials both at home and abroad. Without this convergence – without what Gerald Neuman has termed “dual positivization”²²⁸ – the international law provisions would be much more like the meaningless verbal flatulence that 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

²²⁶ See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004) 355-9.

²²⁷ Ruth Wedgwood, “International Criminal Law and Augusto Pinochet,” 40 *Virginia Journal of International Law* 829 (2000) 836. See also M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 489 (1992).

Jay Bybee has urged for the United States – that in his military decision-making the U.S. President cannot possibly be subject to legislation mandated by international conventions, that any such legislation would be unconstitutional just because it constrained his freedom of action as Commander-in-Chief. (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.)²²⁹ Such a stance might 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 in detail and in the midst of particular hostilities the constraints that they will and will not accept. 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 administrations attitude towards torture might well deal a body blow to the normal mode of operation of human rights law.

16. Conclusion

Let me end with a few cautionary remarks about the concept of legal archetype that I have been using. First, I don’t want to exaggerate the significance of undermining a legal archetype, either in general or in this special case of torture. Undermining an archetype will usually have an effect on the general morale of the law in a given area. It may become much harder for us to hang on to a proper sense of why the surrounding law is important and to convey that sense to the public. For example, if we start issuing torture warrants, it may be harder to hang on to a proper sense of the importance of the

²²⁸ See Neuman, *op. cit.* note 37 and accompanying text.

²²⁹ See FEDERALIST Papers, No. 74 (Isaac Kramnick ed., 1987), 422.

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’s more that each of the surrounding provisions will be kind of thrown back on its own resources and each will be only as resilient (in the face of attempts at repeal, amendment or redefinition) as the particular arguments that can be summoned in its favor. It will lose the benefit of the archetype’s gravitational force. It will derive less or it will derive nothing from the more general sense of the overall point of this whole area of law, previously epitomized in the archetype.

I guess it’s possible that our sense of the purpose, policy, or principle behind the area of law in question will find another archetype if the existing archetype is damaged. But remember that archetypes do dual duty: they do not just epitomize the spirit of the law; they also contribute to it with their primary normative force. So any attempt to find a second archetype when the first archetype is damaged is not just like finding a new logo 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.

Secondly, I should not exaggerate the significance of something’s being an archetype. From a normative point of view, archetypes might be good or bad; they may be archetypal of good law or bad law. Lochner v. New York (1905)²³⁰ is or was archetypal of a certain approach to economic regulation which married the freedom-of-contract provisions of the US Constitution to the dogmas of laissez-faire economics, and that archetype was discredited when the general legal doctrine was discredited. (Indeed, the shock to the system of disrupting or undermining an archetype may well be part of an effective strategy for necessary legal reform.) I mentioned at the end of section 11, that the Treaty of Waitangi is archetypal of a certain approach to race relations law and historic injustice in New Zealand.²³¹ But I think, personally, that this body of law has done a lot of damage, and that it would be better if the archetype were undermined. Archetype is not a natural law idea. 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.

²³⁰ Lochner v. New York 198 U.S. 45 (1905)

²³¹ See above text accompanying notes 161-2.

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

One final caveat. There are all sorts of reasons to be concerned about torture, and I am under no illusion that I have focused on the most important. The most important issue about torture remains the moral issue of the deliberate infliction of pain, the suffering that results, the insult to dignity, and the demoralization and depravity that is almost always associated with this enterprise whether it is legalized or not. The issue of the relation between the prohibition on torture and the rest of the law, the issue of archetypes, is a second tier issue. By that I mean it does not confront the primary wrongness of torture; it is a second-tier issue like the issue of our proven inability to keep torture under control, or the fatuousness of the suggestion made by Professor Dershowitz and others that we can confine its application to exactly the cases in which it might be thought justified. Given that we are sometimes tongue-tied about what is really wrong with an evil like torture, work at this second tier is surely worth doing. Or it is surely worth doing anyway, as part of the general division of labor, even if others are managing to produce a first tier account of the evil.²³²

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

²³² See, e.g., Sussman, *op. cit.*.

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.