In Quest of a "Common Conscience": Reflections on the Current Debate About Torture

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The issues provoked by the topic of torture are the subject of ongoing debate, not least because new disclosures, sometimes with accompanying leaked government documents, seem to be published almost every day.[1] The year 2004 almost literally ended with the December 30, 2004, publication by the Justice Department's Office of Legal Counsel (OLC) of a brand new

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1. For example, allegations have recently emerged about Michael Chertoff, a former official in the Department of Justice and then a federal judge on the Third Circuit before becoming Secretary of the Department of Homeland Security. He is said to have pressured John Walker Lindh into accepting what was seen at the time as a generous plea bargain, on condition that Lindh repudiate claims that he had been subjected to severe mistreatment by United States forces following his capture in Afghanistan. *See* David Lindorff, *Comment: Chertoff and Torture*, THE NATION, Feb. 14, 2005, at 6-7. The most recent compilation of government materials on torture is THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005), which consists of more than 1240 pages of documents, including, for example, FBI emails that were added as the volume was going to press. *Id.* at 1165. Another superb compilation is MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR (2004). Such collections should be published in loose leaf, to enable insertion of new documents. The new documents would include, for example, an exchange of letters between John Yoo, then at the Office of Legal Counsel of the Department of Justice, and William H. Taft IV, Legal Adviser to the Department of State, published on February 8, 2005, by the *The New Yorker* on its Web site. *See The Torture Debate,* NEW YORKER ONLINE ONLY, Feb. 28, 2005, *at* http://www.newyorker.com/online/content/?050214on_onlineonly02. Amidst the torrent of materials published while this article was in production are these four recent items: Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1; Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, NEW YORKER, Nov. 14, 2005, at 44; Douglas Jehl, *Report Warned C.I.A. on Tactics in Interrogation*, N.Y. TIMES, Nov. 9, 2005, at A1; Eric Schmitt & Carolyn Marshall, *In Secret Unit's "Black Room," a Grim Portrait of U.S. Abuse*, N.Y. TIMES, Mar. 19, 2006, §1, at 1.

An extraordinarily bitter debate is also currently underway between Vice President Dick Cheney and Senator John McCain over a proposed law that would prohibit not only torture, but also all "cruel, inhuman, and degrading" methods of interrogation by all American officials, including members (and, presumably, contract employees) of the CIA, anywhere in the world. Although the McCain proposal passed the Senate 90-9, President Bush has threatened to veto any bill containing the proposal. *See, e.g.*, John McCain, *Torture's Terrible Toll*, NEWSWEEK, Nov. 21, 2005, at 34; R. Jeffrey Smith & Josh White, *Cheney Plan Exempts CIA From Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A1. Interestingly, a former CIA General Counsel has strongly supported the measure. *See* Jeffrey H. Smith, *Central Torture Agency?; Exempting the CIA From the McCain Amendment Sends the Wrong Signal to Our Officers*, WASH. POST, Nov. 9, 2005, at A31.

memorandum on the subject,[2] designed to supplant the now notorious August 1, 2002, mem-orandum to White House Counsel Alberto Gonzales.[3] The New Year began, not altogether coincidentally, with the consideration by the Senate Judiciary Committee of President Bush's nomination of Gonzales to succeed John Ashcroft as the Attorney General of the United States.[4] Not surprisingly, the issue of torture dominated the testimony.[5]

Gonzales affirmed his own commitment to the opening line of the December 30 OLC memorandum, which states that "[t]orture is abhorrent both to American law and values and to international norms."[6] He cited, among other supporting evidence, a statement by the President on June 26, 2003, which was United Nations International Day in Support of Victims of Torture.[7] "Torture anywhere," said George W. Bush, "is an affront to human dignity everywhere."[8] The problem is that no respectable person on the entire planet has denied that torture is "abhorrent" or "an affront to human dignity." Whether torture is abhorrent or an affront to human dignity is not the subject of serious debate. There is an argument between those who view torture as so abhorrent that it ought never be used under any conceivable circumstances, and those who are willing to countenance the possibility that under some circumstances it is a "lesser evil" that could be resorted to in order to prevent even greater evils.[9] But it should be obvious that even those who reject an

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2. Memorandum for James B. Comey, Deputy Attorney General, from Daniel Levin, Acting Asst. Attorney General, *Legal Standards Applicable Under 18 U.S.C. §§2340-2340A*, Dec. 30, 2004 [hereinafter Comey Memo], *available at* http://www.usdoj.gov/olc/dagmemo.pdf.

3. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Attorney General, *Standards of Conduct for Interrogation Under 18 U.S.C. §§2340-2340A*, Aug. 1, 2002 [hereinafter Bybee Memo], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf, *reprinted in* DANNER, *supra* note 1, at 115.

4. *See* Neil A. Lewis, *Gonzales Is Likely to Face Hard Questions in Hearings*, N.Y. TIMES, Jan. 3, 2005, at A13.

5. *See Text: Gonzales Nomination Hearing*, WASHINGTONPOST.COM, Jan. 6, 2005, *at* http://www.washingtonpost.com/wp-dyn/articles/A53883-2005Jan6.html.

6. Comey Memo, *supra* note 2.

7. *Text: Gonzales Nomination Hearing, supra* note 5, referring to *Statement by the President: United Nations International Day in Support of Victims of Torture* (June 26, 2003), *available at* http://www. whitehouse.gov/news/releases/2003/06/20030626-3.html.

8. *Statement by the President*, *supra* note 7. The President neglected to acknowledge his rhetorical debt to Martin Luther King Jr., who wrote in 1963, "Injustice anywhere is a threat to justice everywhere." *Letter from a Birmingham Jail*, *in* I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 83, 85 (James Melvin Washington ed., 1986). More recently, President Bush repeated what has become the Administration's mantra: "We do not torture." *See* Dan Froomkin, *Bush's Tortured Logic*, WASH. POST, Nov. 8, 2005. Froomkin writes, "[Bush's words] are in fact enigmatic at best, because it's not at all clear what the president's definition of torture is." *Id.* Bob Cesca, a blogger quoted by Froomkin, suggests that "[Bush is] either outright lying or the administration has a very different definition of torture than the rest of the world. I would argue that it's both." *Id.* For further discussion of this point, see *infra* text at notes 18-24.

9. These questions are explored in TORTURE: A COLLECTION (Sanford Levinson ed., 2004) [hereinafter TORTURE].

absolute ban on torture do not in the least believe that there is anything other than horror attached to the practice of torture.

One might similarly think that certain kinds of military attacks, such as the fire bombings of Dresden and Tokyo or the use of atomic bombs on Hiroshima and Nagasaki, which foreseeably killed thousands upon thousands of innocent civilians, are also abhorrent or an affront to human dignity. Yet this similarity has not led to a consensus among the moral analysts of warfare that such attacks should never, under any circumstances, be carried out. It is a notorious truth, for example, that the United States professes not even to keep records of the number of Iraqi civilians who have been killed by American firepower during the invasion and occupation of Iraq. One might well ask whether (and why) torture is necessarily so much worse than attacks that include such "collateral damage" that it is to be forbidden in any and all contexts.[10]

The answers given usually turn on analyses of the intent of the perpetrators. Collateral damage is justified as an unintended consequence – in the terminology of classic natural law analysis, the "double" (or secondary) effect – of an attack whose guiding intention is to destroy legitimate military targets. Torture, on the other hand, is labeled as something that can never be considered collateral to a legitimate activity.[11] Still, one attuned to what might be termed the "purity of one's primary intentions" – at least if she is a utilitarian – could seek to justify torture by focusing on the intention to save innocent lives by virtue of what might be learned from vigorously interrogating someone believed to have relevant knowledge of dire threats.

Although I have suggested, in my own contribution to a recent book on the subject, that one might have to reject the absolute prohibition of torture,[12] that question is not my primary concern here. Instead, I want to focus primarily on a feature of the present debate that is the central subject of the contribution to this symposium by Professor Seth Kreimer.[13] That is the phenomenon of what he calls "torture lite" and the ways, if any, that it fits into our ordinary legal (and moral) analysis. "Torture lite" involves practices that are "cruel, inhuman, or degrading," or highly coercive, even if they do not meet whatever criteria we might set for denominating them to be "torture." Professor Kreimer's article has the perhaps paradoxical virtue of demonstrating why, in a certain sense, it is a mistake to focus exclusively on "torture." Kreimer shows that an exclusive focus on torture may be legally and morally inadequate. Indeed, it may have some quite pernicious political consequences if the binary distinction between "torture" and "not-torture" has the effect of legitimizing the latter.

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10. *See* Louis Michael Seidman, *Torture's Truth*, 72 U. Chi. L. Rev. 881 (2005).

11. *See, e.g.*, Henry Shue, *Torture,* in TORTURE, *supra* note 9, at 47, 49-51. There is a rich literature on the doctrine of "double effect." *See, e.g.*, THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (P.A. Woodward ed., 2001).

12. Sanford Levinson, *Contemplating Torture*, *in* TORTURE, *supra* note 9, at 23.

13. Seth F. Kreimer, *"Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience*, 1 J. NAT'L SECURITY L. & POL'Y 187 (2005).

To a remarkable degree, both the Bush administration and its critics have focused on whether or not the United States has engaged (or will engage in the future) in "torture." Consider only the fact that Mark Danner's book, which focuses on Abu Ghraib, is tellingly entitled *Torture and Truth*.[14] Danner convincingly demonstrates that some torture certainly occurred there, and he offers as indirect evidence some of the infamous photographs taken at that prison.[15] Yet we know that many political conservatives, including lawyers, have denied that what was photographed constituted torture, even if they would resist joining Rush Limbaugh in describing it as no more serious than fraternity hazing.[16] More to the point, I am not at all certain that there is a single sentence in any official government document, even in the latest OLC memo, that would define what is revealed in these photographs as "torture." Whether or not the OLC is correct, as a legal matter, in its interpretation of relevant American and international law is another matter.

What seems at times to unite both sides – that is, the Bush administration and its most bitter critics – is their joint insistence that the legitimacy of American interrogation practices turns on whether the pictures depict what can accurately be termed "torture." The critics presumably believe that nothing less than the appellation "torture" provides sufficient condemnation of what happened at Abu Ghraib. The Administration seemingly believes that designation of what happened at Abu Graib as "less than torture" is enough, if not to justify it, then at least to justify not getting too riled up about it, especially with regard to the official policies that some of the Abu Ghraib defendants have cited in defending their actions.

It is important to acknowledge that the Bush administration has made no effort to justify what happened at Abu Ghraib; indeed, a number of low-level soldiers have been prosecuted for their misdeeds. This is, however, scarcely relevant to the central debate.

Abu Ghraib is tangential for two separate reasons. One is that some of the most offensive acts, which I shall touch on below, may well not constitute torture, although of course they are no less objectionable. The other is that what occurred at Abu Ghraib has little if any relationship to the most serious episodes of interrogation that are being conducted by the United States. A close reading of Pentagon materials suggests that very few "high value" persons were confined at Abu Ghraib or anywhere else that was under military supervision (not least, perhaps, because the Uniform Code of Military Justice

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14. DANNER, *supra* note 1.

15. *See id.* at 217-226.

16. Limbaugh likened the conduct at Abu Ghraib to "hazing, an out-of-control fraternity prank." *Official: Abu Ghraib Like "Animal House,"* Rush Limbaugh Show (Aug. 30, 2004), *available at* www.rushlimbaugh.com/home/daily/site_083004/content/see_i_told_you_so.guest.html.

(UCMJ) unequivocally prohibits torture).[17] It appears that many of the prisoners were hapless victims of over-inclusive roundups who were never even interrogated in any serious sense. It is almost undoubtedly the case that "high value" suspects are turned over, almost immediately, to the CIA, a civilian agency not subject to the UCMJ, for detention and interrogation in secret camps that are totally unmonitored by any other United States entity, let alone by the International Committee of the Red Cross.

Even if one believes, *arguendo*, that there may be extremely restricted circumstances when torture would be justified as a means of interrogation, I seriously doubt that any such circumstances have been present in Iraq or, for that matter, Afghanistan. To say, for example, that torture would be justified simply in order to procure "actionable intelligence" that might save the lives of American soldiers would be to negate the most basic rules regarding the interrogation of prisoners of war, for surely some detainees in U.S. military custody might possess such intelligence. Afghanistan might present a closer case than Iraq only because there is some reason to believe that among those captured are some high officials of Al Qaeda, who might be expected to have information about the possibility of future attacks similar to those that occurred on September 11.

I have already indicated my strong belief that some torture, under any reasonable definition, has undoubtedly occurred in Iraq, Afghanistan, and, I fear, in the secret camps maintained elsewhere by the CIA or other agencies of the United States government. A "reasonable definition" of torture is, of course, a loaded notion, inasmuch as it suggests that there might be "unreasonable" definitions. I am deeply ashamed, as an American, of the clearly unreasonable, indeed outrageously limited, definition of torture set out in the notorious Bybee Memo of August 1, 2002. That memorandum defined physical torture as the infliction of "excruciating and agonizing physical . . . pain"[18] that is "equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."[19] Perhaps the most appalling phrase in the memorandum is the reference, accompanying this definition, to the "*mere* infliction of pain or suffering on another."[20] The term "mere" tells us all too much about the moral world within which that

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17. *See, e.g.*, *Executive Summary of Intelligence Activities at Abu Ghraib*; Anthony R. Jones, *AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade*; and George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (collectively referred to as the Fay-Jones Report), Aug. 23, 2004, *available at* http://www.dod.mil/news/Aug2004/d20040825fay.pdf (partially redacted), *reprinted in* DANNER, *supra* note 1, at 403, *and in* GREENBERG & DRATEL, *supra* note 1, at 987.

18. *See* Bybee Memo, *supra* note 3, at 16 (DANNER at 128) (quoting an "understanding" of the Reagan administration).

19. *Id.* at 13 (DANNER at 126).

20. *Id*. (emphasis added).

memorandum was written. The explicit repudiation of this definition in the December 30, 2004, replacement memorandum[21] is a step forward, although I think it is much too early to state with confidence that the new memorandum is anything more than a cosmetic public relations gesture designed to erase language that is appalling on its face, and designed to substitute arguments that continue to be highly problematic in every way.

One common theme in the articles in this symposium is that the discussion of torture often generates an almost Orwellian use of language. Thus, President Bush's assertion that "we do not torture" needs the equivalent of a "decoder ring" before one can have any idea what he might mean by such a statement. Recall Humpty Dumpty's famous assertion, in Chapter Six of Lewis Carroll's *Through the Looking Glass*, that "when I use a word, it means just what I choose it to mean . . . ." Upon Alice's protest that "the question is whether you can make words mean so many different things," Mr. Dumpty replies, "The question is which is to be master – that's all." In many ways, the best way of understanding the contemporary debate about torture is as a fundamental struggle over who will get to be the "master" of the language we use when giving concrete definition to "torture." John Yoo in effect lost round one of that struggle when the Bybee Memo was stingingly repudiated by the Administration whose interests he loyally attempted to serve. But no one should believe that the struggle is over, or that Yoo's most serious opponents have won anything more than a cosmetic victory up to this point.

Even if one treats the new OLC memorandum as a serious piece of lawyering, one of its key features remains the assiduous determination to distinguish between torture and other objectionable, but non-torturous, modes of interrogation – what Professor Kreimer denominates "torture lite."[22] For better and worse, it is not at all clear that one should condemn only the author of the memorandum for doing this. If, for example, one believes that the OLC definitions of torture continue to be underinclusive, then one might well condemn the United States Senate for its conditions on consent to the United Nations Convention Against Torture[23] that may be interpreted to loosen the restraints on interrogators and invite just the sort of clever lawyering that is taught at our very best law schools. It is far too easy (and tempting) for liberal critics of the OLC memos to focus on John Yoo or Jay Bybee or Daniel Levin (the current head of OLC), rather than on, say, Senate Democrats who voted

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21. Comey Memo, *supra* note 2.

22. Kreimer, *supra* note 13.

23. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85 [hereinafter Torture Convention]. The text of the Torture Convention, with links to the reservations, declarations, and understandings upon ratification of the United States and other states, can be found at Office of the High Commissioner for Human Rights, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (n.d.), *at* http://www.unhchr.ch/html/menu3/b/h_cat39.htm.

to support the relevant treaty conditions that have helped to cause so much consequent mischief.[24] There is an unseemly desire to slay the messengers of bad tidings, rather than to raise questions about those responsible for the message in the first place.

It is worth noting in this context that not a single prominent Democratic leader said anything cogent about American interrogation methods prior to the release of the Abu Ghraib photographs in May 2004, even though these methods were the subject of important newspaper stories by the end of 2002.[25] Senator Jay Rockefeller, the ranking Democrat on the Senate Intelligence Committee, for example, appeared to have no compunctions at all about "rendering" suspects to allied countries that undoubtedly engage in torture,[26] although that is clearly outlawed by the Torture Convention.[27] And, as Andrew Sullivan noted in a stunning review of Danner's book in the *New York Times Book Review*, "John F. Kerry, the 'heroic' protester of Vietnam, ducked the issue" throughout his campaign for the presidency.[28] It is all too understandable why the Bush administration might wish to avoid any serious discussion of misconduct for which it bears significant responsibility. It may say something considerably more serious about the vacuity of the American political process that the "opposition party" has done so little to provoke that discussion.

In any event, my central arguments are fourfold. First, even if one believes, as I do, that the OLC, especially on August 1, 2002, offered an outrageously narrow definition of "torture," it is still important to retain the word for the most appalling conduct. I believe that Mark Richard, a Deputy Assistant Attorney General in the Reagan Justice Department, was linguistically correct when he testified before Congress that "[t]orture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct."[29] But while I have referred to the "underinclusive"

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24. To be sure, one suspects that the Democrats voted as they did because of a felt need to compromise with North Carolina Republican Senator Jesse Helms.

25. *See, e.g.*, Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations; "Stress and Duress" Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

26. Senator Rockefeller declared that he "wouldn't rule . . . out" the United States turning over Khalid Sheikh Mohammed, a recently captured high-ranking member of al-Qaeda, to a country with no legal restrictions against torture. "I wouldn't take anything off the table where he is concerned," said Rockefeller, "because this is the man who has killed hundreds and hundreds of Americans over the last 10 years." Eric Lichtblau & Adam Liptak, *Threats and Responses: The Suspect; Questioning to Be Legal, Humane and Aggressive, The White House Says*, N.Y. TIMES, Mar. 4, 2003, at A13.

27. Torture Convention, *supra* note 23, art. 3(1).

28. Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 23, 2005, §7 (Book Review), at 1.

29. *Convention Against Torture: Hearing Before the Senate Comm. on Foreign Relations*, 101st Cong. 16 (1990), *quoted in* Bybee Memo, *supra* note 3, at 19 (DANNER at 131). One might find corroboration for the proposition that there is in fact what might be termed a

definition of torture in the August 1, 2002, Bybee Memo, one should be aware of the opposite problem of "overinclusive" definitions, in which torture is alleged to cover all instances of "cruel, inhuman, or degrading treatment," if not all "coercive interrogation." Indeed, the December 30, 2004, Comey Memo notes the Senate's own proclamation that "'the United States' helped to focus the Convention 'on torture rather than other less abhorrent practices.'"[30] I think it is especially important to differentiate between "degrading treatment" and "torture," lest one end up trivializing the concept of torture and diminishing the special horror attached to that term.

Part of my point is rhetorical, since we need to focus on the potential responses of target audiences to the terms we apply to any given situations. Even if one can readily understand why, for example, those identified with the human rights community will try to extend the reach of the word "torture," there is always a risk of turning off those who are not already part of the choir and provoking a dismissal similar to that visited on the child who too often "cried wolf." Extravagant language often repels rather than invites serious discussion. In any event, one should always be aware of the force of certain terms and should use them only when one believes they are fully justified.

My second point, a more legal one, is simply that international, transnational, and domestic laws draw significant lines between torture and what might be termed lesser forms of mistreatment, although those lines may not be clear. International law, especially, is less than transparent in its meaning on this point. Consider first Article 7 of the International Covenant on Civil and Political Rights, which states that "[n]o one shall be subjected to torture *or* to cruel, inhuman or degrading treatment or punishment."[31] I think that most lawyers – and, perhaps, any ordinary reader of the English language – would read this statement to mean that there is a difference between "torture" and what might be termed the lesser included offense of "cruel, inhuman or degrading treatment or punishment." As a practical point, of course, this

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"pyramid" of abuse, with torture at the very top, in Article 45 of the 1641 Massachusetts Body of Liberties, which provides, "No man shall be forced by torture to confess any crime against himself nor any other, unless it be in some capital case where he is first fully convicted by clear and sufficient evidence to be guilty, after which if the cause be of that nature, that it is very apparent there be other conspirators, or confederates with him, then *he may be tortured, yet not with such tortures as be barbarous and inhumane*" (emphasis added). EXCERPTS FROM MASSACHUSETTS BODY OF LIBERTIES, art. 45 (1641), *available at* http://www.constitution.org/bcp/mabodlib.htm. I am very grateful to Quinnipiac Law School Professor Stanton D. Krauss for providing me with this reference.

30. *See* Comey Memo, *supra* note 2, at 7 (quoting S. Exec. Rep. No. 101-30 (1990), at 2-3).

31. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 7, 999 U.N.T.S. 171, 175 [hereinafter ICCPR] (emphasis added); *see also* American Convention on Human Rights, Nov. 22, 1969, art. 5.2, 1144 U.N.T.S. 123, 146, 9 I.L.M. 99, 102 (providing that "[n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment"); Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, pmbl., 25 I.L.M. 519, 520 (containing same language).

linguistic distinction might be relatively unimportant, given that both categories of conduct are equally forbidden. This conclusion might be reinforced by Article 4(2) of the Covenant, which states that "[n]o derogation" from Article 7 is permitted.[32] This is no small point, given that Article 4(1) allows states, during a "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," to "take measures derogating from their obligations under the present Covenant."[33] Article 4(2), by referring to Article 7 in general, seems to state that neither "torture" nor "cruel, inhuman or degrading treatment or punishment" is ever subject to derogation.

Similar reassurance is provided by the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism*, adopted on July 11, 2002,[34] in the extended shadow of September 11. Following a reaffirmation of the "absolute prohibition of torture," there appears this far broader statement: "The use of torture *or of inhuman or degrading treatment or punishment* is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning, and detention of a person suspected of . . . terrorist activities, irrespective of the nature of the acts that the person is suspected of."[35] Lest one have any doubts, guideline XV, entitled "Possible derogations," provides that "States may *never*, however, and whatever the acts of the person suspected of terrorist activities . . . derogate from the . . . prohibition against torture *or inhuman or degrading treatment*."[36] One need not really be concerned whether "torture" simply embraces "inhuman or degrading treatment," or whether the two terms are in fact meant to represent two quite different, though clearly associated, concepts. Both are equally condemned by the Ministers.

Ironically, the most important United Nations convention addressing the subject of torture raises the most serious problems, at least for the lawyer. The Torture Convention[37] tellingly tracks the text of the earlier International Covenant on Civil and Political Rights[38] in its own title: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[39] Once again, one is tempted to believe that the phrase "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" is, like so much legal writing, simply redundant. However, such a construction is not self-evident in its linguistic operation. Although it is surely "degrading," for example, to be

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32. ICCPR, *supra* note 31, art. 4.2, 999 U.N.T.S. at 174.
33. *Id*. art. 4.1, 999 U.N.T.S. at 174.
34. COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, GUIDELINES ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM (July 11, 2002), *available at* http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf.
35. *Id.* at guideline IV (emphasis added).
36. *Id.* at guideline XV (emphasis added).
37. Torture Convention, *supra* note 23.
38. *See* ICCPR, *supra* note 31.
39. Torture Convention, *supra* note 23.

stripped naked before questioning, it is implausible to define this treatment, without more, as "torture." The equivalence of terms is also called into question by Article 2(2) of the Torture Convention itself, which provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[40] Why did the drafters not simply copy the provision of the earlier International Covenant on Civil and Political Rights, which established a non-derogable requirement that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"?[41]

Lawyers, including those who draft international treaties, are notoriously conservative in their use of language, and I have seen no evidence that stopping with the term "torture" manifested a consciously articulated decision that this one word adequately captured all of the attendant notions in its wake.[42] The best – I believe convincing – proof of the implausibility of any such argument is Article 16 of the Torture Convention, which provides that "[e]ach State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1."[43] One must be an especially motivated reader of legal texts to read "acts . . . which do not amount to torture as defined in article 1" as included within the non-derogation duty of Article 2(2).

Having insisted throughout my career on the indeterminacy of almost all legal texts, I am reluctant to rely on "plain meaning" arguments. However, it does seem to me that the most reasonable "ordinary language" way to read Article 16 is that there is a difference between "torture" and acts that, to adopt Jay Bybee's unfortunate language in his August 1, 2002, OLC memo, are "*merely* cruel, inhuman or degrading."[44]

It is worth pointing to another irony within the Bybee Memo, at least for those (usually liberal) constitutional lawyers who have enlisted on Justice Breyer's side in his debate with Justice Scalia about the relevance of foreign and international law in interpreting American legal materials.[45] The memo

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40. *Id.* art. 2(2), 1465 U.N.T.S. at 114 (emphasis added).

41. ICCPR, *supra* note 31, art. 7, 999 U.N.T.S. at 175.

42. In a panel at the 2005 Annual Meeting of the Association of American Law Schools discussing some of these ideas, a speaker from the audience took strong exception to the argument in the text. He suggested in effect that the drafters of the Torture Convention intended the non-derogation duties of Article 2 to extend to "cruel, inhuman, or degrading" conduct as well, and that this is well understood by the community of international lawyers. Perhaps this is correct as a statement of "original intent," but of course original intent is a highly controversial theory of legal interpretation. At the very least, if that was the original intent of the drafters, then Article 2 should not have been worded as it was, given the alternative language in the earlier International Covenant on Civil and Political Rights.

43. Torture Convention, *supra* note 23, art. 16, 1465 U.N.T.S. at 116.

44. Bybee Memo, *supra* note 3, at 30 (DANNER at 141) (emphasis added).

45. *See* Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353, 355-365 (2004).

makes very effective rhetorical use of leading cases decided by the European Court of Human Rights[46] and the Israeli Supreme Court.[47] While these courts condemned the interrogation practices of the United Kingdom in Northern Ireland and of Israeli Security Services in the occupied territories, they take great pains to note that these practices (which are similar to some employed by the United States) did not constitute torture, but "merely cruel, inhuman or degrading" treatment.[48]

Another feature of these cases is worth mentioning. Professor Fionnuala Ní Aoláin notes that the European courts not only are reluctant to describe these offensive practices as "torture," they are also especially hesitant to describe such acts as "administrative practices" of the offending countries, rather than actions of individual interrogators more or less acting on their own.[49] The reason is relatively simple: "It is potentially destabilizing of the political support enjoyed by the Court. . . . States are loath to admit human rights violations but are more graceful where the state violation can be explained away as an individual aberration, a one-off situation."[50] American constitutional lawyers can readily analogize such reluctance to American courts' similar hesitancy (or cowardice) in labeling high-level state officials as the architects of, say, systematically racist policies. This helps to explain why the Bush administration has seemingly limited the invocation of military discipline, such as courts martial, to quite low-ranking individuals, even as it has promoted or otherwise retained in office the architects of overall policy, ranging from Secretary of Defense Donald Rumsfeld to various Army generals. This response presumably allows the Administration to continue proclaiming that the abuses at Abu Ghraib are deviant cases that in no sense represent what it would like to believe is the essence of America.[51]

My third point follows from my arguments immediately above about the importance of maintaining an analytical distinction between "torture" and

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46. Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978), discussed in the Bybee Memo, *supra* note 3, at 28-29 (DANNER at 139-140). The decision is also discussed in the Comey Memo, *supra* note 2, at 6 n.14.

47. Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471 (1999), discussed in the Bybee Memo, *supra* note 3, at 30-31 (DANNER at 140-142). Extensive excerpts of the Israeli decision are reprinted in TORTURE, *supra* note 9, at 165, followed by Miriam Gur-Arye, *Can the War Against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience*, at 183.

48. The quoted phrase, from the Israeli Supreme Court decision, appears in the Bybee Memo, *supra* note 3, at 30 (DANNER at 141).

49. Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in TORTURE, *supra* note 9, at 213, 222.

50. *Id.*

51. For example, on May 5, 2004, President Bush, during interviews with two Arab satellite news channels – al-Arabiya and al-Hurra – described the abuse of prisoners as "abhorrent" and went on to say that it "does not represent the America that I know." *Abu Ghraib Timeline*, CBC NEWS ONLINE, updated Feb. 18, 2005, *at* http://www.cbc.ca/news/background/iraq/abughraib_timeline.html.

"cruel, inhuman, or degrading conduct." For the sake of argument, I am willing to accept even the horrendous Bybee Memo as offering an authoritative statement of the implications of the Senate's most unfortunate modification of the Torture Convention's definition of torture, namely, that anything which does not cause "excruciating pain" is not torture at all. The question I want to ask is short and simple: So what? If we describe what the United States has done as the unwarranted "infliction of pain or suffering on another," does its action not deserve our condemnation, just as we condemn the systematic humiliation of powerless individuals within our power as the essence of "inhuman or degrading" conduct? Much conduct of that sort, after all, serves only to demonstrate the extent to which our captives are precisely in the position of slaves, having only such rights as we choose to respect.

What if, instead of "torture," we adopted as our primary rhetorical trope the phrase "inhuman or degrading"? This would require the obvious acknowledgment that the phrase encompasses a range of objectionable activities, of which torture is clearly the worst. By definition, though, actions at the other end of the range are still dreadful, even if we can differentiate them from "torture." To say that something is "not torture" is not to commend or even to tolerate it. Concomitantly, as I have already suggested, to define whatever one dislikes as "torture" runs the risk both of failing to persuade as a rhetorical matter and of being unfaithful to the legal materials.

One problem, of course, is that the phrase "inhuman or degrading" is no more precise in its meaning than the term "torture." Both terms are placeholders, like the phrases "due process" and "equal protection." They are abstract concepts whose content is to be found in the formulations that are used to fill in the blank or to give meaning to the inkblot. The Senate, when consenting to the Torture Convention, attached a reservation indicating that the United States would be bound by Article 16's ban on "cruel, inhuman or degrading treatment or punishment" only insofar as such actions are prohibited by internal norms of American constitutional law drawn from the Fifth, Eighth, and Fourteenth Amendments.[52] Thus, we are necessarily referred to the hash that the American judiciary, including the Supreme Court, has made of such terms as "cruel and unusual punishment" and "shocks the conscience" with regard to the Eighth Amendment, or of what constitutes a denial of Due Process of Law.

I come to my fourth (and final) argument, which is that we have highly incomplete, indeed frustrating, methods for supplying concrete meaning to these rather vague terms, whether we are referring to "torture" or to "cruel, inhuman, or degrading" actions. How, if at all, do we arrive at definitions of these activities? Is this a philosophical enterprise, involving the manipulation of abstract concepts, or are the definitions provided instead by looking at the

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52. Resolution of Advice and Consent to Ratification as Reported by the Committee on Foreign Relations, ¶I(2), S. TREATY DOC. NO. 100-20, Oct. 27, 1990; *see supra* note 23.

actual way such terms are used within the general (legal) culture? Or is there some meaningful test of conscience which rests, ultimately, on the belief (or hope) that there is what might be called a "common conscience," whether or not it can be reduced to propositional, rule-like statements?

There is, of course, a similarity between any such test and Justice Stewart's famous statement regarding pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see it."[53] But did Stewart "see" the same things the rest of us do?[54] Unless we have confidence in such commonality, claims like Stewart's or even heightened appeals to "conscience" are all too subject to dismissal as ultimately idiosyncratic (and possibly sanctimonious) posturing. In a practical sense, all such tests get their meaning from our responses to very concrete situations. This is, I think, the ultimate vindication of what we do as law professors, that we force abstraction- and rule-loving students to wrestle with the real problems presented by messy factual contexts. We must scrutinize very specific fact situations – perhaps watch very specific movies and photographs – whether our task is differentiating between "hard-core" and "soft-core" pornography or between "torture" and something else. This "something else," of course, may itself need to be further scrutinized and subdivided. Consider only the recent defense, in a report published by the John F. Kennedy School of Government and the Harvard Law School, of "highly coercive interrogation," which is distinguished not only from "torture" (which is unequivocally condemned in all instances) but also from certain equally unacceptable "cruel, inhuman, or degrading" techniques.[55]

Discussions of interrogation practices thus require confrontation of specific examples, with at least two objectives in mind. One is simply definitional: What do we count as exemplifying a general term like "torture" or "cruelty"? The second is to engage, like the Kennedy School/Harvard Law School project, in a morally serious effort to create a legal regime that includes as "acceptable" techniques of interrogation that we would never tolerate if used by American police charged with investigating "ordinary" crimes.

Let me offer two specific situations and ask what names should be given to the practices revealed therein. The first is taken from the affidavit submitted by Ameen Sa'eed Al-Sheikh regarding his treatment at Abu Ghraib:

> The night guard came over, his name is GRANER, open the cell door, came in with a number of soldiers. They forced me to eat pork and

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53. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

54. Maybe even more to the point, do most of us "see" the same things that, say, Catharine MacKinnon sees, given that this noted crusader for women's rights offers notably latitudinarian definitions of pornography? *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993).

55. Philip B. Heymann & Juliette N. Kayyem, *Long Term Legal Strategy Project for Preserving Security and Democratic Freedoms in the War on Terrorism* 23 (n.d.), *available at* http://www.mipt.org/Long-Term-Legal-Strategy.asp.

> they put liquor in my mouth. They put this substance on my nose and forehead and it was very hot. The guards started to hit me on my broken leg several times with a solid plastic stick. He told me he got shot in his leg and he showed me the scar and he would retaliate from me for this. They stripped me naked. One of them told me he would rape me. He drew a picture of a woman to my back and makes me stand in shameful position holding my buttocks. Someone else asked me, "Do you believe in anything?" I said to him, "I believe in Allah." So he said, "But I believe in torture and I will torture you. When I go home to my country, I will ask whoever comes after me to torture you." Then they handcuffed me and hung me to the bed. They ordered me to curse Islam and because they started to hit my broken leg, I cursed my religion. They ordered me to thank Jesus that I'm alive. And I did what they ordered me.[56]

Taken as a whole, I think this fairly easily describes torture. But the key phrase is "taken as a whole." What if, for example, the American officers had not hit him on his broken leg? We might easily disaggregate the particular actions and ask which one or combination of them counts as "torture" and which as something else, whether "torture lite," "cruel, inhuman, or degrading treatment," or "highly coercive interrogation."

I found myself particularly horrified, for example, by the command, made in the name of the United States of America, that Mr. Al-Sheikh "curse Islam and . . . thank Jesus that [he is] alive," not to mention forcing him to eat pork and drink alcohol. Perhaps it is simply because I am Jewish, perhaps for less parochial reasons, that I am as inclined to focus on these aspects of American practices as on many of the more purely physical acts of the military personnel. Of course, one might well say that the prisoner would not have denounced Islam or praised Jesus had he not had altogether justifiable fear of physical punishment if he failed to do so. In any event, the command to denounce Islam or forcing individuals to eat pork in a context where de facto starvation, even without other punishment, is the only alternative meets the very definition of something that is "degrading" and "inhuman," even if I am dubious that it meets any plausible definition of "torture."

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56. Sworn Statement of Ameen Sa'eed Al-Sheikh, Jan. 16, 2004, in DANNER, *supra* note 1, at 227. Charles Graner is one of the low-level soldiers charged and convicted for violating the UCMJ at Abu Ghraib. Charges against him included conspiracy to maltreat detainees; dereliction of duty for willfully failing to protect detainees from abuse, cruelty, and maltreatment; maltreatment of detainees; assaulting detainees; committing indecent acts; adultery; and obstruction of justice. Several charges, including adultery, were dropped, although he was convicted on nine of the remaining ten counts. *See Preferred Charges Against Spc. Charles Graner (May 14, 2004)*, FINDLAW.COM (n.d.), *at* http://news.findlaw.com/hdocs/docs/iraq/graner51404chrg.html. He received a sentence of 10 – out of a possible 15 – years imprisonment. *See Graner Gets 10 Years for Abu Ghraib Abuse*, ASSOCIATED PRESS, Jan 16, 2005, *available at* http://www.msnbc.msn.com/id/6795956/.

Similar sorting problems are presented by other techniques that are clearly part of the contemporary American interrogation arsenal. *Washington Post* reporters Carol D. Leonnig and Dana Priest, for example, have written about "sexual tactics" used in interrogations at Guantánamo.[57] Prisoners told their lawyers that "female interrogators regularly violated Muslim taboos about sex and contact with women. The women rubbed their bodies against the men, wore skimpy clothes in front of them, made sexually explicit remarks and touched them provocatively."[58] An unreleased Pentagon report apparently confirms the allegations.[59] One should be appalled by this "degrading" treatment (degrading to the interrogators as well as to those interrogated) without having to label it "torture."

As already noted, the December 30, 2004, Comey Memo[60] does not explicitly define as torture any of the interrogation practices known to be permitted by the Secretary of Defense and other officials under his command. These include, for example, sleep deprivation, extended solitary confinement, and the use of food or access to medicine as a control mechanism.[61] *The Interrogators,* an insiders' account of interrogation practices in Afghanistan, makes it very clear that sleep deprivation was used as a standard method of "preparing" detainees for interrogation.[62] Whenever I read of sleep deprivation, I think of Menachem Begin's description of his own torture as a

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57. Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantanamo*, WASH. POST, Feb. 10, 2005, at A01.

58. *Id.*

59. *Id.*

60. Comey Memo, *supra* note 2.

61. *See* Memorandum from Donald Rumsfeld, Secretary of Defense, to Commander, US Southern Command, *Counter-Resistance Techniques in the War on Terrorism*, Apr. 16, 2003, *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc9.pdf. Rumsfeld's memorandum makes reference to an earlier one, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, Apr. 4, 2003, *available at* http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf, *reprinted in* DANNER, *supra* note 1, at 187. The Working Group Report treats sleep deprivation as a "more aggressive counter-resistance technique[]" that requires special authorization, but is not prohibited per se. *Id.* at 64-65 (DANNER at 191-192). It was not included in the list of acceptable techniques in the April 16 memorandum, which explicitly states, "Sleep Adjustment: Adjusting the sleeping times of the detainee (e.g., reversing sleep cycles from night to day) . . . is NOT sleep deprivation." *Counter-Resistance Techniques*, *supra*, at Tab A, ¶V (DANNER at 202) (capitalization in original). One may, of course, have real doubt about the extent to which the law in action in the field – and especially in the CIA camps (which would not have been affected by the Rumsfeld directive) – has anything to do with the law on the books generated by the Pentagon, especially given the failure of the Bush administration to hold any high-level official in the Pentagon accountable for the patent failures of command and control at Abu Ghraib and elsewhere. *See also* Mayer, *supra* note 1, noting the failure of the United States to prosecute CIA operatives for what, on the face of it, clearly seem to be acts of homicide.

62. CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA (2004).

young man in the Soviet Union and of the particular consequences of sleep deprivation.[63] The spirit of a sleep-deprived prisoner, Begin writes, "is wearied to death, his legs are unsteady, and he has one sole desire to sleep, to sleep just a little, not to get up, to lie, to rest, to forget. . . . Anyone who has experienced this desire knows that not even hunger or thirst [is] comparable with it."[64] He does not even mention the psychotic episodes that are sometimes said to accompany extended sleep deprivation.

Under some circumstances, I have no trouble defining sleep deprivation as torture or inhuman. But I confess that I do not view, say, 24-36 hours of such deprivation as "torture," even if it is undoubtedly coercive (and, most certainly, "cruel and unusual," if used as a form of punishment rather than as a goad to interrogation). Indeed, the authors of *The Interrogators* insist, with whatever degree of plausibility, that very often the interrogators themselves, as a practical matter, got little more sleep than those they were interrogating.

My second example comes from a relatively recent decision by the United States Supreme Court, *Chavez v. Martinez*.[65] I will not focus here on the substantive law laid out by the case, which contains a remarkable fragmentation of opinions and rationales. Instead, I want to emphasize the quite different descriptions of the facts found in the opinions, and the concomitant responses by different justices.

Justice Thomas, writing for himself and Chief Justice Rehnquist,[66] offers a relatively minimalist account of the background of the case. The reader is informed that an "altercation" occurred when police attempted to arrest Mr. Martinez and that, upon the purported belief that Martinez had taken hold of an officer's gun, another officer "then drew her gun and shot Martinez several times, causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down."[67] To his credit, Thomas notes that Martinez was never in fact charged with a crime,[68] which for some readers may serve to cast doubt upon the police version of events.

The central event of the case was not the altercation but, rather, a hospital emergency-room interrogation of Martinez by police officer Benjamin Chavez, an English-language transcript of which is included at the beginning of Justice

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63. MENACHEM BEGIN, WHITE NIGHTS: THE STORY OF A PRISONER IN RUSSIA 107–108 (Katie Kaplan trans., Harper & Row 1977) (1957), *quoted in* JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 34 (2000).

64. *Id.*

65. 538 U.S. 760 (2003).

66. *Id.* at 763-764. Justices O'Connor and Scalia also joined in parts of the opinion, including the statement of the facts.

67. *Id.* at 764.

68. *Id.*

Stevens' concurring and dissenting opinion.[69] As Justice Stevens notes, "both parties believed that respondent was about to die":[70]

"Chavez: What happened? Olivero, tell me what happened.
"O[liverio] M[artinez]: I don't know.
"Chavez: I don't know what happened (sic)?
"O. M.: Ay! I am dying. Ay! What are you doing to me? No, . . . ! (unintelligible scream).
"Chavez: What happened, sir?
"O. M.: My foot hurts . . . .
"Chavez: Olivera. Sir, what happened?
"O. M.: I am choking.
"Chavez: Tell me what happened.
"O. M.: I don't know.
"Chavez: 'I don't know.'
"O. M.: My leg hurts.
"Chavez: I don't know what happened (sic)?
"O. M.: It hurts . . . .
"Chavez: Hey, hey look.
"O. M.: I am choking.
"Chavez: Can you hear? look listen, I am Benjamin Chavez with the police here in Oxnard, look.
"O. M.: I am dying, please.
"Chavez: OK, yes, tell me what happened. If you are going to die, tell me what happened. Look I need to tell (sic) what happened.
"O. M.: I don't know.
"Chavez: You don't know, I don't know what happened (sic)? Did you talk to the police?
"O. M.: Yes.
"Chavez: What happened with the police?
"O. M.: We fought.
"Chavez: Huh? What happened with the police?
"O. M.: The police shot me.
"Chavez: Why?
"O. M.: Because I was fighting with him.

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69. *Id.* at 784-786. The quoted material that follows is unusually long for an academic article. This only underscores a central issue that arises in considering the meaning of abstract terms like "torture." If, as I believe, one must confront the concrete details of interrogation, one might have to include quotations of unconventional length. Indeed, as Justice Stevens suggests, one might well need to *listen* to tapes as well. *Id.* Thus, he adds, at the conclusion of the transcript, "The sound recording of this interrogation, which has been lodged with the Court, vividly demonstrates that respondent was suffering severe pain and mental anguish throughout petitioner's persistent questioning." *Id.* at 786.

70. *Id.*

"Chavez: Oh, why were you fighting with the police?
"O. M.: I am dying . . . .
"Chavez: OK, yes you are dying, but tell me why you are fighting, were you fighting with the police? . . .
"O. M.: Doctor, please I want air, I am dying.
"Chavez: OK, OK. I want to know if you pointed the gun [to yourself] at the police.
"O. M.: Yes.
"Chavez: Yes, and you pointed it [to yourself]? (sic) at the police pointed the gun? (sic) Huh?
"O. M.: I am dying, please. . . .
"Chavez: OK, listen, listen I want to know what happened, ok??
"O. M.: I want them to treat me.
"Chavez: OK, they are do it (sic), look when you took out the gun from the tape (sic) of the police . . . .
"O. M.: I am dying . . . .
"Chavez: Ok, look, what I want to know if you took out (sic) the gun of the police?
"O. M.: I am not telling you anything until they treat me.
"Chavez: Look, tell me what happened, I want to know, look well don't you want the police know (sic) what happened with you?
"O. M.: Uuuggghhh! my belly hurts . . . .
"Chavez: Nothing, why did you run (sic) from the police?
"O. M.: I don't want to say anything anymore.
"Chavez: No?
"O. M.: I want them to treat me, it hurts a lot, please.
"Chavez: You don't want to tell (sic) what happened with you over there?
"O. M.: I don't want to die, I don't want to die.
"Chavez: Well if you are going to die tell me what happened, and right now you think you are going to die?
"O. M.: No.
"Chavez: No, do you think you are going to die?
"O. M.: Aren't you going to treat me or what?
"Chavez: Look, think you are going to die, (sic) that's all I want to know, if you think you are going to die? Right now, do you think you are going to die?
"O. M.: My belly hurts, please treat me.
"Chavez: Sir?
"O. M.: If you treat me I tell you everything, if not, no.
"Chavez: Sir, I want to know if you think you are going to die right now?
"O. M.: I think so.
"Chavez: You think (sic) so? Ok. Look, the doctors are going to help you with all they can do, Ok? That they can do.

"O. M.: Get moving, I am dying, can't you see me? come on.
"Chavez: Ah, huh, right now they are giving you medication."[71]

The central question before the Supreme Court was, in essence, first, how to describe this interrogation and then how to respond to it. In particular, did it "shock the conscience" and thus establish a violation of Martinez's rights under the Due Process Clause?[72] (A majority of the Court agreed that it did not state a violation of the Self-Incrimination Clause of the Fifth Amendment.[73]) The Court was hopelessly fragmented on the "conscience" test.

Justice Thomas's opinion dismissed any argument that Martinez's constitutional rights had been violated. Justices Thomas and Rehnquist were "satisfied that Chavez's questioning did not violate Martinez's due process rights" or warrant any description as "egregious" or "conscience shocking."[74] Reaching that level, they concluded, requires "'conduct intended to injure in some way *unjustifiable by any government interest*.'"[75] The emphasized language might be read to permit a "compelling interest" test that would justify any and all "conduct intended to injure," so long as the government interest was great enough. It is, incidentally, not difficult to get from here to that part of the analysis in the August 1, 2002, Bybee Memo that focused on the intent of an alleged torturer, and that basically exempted from potential liability anyone who was motivated by what we might call a "public purpose," rather than the merely "private," sadistic infliction of awful pain.[76]

Justice Thomas's opinion noted that "there is no evidence that Chavez acted with a purpose to harm Martinez by intentionally interfering with his medical treatment."[77] Medical personnel were able "to treat Martinez throughout the interview," during which the officer "ceased his questioning to allow tests and other procedures to be performed."[78] Furthermore, Justice Thomas wrote:

> [T]here [was no] evidence that Chavez's conduct exacerbated Martinez's injuries or prolonged his stay in the hospital. Moreover, the need to investigate whether there had been police misconduct constituted a justifiable government interest, given the risk that key

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71. *Id.* at 784-786.

72. *See id.* at 774 ("Convictions based on evidence obtained by methods that are 'so brutal and so offensive to human dignity' that they 'shoc[k] the conscience' violate the Due Process clause.").

73. *Id.* at 767.

74. *Id*. at 774-775.

75. *Id.* at 775 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)) (emphasis added).

76. *See* Bybee Memo, *supra* note 3, at 3-5 (DANNER at 117-118) (discussing "specific intent").

77. *Chavez*, 538 U.S. at 775.

78. *Id.*

> evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.[79]

Far more interesting, in many ways, is Justice Kennedy's tortured opinion, joined by Justices Stevens and Ginsburg in relevant respects. These justices provided the key votes, together with Justices Souter and Breyer, to remand the case for further consideration of Martinez's substantive due process claim. Kennedy agreed that "[h]ad the officer inflicted the initial injuries sustained by Martinez (the gunshot wounds) for purposes of extracting a statement, there would be a clear and immediate violation of the Constitution, and no further inquiry would be needed."[80] But, of course, infliction of the gunshot wounds was neither a technique of interrogation nor, more to the point, what the case was really about. "The case can be analyzed, then, as if the wounds had been inflicted by some third person, and the officer came to the hospital to interrogate."[81] Kennedy went on to declare:

> There is no rule against interrogating suspects who are in anguish and pain. The police may have legitimate reasons, borne of exigency, to question a person who is suffering or in distress. Locating the victim of a kidnapping, ascertaining the whereabouts of a dangerous assailant or accomplice, or determining whether there is a rogue police officer at large are some examples.[82]

It is interesting, given the 2003 date of the decision, that Justice Kennedy did not invoke the "ticking time bomb" hypothetical that is so much a part of recent discussions of interrogation methods, including torture.[83]

Justice Kennedy also noted potential advantages to interrogating suspects who fear imminent death:

> The fear may be a motivating factor to volunteer information. The words of a declarant who believes his death is imminent have a special status in the law of evidence. A declarant in Martinez's circumstances may want to tell his story even if it increases his pain and agony to do so. The Constitution does not forbid the police from offering a person an opportunity to volunteer evidence he wishes to reveal.[84]

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79. *Id.*
80. *Id.* at 796.
81. *Id.*
82. *Id.*
83. *See* Kim Lane Scheppele, *Hypothetical Torture in the "War on Terrorism,"* 1 J. NAT'L SECURITY L. & POL'Y 285 (2005).
84. *Chavez*, 538 U.S. at 797.

Nonetheless, Justice Kennedy was part of the majority that remanded the case to the Ninth Circuit for further deliberation on Martinez's Due Process claim. "[R]ecovery," he wrote, "should be available under §1983 if a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement. That showing has been made here."[85] For Justice Kennedy, the transcript "demonstrate[d] that the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions."[86] He quoted the District Court's finding that Martinez "had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police."[87] Kennedy noted that "[t]he officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him." Thus, Kennedy concluded, "*no reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement*. The record supports the ultimate finding that the officer acted with the intent of exploiting Martinez's condition for purposes of extracting a statement."[88] But the four members of the Court who refused to remand the case – Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor – must have concluded that a reasonable police officer *could* believe that the interrogation was constitutional, precisely because there were various social interests that legitimized such gathering of evidence even from an apparently dying man in great pain. Otherwise, presumably, they would have agreed with Justice Kennedy and remanded the case.

Perhaps the most genuinely disturbing essay in *Torture: A Collection*[89] is Mark Osiel's analysis of torture in Argentina during that country's "Dirty War" in the 1970s.[90] Its central point is that we are deeply mistaken in believing that we can necessarily describe certain acts as "manifestly" illegal. Osiel notes that the Rome Statute of the International Criminal Court authorizes a defense of obedience to the orders of superiors only when "the order was not manifestly unlawful."[91] This requires, he suggests, far greater confidence than is warranted that illegality (or, for that matter, immorality) is so "manifest" (or, to use an older term, "self-evident"). Serious interrogation, including torture, is a profoundly social activity. This means, among other things, that it is almost always carried out within complex institutional contexts that include

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85. *Id.*
86. *Id.*
87. *Id.* at 798.
88. *Id.* at 798-799 (emphasis added).
89. *Supra* note 9.
90. *See* Mark Osiel, *The Mental State of Torturers: Argentina's Dirty War*, *in* TORTURE, *supra* note 9, at 129.
91. *Id.* at 130 (citing the Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999.).

sufficient actual or perceived approval to make the notion of "manifest" illegality or immorality problematic. In Argentina, for example, legitimation of torturous activities was provided not only by military officials but also, and perhaps even more significantly, by priests of the Roman Catholic Church, all too many of whom framed what we call the "Dirty War" as a basically holy war on terrorism that called for the suspension of ordinary restraints. Osiel argues, both in his essay and in the longer book from which it is drawn,[92] that it is a profound mistake to view the Argentinian torturers as "sadists" or "men without conscience." Many were patriots, in their own way.

Indeed, it is this very contextual complexity that has often made it difficult for the victims of torture to collect damages for their injuries. In *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, John Conroy emphasizes both the "ordinariness" of many people who engage in torture and the fact that many of their victims are viewed as tainted, sometimes leading juries to find that torture has occurred, but to award no damages.[93] The same complexity may help to explain the relatively mild punishments visited by most countries on officials found guilty of using excessive force when those officials appear to have been motivated by a desire to protect the national interest.

So what is the ultimate point of these remarks? It is this: Those of us who discuss "torture," "cruel, inhuman, or degrading activities," and "highly coercive interrogations" *must* climb down into the muck and confront the "facts on the ground," rather than merely doing what we do best, which is to proffer (and take refuge in) place-holding abstraction. As we climb down we discover that there is far less of a "common conscience" than we might wish, whatever may be the degree of our ostensible agreement on the abstract statement of the norms in question. One need not believe that these norms are useless, however. What would a world be like that did not state that torture is abhorrent – even if we believe that, at the end of the day, the practical utility of our norms may be limited? Our fate may be at once to accept the darkness of the glass through which we comprehend reality and to accept the duty to decide, perhaps by making "leaps of faith," the degree to which we are willing to inflict pain or degradation on other human beings in order to wring out information that we believe they possess about matters of great importance to us.

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92. MARK OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA'S DIRTY WAR (2001).

93. JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE (2000).