

## **“Just for Fun”: Understanding Torture and Understanding Abu Ghraib**

John T. Parry\*

My contribution to this symposium seeks to accomplish two things. First, I want to engage in a dialogue with Professors Levinson and Kreimer about the problems of defining torture and the law’s response to torture. My contentions are that, contrary to Professor Levinson’s suggestion, we should not seek to limit the category “torture,” and that, contrary to Professor Kreimer’s argument, law in fact fails to regulate torture. More precisely, I argue that law provides less of a constraint on torture, properly defined, than most people probably assume. Second, I want to use that dialogue as the launching point for a more open-ended exploration of torture and the more general problem of state violence. To that end, the last section of this essay considers with broad strokes some of the possible reasons for law’s failure to regulate torture adequately.<sup>1</sup>

### I. TALKING ABOUT TORTURE

This first section offers a critique of some common ways to talk about torture in order to clear a bit of ground. In the process, I hope to provide a sense of the way in which I am approaching the issue of torture. These examples are not exhaustive; rather, they illustrate two types of pitfall that I want to avoid.

First, one could say that people from different backgrounds or cultures may expect and accept – or at least resign themselves to – a certain level of violence from the authorities, so that a few slaps or blows may be illegal when directed at certain people but ordinary and even permissible treatment when directed at others. As the European Commission of Human Rights observed

---

\* Visiting Professor, Lewis & Clark Law School; Associate Professor, University of Pittsburgh School of Law. This is an expanded version of a paper I presented on a panel sponsored by the Section on National Security Law at the 2005 Annual Meeting of the Association of American Law Schools. I am grateful for the questions, thoughts, and comments of my fellow panelists and the many audience members who participated. I presented earlier versions of this paper at faculty colloquia at Lewis & Clark Law School and the University of Washington School of Law, and I am grateful for the many comments and questions I received on both of those occasions.

1. I want to stress the idea of broad strokes, for this essay is a snapshot of one moment in an ongoing inquiry. I will develop many of these arguments in greater detail in my book, *UNDERSTANDING TORTURE*, forthcoming in 2007 from the University of Michigan Press.

in the famous “Greek” case of 1969, some prisoners may “tolerate[] . . . and even take[] for granted . . . a certain roughness of treatment . . . by both police and military authorities. . . . Such roughness may take the form of slaps and blows of the hand on the head or face.”<sup>2</sup> In these circumstances, the Commission concluded there had been no cruel, inhuman, or degrading treatment within the meaning of the European Convention on Human Rights, because “the point up to which prisoners *and the public* may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.”<sup>3</sup> Put differently, people detained for political reasons by the Athens Security Police in the 1960s would have expected some rough treatment, and they – or at least some significant proportion of the public as a whole – would have found rough treatment acceptable in the context of Greek society at that time.

Second, one could argue in the other direction. Certain forms of treatment are particularly distressing to victims from certain backgrounds. Nigel Rodley suggests, for example, that “forcing a devout Muslim to fall to his knees and kiss the cross might well fall within the prohibition [against cruel, inhuman, and degrading treatment], whereas similar behaviour towards prisoners who have no *profound* philosophical or religious aversion to the procedure would have no comparable significance.”<sup>4</sup> Another version of this kind of analysis comes from the conduct of U.S. soldiers at Abu Ghraib prison in Baghdad and at Guantánamo Bay Naval Base. Reports that women soldiers mistreated male Muslim prisoners or that soldiers put women’s underwear on the heads of such prisoners have been accompanied by claims that these practices are particularly distressing to Muslim men.<sup>5</sup>

---

2. NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 103 (2d ed. 1999) (quoting 12 *YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS – THE GREEK CASE* 180, 501 (1969)).

3. *Id.* at 104 (emphasis added). For a qualified endorsement of this holding, see *id.*

4. *Id.* (emphasis added).

5. See Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators*, WASH. POST, Feb. 10, 2005, at A1 (discussing tactics used by some women who interrogated detainees at Guantánamo Bay Naval Base); Paisley Dodds, *Gitmo Soldier Details Sexual Tactics*, ASSOC. PRESS, Jan. 28, 2005 (same); Editorial, *Torture Policy*, WASH. POST, June 16, 2004, at A26 (mentioning the use of women’s underwear on male detainees at Abu Ghraib); Neil A. Lewis, *Red Cross Found Abuses at Abu Ghraib Last Year*, N.Y. TIMES, May 11, 2004, at A13 (noting “women’s underwear over the heads for prolonged periods – while being laughed at by guards, including female guards”); Andrew Miga, *War on Terror; “Stain on Our Honor”*; *Prez Backs Rumsfeld, Apologizes*, BOSTON HERALD, May 7, 2004, at 5 (noting photographs that showed “a female U.S. soldier holding a leash tied around a naked prisoner’s neck” and “an Iraqi prisoner handcuffed to a bed with women’s underwear covering his head”); Uwe Siemon-Netto, *Analysis: Horror over Women Torturers*, UNITED PRESS INT’L, May 6, 2004.

Both ways of thinking seek to be sensitive to supposed cultural differences. Different societies, and different sectors within societies, generate and experience varying background levels of violence. People in communities in which the level of everyday violence is high may tend to accept that level – perhaps not as legitimate, but maybe as a fact of life. Their expectations about their encounters with state authority quite possibly will reflect that background understanding. In some communities, as well, certain behaviors may be particularly offensive, including or especially when engaged in by state actors.

The critical question is how to respond to this sensitivity to cultural differences. If people expect a certain level of violence – and if, as a result of that expectation, they are more accustomed to that violence than others would be – should we interpret the law of torture or interrogation to legitimate that violence? If someone is subjected to treatment that he or she finds significantly more stressful than others would, do we declare that conduct illegitimate even if we would rank it relatively low in terms of the suffering it causes others?

My goal here is not to provide a legal answer to those questions but rather to emphasize the risk in thinking about torture from these perspectives. Both ways of thinking exoticize the victims of torture. We might imagine that they are not like us; that is, they are not from modern, progressive societies in which human rights are taken for granted. Rather, they are from “traditional” societies in which justice is rough, if it exists at all, religious practices are more “profound,” and people hold strange and inappropriate views on issues of sexuality and gender. This kind of easy dichotomy should put us on our guard. These notions of cultural difference too easily become associated with every individual linked to that culture; the exotic culture trumps individual differences. Thus, Greeks may be thought of as physically more able to endure physical violence. Muslims are going to be offended by having to kiss a cross (and Muslim men have weird ideas about sexuality and gender). These attributed qualities – whether or not they have much to do with a given individual or with his or her cultural heritage – become defining and encompassing.

By stressing the supposed cultural differences that define victims, we deflect the discussion of torture away from the torturers and from the act of torture. Instead of focusing on the practices of countries that torture – including the United States at Abu Ghraib and other places – we spend more time talking about the victims, but primarily from a perspective that assumes that they are different from us. A decent respect for human rights, which reflects a concern for the relationship between perpetrator and victim within a given context of state power, counsels against such a perspective. Instead of directing us to focus on the infliction of suffering (including mental suffering derived from humiliation that includes religious or sexual taunting), crude

ideas of cultural relativism (that is, claims that some kinds of people suffer more or less than the norm that “we” represent) distance us from a common denominator of human pain and fear.<sup>6</sup> This distance, in turn, facilitates claims, such as the post-Abu Ghraib statements by some U.S. political and cultural figures, that what we did was not so bad or has been over-emphasized, and that, in any case, Saddam Hussein’s conduct was worse (curiously implying that the Abu Ghraib detainees should be thankful to be in our custody).<sup>7</sup>

---

6. For discussions of cultural relativism in the context of human rights, see John T. Parry, *Progress and Justification in American Criminal Law*, 40 TULSA L. REV. 639 (2005), and sources cited therein. It is worth noting here that in the analogous context of police violence in U.S. cities, a former Los Angeles Chief of Police once claimed that “some blacks might be more susceptible than ‘normal’ people to injury when officers applied a choke hold.” *Coast Police Chief Accused of Racism*, N.Y. TIMES, May 13, 1983, at A24, *quoted in* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 340 n.98 (1987).

7. The starkest examples are statements by Senators James Inhofe of Oklahoma and Zell Miller of Georgia, and by Rush Limbaugh. Senator Inhofe said he was “more outraged by the outrage than . . . by the treatment,” and he went on to assert that the Abu Ghraib detainees were “not there for traffic violations . . . they’re murderers, they’re terrorists, they’re insurgents.” Charles Babington, *Senator Critical of Focus on Prisoner Abuse*, WASH. POST, May 12, 2004, at A18. Senator Miller derided those who were “rushing to give aid and comfort to the enemy. . . . Why is it that there’s more indignation over a photo of a prisoner with underwear on his head than over the video of a young American with no head at all?” Fred Hiatt, *Why Hawks Should Be Angry*, WASH. POST, May 31, 2004, at A23; *see also* Sanford Levinson, *In Quest of a “Common Conscience”: Reflections on the Current Debate About Torture*, 1 J. NAT’L SEC. L. & POL’Y 231, 237 n.26 (2005) (quoting statement of Senator Jay Rockefeller, made before the Abu Ghraib revelations, that suggests approval of coercive interrogation tactics). Rush Limbaugh likened the conduct at Abu Ghraib to “hazing . . . an out-of-control fraternity prank” and “Saturday night hijinks.” *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](http://www.rushlimbaugh.com/home/daily/site_083004/content/see_i_told_you_so.guest.html); *see also* Max Boot, *Necessary Roughness: Terrorists Don’t Rate Geneva Protections*, L.A. TIMES, Jan. 20, 2005, at B13 (criticizing “the sickos at Abu Ghraib” but also “reject[ing] the absolutist grandstanding of so many of the president’s critics, who would turn international law into a suicide pact”); Michael Massing, *Trial and Error*, N.Y. TIMES, Oct. 17, 2004, §7 (Book Review), at 17 (asking, “How could Americans, imbued with all the right values, have committed such acts?” but then offering the partial excuse that “[n]eedless to say, the happenings at Abu Ghraib are a long way . . . from the murderous activities of Saddam Hussein.”); Cal Thomas, *Those Iraqi Prisoner Pictures*, TOWNHALL.COM, May 5, 2004 (suggesting that critics of Abu Ghraib said nothing about torture by Saddam Hussein’s government and asserting that any humiliation of Muslims in Iraq “isn’t the fault of the West. It’s Muslims’ fault.”), *available at* <http://www.townhall.com/columnists/calthomas/ct20040505.shtml>. I am not denying or trying to minimize the fact that Saddam Hussein’s government killed many people, or that it abused or tortured more Iraqis than have been mistreated while in the custody of coalition forces (although whether his government killed or hurt as many Iraqis as have died or been harmed in the current war is far less clear).

In a word, and particularly in the context of Abu Ghraib, these are “orientalist” approaches to torture that obscure the actual effects of coercive practices.<sup>8</sup> Some of us, after all, whatever our backgrounds and beliefs, would be better able to absorb slaps or blows than others would be, or would be less distressed by them. And if any of us – again, regardless of our backgrounds or beliefs – were held prisoner by an occupying army, were taken out of our cell at night, stripped, and escorted by people with guns into a room full of more people with guns and trained dogs, and were then abused, I suspect that we would find the placement of underwear on our heads or the presence of people of the opposite sex to be among the least disturbing aspects of that experience – even if in other contexts those particular things would disturb us, and even if they were in fact disturbing to some extent. Why do we so easily assume that others would feel differently?

These two examples of how not to talk about torture are fairly straightforward. The next one may seem much less so, but it is crucial for the rest of my argument. The third way not to talk about torture is to say that it is particularly bad, must never happen, and could be eradicated if only we had better laws and better enforcement. This kind of argument treats torture as a separate, universally prohibited, and egregious form of conduct that is categorically different from other forms of state violence, with the probable exception of genocide. In the context of human rights discourse, this claim also tends to treat torture as something that belongs to the history but not the current reality of the West, so that when it happens it is by definition an aberration – as opposed to the reality in other countries that have not “progressed” so far. My claim here is not that other countries do not torture or do not have policies of using torture. My point is that torture sits on a continuum of violent and coercive state practices, where the use of these forms of violence by modern states, including the United States, is far more significant than whether torture is the particular form of violence used.<sup>9</sup>

---

8. See EDWARD W. SAID, *ORIENTALISM* (1978). By “orientalism” Said means such things as defining and positioning the Orient as “in need of corrective study by the West.” *Id.* at 41. Referring to orientalism in post-colonial or Near East studies gets at the way in which Western observers construct a dichotomy between East and West, in which the West is normal and superior, while the East is exotic, passive, and inferior. For an insightful application of these ideas in the context of the status of Arab-Americans after 9/11, see Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575 (2002).

9. The contemporary use of torture by officials in some countries has even been facilitated by instruction from U.S. personnel. See Timothy Kepner, *Torture 101: The Case Against the United States for Atrocities Committed by School of Americas Alumni*, 19 *DICK. J. INT’L L.* 475 (2001); Tom Blanton, *The CIA in Latin America*, Mar. 14, 2000 (including links to CIA training manuals that contain material on coercive practices), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB27/index.html>.

Indeed, one could say that violent treatment of “others” has been a persistent part of our nationalism, just as it has been in many other countries.

I want, in short, to get at torture in ways that avoid exoticizing its victims or treating the regulation of torture from a perspective that defines it as primarily a non-western problem and as an aberration when it does occur in the West.<sup>10</sup> In the process, I also want to avoid treating torture as different from other state violence. Instead, I hope to expose the ways in which law fails to confront torture and to explore other ways of understanding and addressing it. Central to this effort is the need to put torture into its larger contexts of interrogation, state power and violence, and international law and relations. Admittedly, this approach normalizes torture, but my argument is precisely that torture – understood as something more than the strictly defined term of art that one finds in international human rights documents – is already a normal part of the modern state’s coercive apparatus. Creating a separate category for an intentionally narrow set of practices labeled and banned as “torture” only functions to normalize and legitimate the remaining practices that are “not-torture.”

Understanding torture, then, may require redefining it. Darius Rejali suggests a simple definition: “physical and often sanguinary violence on individuals sanctioned by state authorities for state purposes. It is characterized by standard technology and procedures reproduced over time.”<sup>11</sup>

---

10. As Shani D’Cruze and Anupama Rao have written about Abu Ghraib: Dominant voices have sought to narrate soldiers’ violence against Iraqi prisoners as a story of exceptionality. In that context, an unequivocally violent woman may indeed appear as its overdetermined instance. There is also an element of indecipherability here, of course, as we encounter the complicated politics of the gendered victim as coloniser and racist perpetrator. Growing public consternation about the extent to which the abuse of authority can be excused away as either aberrant or exceptional has been fuelled by fragmented and diversely positioned reminiscences about the recurrent scandals of unofficial or unauthorised violence during warfare.

Shani D’Cruze & Anupama Rao, *Violence and the Vulnerabilities of Gender*, 16 GENDER & HIST. 495, 497 (2004). For a discussion of this dynamic in the context of British rule in India, in which the use of torture by native police was identified as aberrant because it was not formally approved by official policies and because it was seen as a vestige of pre-colonial native culture (within the parameters of either understanding, of course, such conduct was not attributable to British authorities), see Anupama Rao, *Problems of Violence, States of Terror: Torture in Colonial India*, 3 INTERVENTIONS 186 (2001).

11. Darius Rejali, *Modern Torture as Civic Marker: Solving a Global Anxiety with a New Political Technology*, 2 J. HUM. RTS. 153, 153 (2003). Rejali goes on to describe torture’s value as “a tool in public and private social control of crime. Torture thrives on an insecurity characteristic of modern democracies, a fear of threats to property and personal security by vagrants, aliens, guest workers, drug addicts and the homeless.” More particularly, he contends

In my own work, I have developed a narrower definition. My proposed definition of torture is still quite broad relative to, and it intentionally blurs (although it does not obliterate), the distinctions created by international and domestic law: “torture is not merely the infliction of severe pain to gather information or punish. Rather, torture is also the infliction of potentially escalating pain for purposes that include dominating the victim and ascribing responsibility to the victim for the pain incurred.”<sup>12</sup>

At this point, I must confront Professor Levinson’s concern about the “problem of ‘overinclusive’ definitions, in which torture is alleged to cover all instances of ‘cruel, inhuman, or degrading treatment,’ if not all ‘coercive interrogation’”<sup>13</sup> – a concern that conflicts to some degree with what my definition seeks to do. Levinson is particularly worried that commingling these categories will “end up trivializing the concept of torture and diminishing the special horror attached to that term.”<sup>14</sup> Most readers, I suspect, will reflexively agree. What Levinson would like to see is a discussion that would focus less

---

that “stealth technologies [of torture] mediate experiences of citizenship in the modern world, inducing civic discipline, shaping civic order and so resolving anxieties about the fluid character of modern citizenship. In democratic states in particular, torture serves as a civic marker, separating different gradations of citizenship.” *Id.* at 154. Rejali also demonstrates the corresponding fluidity of the category “torture” in response to social and political status and circumstances, so that the use of a particular technology, such as stun guns, counts as torture “depending on its civic use.” *Id.* at 167; *see also* Darius Rejali, *How Not to Talk About Torture: Violence, Theory, and the Problems of Explanation*, in *VIGILANTISM AND THE STATE IN MODERN LATIN AMERICA: ESSAYS ON EXTRALEGAL VIOLENCE* 127, 138 (Martha K. Huggins ed., 1991) (suggesting flaws in “humanist,” “developmentalist,” and “state terrorist” approaches to torture and insisting “torture is part of modern life in the sense that torture complexes can best be elucidated by means of ordinary features of modern life. Torture complexes are closely related to bureaucracies, prisons, hospitals, and to a certain extent, factories.”).

12. John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *TORTURE: A COLLECTION* 145, 154 (Sanford Levinson ed., 2004) [hereinafter *TORTURE*]; *see also* John T. Parry, *What Is Torture, Are We Doing It, and What If We Are?*, 64 *U. PITT. L. REV.* 237, 249 (2003).

13. Levinson, *supra* note 7, at 238.

14. *Id.* Jeremy Waldron expresses a related concern about legalizing any acts of torture: failure to maintain a category of conduct labeled “torture” that is banned as an absolute wrong will undermine our confidence in the wrongness of “lesser evils.” Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *COLUM. L. REV.* 1681, 1734-1735 (2005). Waldron is correct, of course, about the possible slippery slope problem. *See* John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be an Option?*, 63 *U. PITT. L. REV.* 743, 763 (2002) (“Once torture is available for terrorists in extreme circumstances, someone inevitably will demand it in less extreme circumstances, and then for suspected serial rapists and murderers, or even for those accused of lesser crimes. The slippery slope problem with torture and the related risk of abuse is real, and the harms that would inevitably result from a loosening of standards are significant.”).

on whether a particular practice amounts to torture and more on what to do with the undisputed fact that “the United States has [engaged in] the unwarranted ‘infliction of pain or suffering on another.’”<sup>15</sup> I share that goal, but I also believe that conflating the definitions of “torture” and “cruel, inhuman or degrading treatment or punishment” could help us attain that goal. If we deprive governments of these two different categories of coercive treatment – both of which are prohibited in nearly all circumstances<sup>16</sup> – officials will no longer be able to take refuge in the claim that, no matter what they do, at least it was not torture. The basic inquiry should be instead to establish the fact that officials deliberately cause suffering and to evaluate any reasons put forward in support of their actions.

All that would be missing from such an inquiry would be the “special horror” of knowing in some cases that conduct amounts to “torture” (in the sense of particularly extreme state violence), as well as the ability to say that certain conduct is wholly outside the realm of acceptable human conduct. But it is precisely the desire to attach these labels that worries me. The special horror of torture provokes an all-too-easy condemnation, followed by the satisfaction that we have judged righteously, causing us to be distracted from the everyday horrors of state power. Another way to make this point is to say that condemning torture is easy – almost everyone does it without hesitation. But condemnation does not get us very far. Indeed, it can distract us from the harder task of sorting out what it means to live under pervasive and sometimes violent authority. That sorting out would in turn require us to confront one of the disjunctions or at least one of the tensions between how we live and how we think we live.<sup>17</sup>

---

15. Levinson, *supra* note 7, at 242.

16. For a discussion of possible exceptions to the bans on torture and on other cruel, inhuman, or degrading treatment, see *id.* at 235-241; *infra* text accompanying notes 18-77.

17. A classic example of general claims about the existence and nature of pervasive authority in modern states is this one by Foucault:

The general juridical form that guaranteed a system of rights that were egalitarian in principle [under representative governments] was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines. And although, in a formal way, the representative régime makes it possible, directly or indirectly, with or without relays, for the will of all to form the fundamental authority of sovereignty, the disciplines provide, at the base, a guarantee of the submission of forces and bodies.

MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 222 (Alan Sheridan trans., 1977). As the quotation makes clear, however, Foucault tended to emphasize discipline more than overt physical state violence. *But see* MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975-1976, at 254-263 (David Macey trans., 2003) (emphasizing the role of racism in licensing state violence). Agamben draws heavily on

In sum, my goal is to normalize torture without trivializing it. I seek not so much to deny the horror of torture as to insist that if we label it a horror we must also recognize it as but one of a range of related horrors and risks associated with contemporary life in a modern state. And here I count as modern states both the United States and Iraq, notwithstanding the differences between them.

## II. THE LAW OF TORTURE

In this section, I briefly describe the law of torture both as it is commonly understood and as it appears from a more skeptical perspective. I conclude that law does much less to protect us from torture than we might have expected.

“Torture” is a crime under international law and the laws of most countries. International law allows no justification, no emergency situation that would justify its use. After the approval of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)<sup>18</sup> by the U.S. Senate, and in light of decades of constitutional interpretation, the same would appear to be true for the United States. Professor Kreimer has detailed, both in his contribution to this symposium and in other writings, the many ways in which constitutional doctrine leads to the conclusion that torture

---

Foucault but puts greater emphasis on the problem of state violence by making the modern state’s sovereign power to decide life and death his central concern. For example, he argues that “the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals’ lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.” GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 121 (Daniel Heller-Roazen trans., 1998); *see also* Talal Asad, *On Torture, or Cruel, Inhuman, and Degrading Treatment*, in *SOCIAL SUFFERING* 285, 288-289 (Arthur Kleinman et al. eds., 1997) (discussing modern torture as a secret practice and therefore as a kind of “disciplinary knowledge” in the Foucauldian sense); D’Cruze & Rao, *supra* note 10, at 499 (noting that “[o]ne of the achievements of feminist analysis over the last three decades has been to recognise the ways that domination silences and hides the coercive and violent outcomes of power”).

18. 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.ohchr.org/english/law/cat.htm>.

is unconstitutional.<sup>19</sup> You might think from this description that torture is banned absolutely, but such a perception would be false. Torture, properly defined – by which I mean either the definition I developed above or, more simply, conduct of the kind that most people likely would consider to be torture – is justifiable in some circumstances under international law and the laws of at least some countries, including the United States.<sup>20</sup>

The foundational international law documents on torture are the Geneva Conventions,<sup>21</sup> the International Covenant on Civil and Political Rights,<sup>22</sup> and the Torture Convention.<sup>23</sup>

---

19. See Seth F. Kreimer, “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience, 1 J. NAT’L SEC. L. & POL’Y 187 (2005); Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003); see also Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 216-251 (2003) (discussing the Constitution’s application to torture and reaching a less absolutist legal conclusion while retaining an absolute rejection of the practice of torture).

20. This discussion draws from and to some extent expands my analysis of international and domestic law’s application to torture in several other articles, particularly Parry, *What is Torture?*, *supra* note 12, at 238-246; Parry, *Escalation*, *supra* note 12, at 146-152; and Parry, *Progress and Justification*, *supra* note 6, at 656-660. I do not discuss customary international law in the text. I recognize, however, that customary international law prohibits torture, and the Supreme Court recognized this last Term. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-2766 (2004); see also Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1483 n.10 (2004) (collecting citations). Nonetheless, the customary international law prohibition remains vague and has been given greater specificity and substance by international agreements, particularly the Torture Convention, *supra* note 18.

21. Convention (No. I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 31; Convention (No. II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 85; Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 135; Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, T.I.A.S. 3362, 75 U.N.T.S. 287; Protocol Additional (No. I) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977); and Protocol Additional (No. II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 (1977). The 1949 Conventions and the 1977 Protocols Additional are available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>.

22. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]; see also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Pt. I, Resolutions, at 71, U.N. Doc. A/810 (1948), art. 5 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

23. Torture Convention, *supra* note 18.

The Geneva Conventions provide broad protections:

Any person detained, whether a prisoner of war, unprivileged belligerent, terrorist, or noncombatant, has at least minimum guarantees “in all circumstances” “at any time and in any place whatsoever” under common Article 3. Such rights include the right to be “treated humanely,” freedom from “cruel treatment and torture,” and freedom from “outrages upon personal dignity, in particular, humiliating and degrading treatment,” and minimum human rights to due process in case of trial.<sup>24</sup>

Common Article 1 of the Conventions states that there can be no derogations from these protections under any circumstances. Although common Article 3 applies by its terms only to “an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,” it is frequently understood to state the minimum acceptable conditions of treatment for people covered in any way by the Conventions, and other provisions of the Conventions provide more extensive protections to varying categories of people.<sup>25</sup>

A great deal of effort by Bush administration officials went into developing arguments for avoiding application of the Geneva Conventions to U.S. actions in Afghanistan, and to some extent in Iraq, precisely because when they do apply, the Conventions dramatically constrain our ability to dominate and interrogate prisoners.<sup>26</sup> The Geneva Conventions do not, however, cover all

---

24. Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, The Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1351 (2004) (quoting provisions of the Geneva Conventions).

25. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 399-409 (2004).

26. See Memorandum for Alberto R. Gonzales from Asst. Atty. General Jack L. Goldsmith III, *Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq*, Mar. 19, 2004 (draft), available at [http://traynor.uchastings.edu/library/Library%20Information/News%20and%20FAQ/doj\\_march\\_19.pdf](http://traynor.uchastings.edu/library/Library%20Information/News%20and%20FAQ/doj_march_19.pdf); Memorandum from President George W. Bush to the Vice President et al., *Humane Treatment of al Qaeda and Taliban Detainees*, Feb. 7, 2002, available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>; Memorandum for the President from Alberto R. Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban*, Jan. 25, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>; Memorandum from John Yoo & Robert J. Delahunty to William J. Haynes, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>. Not all Administration officials agreed with these arguments. See Memorandum from William H. Taft IV to Counsel to the President,

forms of armed or military action. They deal primarily with armed conflicts between and among nations that became parties to the Conventions and with the occupation of a state party's territory by the forces of another nation.<sup>27</sup> Thus, they do not apply to such activities as domestic criminal law enforcement, including police violence, and their application to internal "unrest" or insurgencies is less certain and less comprehensive.<sup>28</sup> Nor are they likely to apply to actions against individual "terrorists" or members of terrorist organizations, despite rhetoric proclaiming a "war on terror," and despite the corresponding belief of many that terrorism cannot be thwarted through ordinary criminal law processes.<sup>29</sup>

---

*Comments on Your Paper on the Geneva Convention*, Feb. 2, 2002, available at <http://www.fas.org/sgp/othergov/taft.pdf>; Memorandum from Colin L. Powell to Counsel to the President, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan*, Jan. 26, 2002, available at <http://www.msnbc.msn.com/id/4999363/site/newsweek/>. All of these documents are available in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *TORTURE PAPERS*]. Additional documents reflecting the debate within the Administration over the Conventions are available at [http://www.newyorker.com/online/content/?050214on\\_online](http://www.newyorker.com/online/content/?050214on_online) only02.

27. See George H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 892 n.8 (2002) (describing the application of common Article 2 to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" and to "all cases of partial or total occupation of the territory of a High Contracting Party").

28. Common Article 3 of the Conventions extends basic protections to "an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," but the more comprehensive provisions of the Conventions do not expressly apply. See Geneva Conventions I-IV, art. 3, *supra* note 21. The 1977 Protocols to the Conventions, *supra* note 21, expand protections for people involved in "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," Protocol I, *supra* note 21, art. 1(4), 1125 U.N.T.S. at 7, 16 I.L.M. at 1397, and conflicts between the armed forces of a contracting party and "dissident armed forces or other organized armed groups." Protocol II, *supra* note 21, art. 1, 1125 U.N.T.S. at 611, 16 I.L.M. at 1443. But the United States and many other "states of geo-strategic significance" have not ratified either document. See Int'l Comm. of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols* (updated Apr. 12, 2005), at [http://www.icrc.org/Web/eng/siteeng0.nsf/html/party\\_gc](http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc); see also Jinks, *supra* note 25, at 424.

29. See Aldrich, *supra* note 27, at 893 ("Al Qaeda does not in any respect resemble a state, is not a subject of international law, and lacks international personality. It is not a party to the Geneva Conventions, and it could not be a party to them or to any international agreement."); Paust, *supra* note 24, at 1342 ("any conflict between the United States and al Qaeda as such cannot amount to or trigger application of the laws of war"). Reacting to one of the Bush administration memos, Jeremy Waldron argues that the Geneva Conventions should be read to apply to categories of persons not explicitly covered by them. See Waldron, *supra*

The International Covenant on Civil and Political Rights (ICCPR) provides that “[n]o one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>30</sup> Article 4 of the ICCPR allows no derogation from that provision.<sup>31</sup> Unlike the Geneva Conventions, moreover, the ICCPR’s ban on torture applies to government conduct in general, not just during armed conflicts, and so would apply to law enforcement and military actions loosely grouped under the war on terror heading.<sup>32</sup>

So far, international law comes close to the absolutist image I set out above. The most specific and significant international law document on torture, however, is the Torture Convention.<sup>33</sup> It defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” by or at the instigation of or with the consent or acquiescence of state actors as part of interrogation, punishment, intimidation, or discrimination.<sup>34</sup> Torture, so defined, is banned absolutely: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal

---

note 14, at 1693-1695. Waldron’s argument contrasts with the equally plausible assertion that international law documents are carefully negotiated and crafted, and one can usually be sure that exclusions are intentional, even if some of those involved in the negotiations hope the exclusion will some day be swallowed by the rule. Still, there is some basis for his argument, to the extent that the Conventions are seen as beginning points for an evolving set of standards. *See, e.g.*, Jinks, *supra* note 25, at 425-426 (discussing relaxation by the International Criminal Tribunal for the Former Yugoslavia of the nationality requirements of Geneva Convention IV). In a careful analysis, Jinks concludes that the Conventions provide more protections than commonly thought – both by their text and through judicial interpretation – but he also recognizes limitations to those protections. *Id.* at 425-428; *see generally* Jason Callen, *Unlawful Combatants and the Geneva Conventions*, 44 VA. J. INT’L L. 1025 (2004) (discussing and interpreting some of the issues that arose during negotiation of the Conventions about the categories of persons covered by them).

30. ICCPR, *supra* note 22, art. 7, 999 U.N.T.S. at 175, 6 I.L.M. at 370.

31. *Id.*, art. 4, 999 U.N.T.S. at 174, 6 I.L.M. at 370.

32. Some Administration officials have taken the position that the ICCPR does not apply, at least as ratified by the United States, to conduct by the U.S. outside its territory or jurisdiction or during wartime. *See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations*, Apr. 4, 2003, at 6, available at <http://www.defenselink.mil/news/Jun2004/d20040622.doc8.pdf>. The International Court of Justice has reached the opposite conclusion about the extraterritorial reach of the ICCPR in general. *See Advisory Opinion No. 131, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Int’l Ct. Justice, July 9, 2004), 43 I.L.M. 1009 (2004), at ¶¶105-111. For purposes of this essay, I do not want to develop or embrace the Administration’s theory as a possible reading of the ICCPR or of the Torture Convention.

33. Torture Convention, *supra* note 18.

34. *Id.*, art. 1(1), 1465 U.N.T.S. at 113-114.

political instability or any other public emergency, may be invoked as a justification of torture.”<sup>35</sup>

Yet the Torture Convention also takes account – as does the ICCPR – of a different category of state violence: “other cruel, inhuman or degrading treatment or punishment” that states must “undertake to prevent.”<sup>36</sup> The Torture Convention does not define this category, so it is hard to say more than that it describes illegal conduct that is “not torture.” Significantly – and here the Torture Convention differs from the ICCPR – the “no justification” clause of the Torture Convention does not apply to the ban on cruel, inhuman, or degrading treatment.<sup>37</sup> This exclusion, if it means anything, must contemplate the possibility that violent treatment of prisoners or others that does not rise to the level of torture can be justifiable under some circumstances. The ICCPR and the Torture Convention thus stand in tension. Because the Torture Convention is the more specific and recent document, one can make a reasonable argument that for states that are parties to it, its prohibitions and silences trump those of the ICCPR, and perhaps, for the same reasons, even the Geneva Conventions.<sup>38</sup> The Torture Convention is arguably the controlling international law document to address state torture and other abuse, and it seems to be deliberately crafted to leave room for states to engage in coercive treatment in compelling circumstances, so long as the conduct falls short of torture as defined in that document.

---

35. *Id.*, art. 2(2), 1465 U.N.T.S. at 114.

36. *Id.*, art. 16(1), 1465 U.N.T.S. at 116.

37. The Association of the Bar of the City of New York’s Committee on International Human Rights pointed out the significance of the distinction between torture and cruel, inhuman or degrading treatment well before the U.S. ratified the Convention. *See* Comm. on Int’l Human Rights, *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 42 REC. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y. 235, 240 (1987) (noting that “most of the obligations imposed by the Convention apply only to acts of torture, as defined in Article 1”).

38. Of course, one can just as plausibly argue that states must comply with both documents fully, so that in cases of inconsistency the most rights-protective document controls. Some commentators argue, for example, that interpretation of the Torture Convention should be based on the ICCPR and thus must incorporate the ICCPR’s more nearly complete ban on torture and other cruel, inhuman or degrading treatment or punishment. *See* J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 124 (1988). Article 16 of the Torture Convention provides a good basis for such arguments, although the fact remains that the Torture Convention, drafted after the ICCPR, appears consciously to depart from the earlier document. I will not discuss the relevance of Article 16 in this essay, except to suggest that the Torture Convention may be purposefully ambiguous on the scope of the prohibition on cruel, inhuman, and degrading treatment, and that this ambiguity must be settled (and possibly unsettled) through ongoing interpretation rather than textual analysis.

If the Torture Convention is the controlling document, then a state that wishes to justify its violence need only assert that, whatever it may have done, it has not tortured. At this point the discussion gets bogged down in definitions, a development that serves state interests because the legal issues quickly dissolve into denials of responsibility for conduct that goes too far and into accusations of partisanship against those who say otherwise. These moves should be familiar by now from the Bush administration’s reaction to Abu Ghraib (but I would expect the same from any administration).<sup>39</sup>

We need to recognize one other critical point. Legally, the definitional game applies only to the Torture Convention (upon the assumption that it is the controlling legal document). Politically, socially, and culturally, the game applies to any international law document that makes the distinction between categories of abuse. The primary goal of a state that engages in abusive treatment of its detainees is not to have that abusive treatment characterized as “legal.” Rather, the state’s goal is to have that treatment seen as “not-torture” – a category legitimated by international law generally. From there, the state can distance itself from the conduct of bad apples and, if necessary, make justification arguments to the court of popular opinion based on whatever emergency, insurgency, or war is at hand.<sup>40</sup>

For an example of the definitional game before Abu Ghraib, consider a case involving Great Britain. The European Convention on Human Rights, like the Torture Convention, prohibits “torture,” as well as “inhuman or degrading treatment or punishment.”<sup>41</sup> The European Court of Human Rights ruled that Britain’s practice of subjecting suspected IRA members to the combination of wall-standing for hours, hooding, continuous loud and hissing noise, sleep deprivation, and restricted food and water did not meet the definition of torture, although it did violate the European Convention’s ban on inhuman or degrading treatment.<sup>42</sup> Britain did not deny its conduct, but it also did not want

---

39. For an example of a nonpartisan proposal for the use of coercive interrogation in limited circumstances, see PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 23-32 (2004), which is the product of a joint project of Harvard Law School and Harvard’s John F. Kennedy School of Government.

40. Levinson describes, for example, how European courts are reluctant to declare that particular conduct amounts to state-sponsored torture, in part because of fear of political repercussions. Instead, the worst conduct ends up being defined as aberrational, the conduct of individuals acting alone. Levinson, *supra* note 7, at 241 (citing Fionnuala Ní Aoláin, *The European Convention on Human Rights and Its Prohibition on Torture*, in TORTURE, *supra* note 12, at 213, 222).

41. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 221.

42. Republic of Ireland v. United Kingdom, 2 Eur. Ct. H.R. 25 (1978).

to be labeled a torturer, and international law provided a straightforward set of arguments to assist it. Moreover, British officials and media sought to justify these practices – again, in the court of public opinion more than in courts of law – as necessary to fight IRA terrorism, although it ultimately stopped the conduct at issue.<sup>43</sup>

A second example is the conduct of Israel's General Security Service, which used a broad range of coercive tactics – similar to but more extensive than Britain's – against Palestinians suspected of terrorism.<sup>44</sup> In 1987, the Landau Commission examined and approved these practices on the ground that they were justified by principles of necessity, but the commission was careful to insist that these practices were not torture and that the level of coercion “must never reach the level of physical torture or maltreatment of the suspect or grievous harm to his honour which deprives him of his human dignity.”<sup>45</sup>

More recently, in a widely noted decision, the Supreme Court of Israel ruled that these practices were illegal.<sup>46</sup> Three aspects of the decision are critical for this discussion. First, the court was very careful not to refer to these practices as torture.<sup>47</sup> Second, the court based its decision on the Knesset's failure to specifically authorize these practices – not on any holding that they were categorically illegal. Finally, the court made clear that a necessity or justification defense would be available after the fact for any official prosecuted for using coercion.<sup>48</sup> In other words, coercive treatment that in the eyes of many human rights advocates rises to the level of torture is not illegal in the most pragmatic sense, because an exception ensures that in some cases the torturer will walk free.

---

43. See JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE 42-46, 188 (2000). Similarly, France has long sought to avoid discussion of its use of torture in Algeria and Vietnam, but some former officials have defended that conduct, particularly with respect to Algeria. See Vivian Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677 (2003).

44. For descriptions, see CONROY, *supra* note 43, at 212-214; John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 88 & n.75 (2002).

45. Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Landau Commission) (1987), *excerpted in* 23 ISR. L. REV. 146, 175 (1989).

46. See Public Committee Against Torture in Israel v. Israel, 53(4) P.D. 817 (H.C. 5100/94) (1999), *reprinted in* 38 I.L.M. 1471 (1999). For extensive analysis of *Public Committee*, see Parry, *Judicial Restraints*, *supra* note 44.

47. Perhaps this is so for the reasons identified *supra* note 40.

48. *Public Committee Against Torture in Israel*, 38 I.L.M. at 1478, 1480-1486.

A final example of the “definitional game” concerns the United States, where coercive interrogation has long been an important legal issue. Professor Kreimer’s work provides a thorough, passionate, and persuasive argument that the Constitution, correctly interpreted, bans both torture and most other forms of cruel, inhuman, or degrading treatment or punishment.<sup>49</sup> His writing exemplifies a vision of the Constitution as a progressive baseline in the story of human rights from which no slippage should be permitted. So, too, constitutional rights appear to operate in Professor Kreimer’s analysis not only as constraints on government conduct, but also as sources of law independent of the state, with the result that rights discourse is not a subset of state power discourse but instead stands on its own foundation. One might even argue that the insistence on this separateness is foundational to American political identity.<sup>50</sup>

Perhaps Professor Kreimer is entirely correct. But as a skeptic of the notion that the Constitution has a precise, let alone “best,” meaning<sup>51</sup> – regardless of what my preferences are – I want to offer an alternative interpretation of United States law. My interpretation does not claim a special status for rights but instead assumes that rights are an aspect of state authority, and it assumes that the law of individual autonomy has meaning only in relation to and in dependence upon the law of state power.<sup>52</sup> I do not claim that

49. See Kreimer, “*Torture Lite*,” *supra* note 19; Kreimer, *Too Close to the Rack and the Screw*, *supra* note 19.

50. Relying on Kreimer, Jeremy Waldron spells out in greater detail something similar to this idea when he argues that the prohibition on torture is an “archetype,” emblematic of the spirit of Anglo-American law – and particularly American constitutional law – with respect to the relationship among law, force, and individual dignity. See Waldron, *supra* note 14, at 1728–1734. From a more critical perspective, Patrick Hanafin describes the idea of “a right dislodged from the repressive state apparatus” or “a right beyond state power” as “impossible to conceive, by virtue of its very ungroundedness,” but he also embraces the assertion of this idea as a form of dissent that could ground a new politics. Patrick Hanafin, *The Writer’s Refusal and Law’s Malady*, 31 J.L. & SOC. 3, 12 (2004), reprinted in *LAW AND LITERATURE* 3, 12 (Patrick Hanafin et al. eds., 2004).

51. See John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 GA. L. REV. 733, 784–786 (2005).

52. Consider Stephen Holmes’s assertion, “To violate rights in a liberal society, after all, is to deny the authority of the liberal state.” STEPHEN HOLMES, *THE ANATOMY OF LIBERALISM* 203 (1993). The relation between power and autonomy that I am positing here has a different quality from the law-force-autonomy relationship described by Waldron (*see supra* note 50), if only because my version insists on autonomy as a creature of, and thus in a subordinate relation to, state power. For more theoretical discussions of human rights that go in this direction, see AGAMBEN, *supra* note 17; Roberto Buonamano, *Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Juridical Norms*, in *EVIL, LAW, AND THE STATE: PERSPECTIVES ON STATE POWER AND VIOLENCE* 159, 169 (John T. Parry ed., 2006) (arguing that human rights are “not a benign development of a humanistic ideal that proclaims the

this alternative interpretation is more likely to be adopted by the Supreme Court, although at points I think it is as persuasive as Professor Kreimer's interpretation. It is enough for my argument that – like the interpretation of international law I developed above – the Constitution and the interpretations of it by the Supreme Court permit officials to make this kind of reading as they decide how to treat people.<sup>53</sup>

My constitutional narrative starts with the Senate's consent to the Torture Convention.<sup>54</sup> In the process of consenting, the Senate narrowed the definition of torture in two ways. First, it included a requirement that in order to constitute torture an act must be "specifically" intended to inflict severe mental or physical suffering.<sup>55</sup> Second, it narrowed the kinds of mental harm that count as torture.<sup>56</sup> The only way to interpret these changes is as an effort to leave more room for coercive practices by freeing U.S. officials and military personnel from concern about violations of international law, especially during operations outside U.S. territory.

The Senate also sought to limit U.S. responsibility to avoid "cruel, inhuman or degrading treatment or punishment" by this reservation:

the United States considers itself bound by the obligation . . . to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term . . . means the cruel, unusual and inhuman

---

sacrosanctity of human life, nor the final exposition of a philosophical position on the liberty of the individual against the intrusive effects of state sovereignty; rather, [they are] an effect of the form of power exercised within the institution of the modern liberal state and through the instrument of international law"). For a straightforward, less theoretical, and unapologetic example of this dynamic, see George F. Will, *Acts of Character Building*, WASH. POST, Jan. 30, 2005, at B7 (describing individual character "as something that is, to a very limited but very important extent, constructed. Public policy participates in the building of it. This is a doctrine of architectonic government, concerned with *shaping the structure of the citizenry's soul.*") (emphasis added).

53. I am deliberately avoiding in this discussion the ethical issues of whether and how government lawyers, knowing that their analysis may mean the difference between life and death or between suffering and relative comfort for many people, could advance arguments similar to mine (not to mention arguments that go farther) in the form of legal advice to decisionmakers. The debate over such ethical issues is addressed in other articles in this issue of the *Journal of National Security Law & Policy* at pp. 357-472.

54. Resolution of Advice and Consent to the Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17491 (Oct. 27, 1990).

55. *Id.* ¶III(1)(a).

56. *Id.*

treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>57</sup>

In other words, “cruel, inhuman or degrading” conduct is, according to the Senate reservation, unconstitutional conduct. It follows that torture is unconstitutional as well. Taken as a whole, then, the Senate consented to the Convention only insofar as it banned conduct that was already unconstitutional.<sup>58</sup>

What, then, is the specific content of the constitutional prohibition on torture and cruel, inhuman, or degrading treatment or punishment? The Senate did not mention the Fourth Amendment, but the protection against excessive force in the context of a search or seizure would appear to ban a wide variety of practices that inflict pain.<sup>59</sup> Any use of force, after all, must be reasonable,<sup>60</sup> a doctrine that serves as both a limitation and a delegation of power, and that is roughly consistent with the Torture Convention’s statement that torture “does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”<sup>61</sup> The Supreme Court has indicated, however, that application of the constitutional standard turns on the reasonableness, not just of the force itself, but of an official’s belief about the need to use force.<sup>62</sup> In theory, then, the Fourth Amendment bars unreasonable force, but in practice officials are likely to receive a great deal of latitude.

---

57. *Id.* ¶II(2).

58. These conditions on consent to the Convention by the Senate and at the behest of the executive branch are part of a pattern of using reservations, understandings, and declarations to limit the constraints otherwise created by international law. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 404-410 (2000). The Senate practice is controversial both as a matter of U.S. law and policy, and also as a matter of international law and relations. See, e.g., Malvina Halberstam, *Alvarez-Machain II: The Supreme Court’s Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. NAT’L SECURITY L. & POL’Y 89 (2005). For a convincing defense of the constitutionality of this practice, see Bradley & Goldsmith, *supra*. For a description and analysis of the United Nations’ response to the use of this practice by a range of countries, including the United States, see Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT’L L. 277 (1999).

59. See *Graham v. Connor*, 490 U.S. 386, 388 (1989).

60. See *id.* at 399.

61. Torture Convention, *supra* note 18, art. 1(1), 1465 U.N.T.S. at 114.

62. See *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (“If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed.”).

The Eighth Amendment bans “cruel and unusual punishments,” and the Supreme Court has interpreted that language to prohibit the “unnecessary and wanton infliction of pain.”<sup>63</sup> This standard seems clearly to outlaw gratuitous sadism, but the possibility of justification leaves an opening for officials to inflict severe pain so long as it is related to a legitimate goal, such as maintaining discipline. In *Whitley v. Albers*, for example, the Supreme Court said that prison officials are not liable in damages if “force was applied in a good faith effort to maintain or restore discipline,” but officials will be liable if they act “maliciously and sadistically for the very purpose of causing harm.”<sup>64</sup> As with the Fourth Amendment, officials are likely to receive a great deal of latitude when prison order is – or “reasonably” appears to be – at stake.

The Fifth Amendment’s Self-Incrimination Clause would also seem to provide protection against torture, and indeed that appears to have been one of its original purposes.<sup>65</sup> Yet in *Chavez v. Martinez* four justices stated clearly that the privilege against self-incrimination is only a trial right. For these four, the privilege applies only to efforts to introduce coerced testimony in a legal proceeding and has no application in other contexts.<sup>66</sup> Two other justices who concurred in that part of the judgment were not willing to go quite so far. For them, the privilege would almost never apply outside the courtroom, but they did not dismiss the possibility that it might apply in an extreme case in which a plaintiff made a “powerful showing.”<sup>67</sup> Presumably they had something like torture in mind, but given the very disturbing facts of *Chavez*, their definition of torture may not be expansive, and they might not have meant to include cruel, inhuman, or degrading treatment in the category of conduct that would provide a “powerful showing.”<sup>68</sup>

---

63. See *Hudson v. McMillian*, 503 U.S. 1, 6-9 (1992).

64. 475 U.S. 312, 320-321 (1986).

65. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2651 (1996) (collecting sources).

66. 538 U.S. 760, 766-767 (2003) (opinion of Thomas, J., joined by Rehnquist, C.J., O’Connor, J., and Scalia, J.).

67. *Id.* at 778 (Souter, J., joined by Breyer, J., concurring) (quoting *Miranda v. Arizona*, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)).

68. Justice Stevens, by contrast, considered the police conduct in *Chavez* to be “the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods,” *id.* at 783 (Stevens, J., concurring in part and dissenting in part). This statement, however, was part of a substantive due process analysis. He said nothing about the privilege against self-incrimination in his opinion, and he may agree with the *Chavez* plurality that the privilege is only a trial right. See Parry, *Constitutional Interpretation*, *supra* note 51, at 752 n.108, 773 n.230.

After *Chavez*, restrictions on coercive interrogation will be governed primarily by Fifth and Fourteenth Amendment substantive due process doctrine, which provides two different doctrinal approaches. First, conduct that “shocks the conscience” violates the Constitution. Yet the Supreme Court declared in *County of Sacramento v. Lewis* that otherwise outrageous conduct does not shock the conscience unless it is “unjustifiable by any government interest.”<sup>69</sup> Three justices applied this doctrine in a very straightforward way in *Chavez*, concluding that

the need to investigate whether there had been police misconduct constituted a justifiable government interest [allowing interrogation of a severely wounded man in a hospital emergency room] given the risk that key evidence would have been lost if Martinez had died without the authorities even hearing his side of the story.<sup>70</sup>

Only three of the remaining justices were willing to disagree publicly with that conclusion.<sup>71</sup> More generally, if we take seriously the possibility that “any government interest” will justify otherwise conscience-shocking behavior, then we have not said much more than that the state must have a purpose when it tortures; it cannot do so arbitrarily.

The second way that conduct can offend substantive due process principles is by violating a fundamental right. Although this doctrine provides stronger protection than the shocks-the-conscience test, it still makes room for exceptions.<sup>72</sup> Conduct that is narrowly tailored to serve a compelling state interest is constitutional even if it violates an individual’s fundamental rights.<sup>73</sup> Add to that the sometimes-enforced requirement that the claimed right be

---

69. 523 U.S. 833, 849 (1998).

70. *Chavez*, 538 U.S. at 775 (opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.).

71. *See id.* at 787-788 (Stevens, J., concurring in part and dissenting in part); *id.* at 796-799 (Kennedy, J., concurring in part and dissenting in part). Justice Ginsburg joined the relevant portions of Justice Kennedy’s opinion. *Id.* at 799 (Ginsburg, J., concurring in part and dissenting in part).

72. Justice Thomas applied this doctrine in *Chavez*, 538 U.S. at 775-776 (plurality opinion), but in *Lewis* a majority of the Court suggested that it applies only to legislative action, so that executive action would be judged solely under the shocks-the-conscience test. *See Lewis*, 523 U.S. at 847 n.8.

73. *Chavez*, 538 U.S. at 775 (opinion of Thomas, J.) (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

described with particularity, and the doctrine becomes malleable enough to allow at least some coercive interrogation.<sup>74</sup>

In short, one can easily argue that there is no absolute constitutional right not to be tortured. Courts are not bound to follow doctrines to their logical conclusions, of course, and even in *Chavez* the justices seemed to say that “torture” is unconstitutional.<sup>75</sup> But it is also clear that constitutional doctrine is constructed in a way that leaves room for government action in cases of perceived necessity.<sup>76</sup> Thus, even if there is an absolute right not to be “tortured,” we cannot be confident that the right extends to coercive interrogation that technically falls short of legal definitions of torture where the government can assert necessity.

International and domestic laws purport to ban torture. But if we look at the practices of Western countries, we see that in many circumstances coercion is not only an ongoing issue but also arguably legal – as well as justifiable politically. This conclusion only reinforces my caution in the first section about avoiding orientalizing<sup>77</sup> or imperializing approaches to torture under which developing, supposedly pre-modern countries must not torture (because that is one of the ways they prove their merit), but countries defined as modern and progressive are assumed not to torture. It also raises serious questions about who benefits from carefully constructed categories of torture and cruel, inhuman, or degrading treatment or punishment.

---

74. See *id.* at 775-776 (describing this requirement). For additional analysis of the self-incrimination and substantive due process issues raised by *Chavez*, see Parry, *Constitutional Interpretation*, *supra* note 51.

75. See 538 U.S. at 773 (opinion of Thomas, J.) (stating that due process doctrine will “provide relief in appropriate circumstances” for “police torture or other abuse that results in a confession”); *id.* at 783-784 (Stevens, J., concurring in part and dissenting in part); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part); see also *McKune v. Lile*, 536 U.S. 24, 41 (2002) (referring to “the physical torture against which the Constitution clearly protects”). Aside from constitutional constraints, in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-2766 (2004), the Supreme Court referred to the ban on torture as an example of a clearly accepted international norm, violation of which will give rise to a claim under the Alien Tort Statute, citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and including the following quotation from that case: “[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.” *Filartiga*, 630 F.2d at 890.

76. Perhaps this is a goal of judicial minimalism. For an interesting discussion of how judicial minimalism might apply to the war on terror, see Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.

77. See *supra* note 8.

## III. WHY LAW FAILS

I want to return to the definition of torture. International and domestic law describe it as the infliction of severe mental or physical pain or suffering. I have argued that the definition of torture should include the infliction of potentially escalating pain for purposes that include dominating the victim and ascribing responsibility to the victim for the pain incurred. Both approaches recognize that, although torture is most commonly linked to interrogation, it can also be used, as the Torture Convention states, to punish, intimidate, or discriminate. My definition seeks to expand upon the Convention to make clear that the purposes of torture include the maintenance of public order, control of racial, ethnic, and religious minorities, and – critically – domination for the sake of domination (or, if you prefer, for the sake of power).

Now consider the implications of this broader definition and broader recognition of torture’s purposes. First, the abuses at Abu Ghraib are harder to characterize as aberrational. Instead, to the extent that the conduct there amounts to torture or its near equivalent, it sits on a continuum with other practices that also meet the definition. Those practices include not only other forms of coercive interrogation and punishment by military and intelligence personnel, but also other applications of state power, such as contemporary police violence in U.S. cities, violent repression of racial minorities throughout U.S. history, and similar practices in other countries, as well as hierarchical exercises of power and control in a variety of political, social, and interpersonal contexts.

Second, the broader definition also suggests a kinship between torture and forms of domination that rely on discipline instead of pain. If there is such a kinship, then torture is not exceptional conduct that belongs in a separate category, and the torture/not-torture distinction can no longer be used to legitimate lesser forms of state violence. Or, to the extent that torture is exceptional, its pervasiveness suggests that the exception has become the norm, and the language of exception has become the language of our legal and political discourse.<sup>78</sup> In other words, the fact that coercion and state violence

---

78. I am hardly the first to make this connection. See GIORGIO AGAMBEN, *STATE OF EXCEPTION 2* (Kevin Attell trans., 2005) (“[T]he voluntary creation of a permanent state of emergency (though perhaps not declared in the technical sense) has become one of the essential practices of contemporary states, including so-called democratic ones.”); Oren Gross, *The Normless and Exceptionless Exception: Carl Schmitt’s Theory of Emergency Powers and the “Norm-Exception” Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1854, 1857 (2000); Sanford Levinson, *Torture in Iraq & the Rule of Law in America*, *DÆDALUS*, Aug. 2004, at 5; Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 *U. PA. J. CON. L.* 1001 (2004).

are themselves normal attributes of modern state power is masked by the effort to define certain egregious categories of violence, such as torture, that the state can then claim it rarely, if ever, employs.

Finally, the very linkage of torture with other forms of domination suggests why we try to cabin it with narrow definitions. Torture, after all, is not a neutral word. To call something torture is almost always to condemn it, with the result that we have to confine the term, lest we be forced either to reexamine the legitimacy of our other coercive practices or to accept the fact of coercion as a routine aspect of our personal, social, and political arrangements.

All of this suggests that defining torture as broadly as I insist, coupled with the recognition that torture belongs on a continuum with other coercive practices, makes the task of crafting legal rules to contain torture more difficult. In the remaining paragraphs of this essay, I want to suggest that the task of regulating torture is more difficult still, and that it might even be impossible.

Consider, first, the role of bureaucracy and collective action. Bureaucratic institutions often display an interesting mix of efficiency and inertia. Violent practices will commend themselves as expedient to actors who operate in the short term – a category that, depending on the circumstances, includes military and police, as well as politicians. Inertia, in turn, impedes change or reform, so that entrenched conduct, including violence, will persist once it becomes part of the institutional culture. This phenomenon may be particularly difficult to control in institutions, like the police or the military, that exist to be violent, by which I mean that the military and police are the institutional structures through which a state can wield violence and claim legitimacy. Violence is already part of the institutional culture, and although military and police officials labor to control and channel that violence in ways that are roughly consistent with rights claims, they inevitably fail some of the time.<sup>79</sup>

Another aspect of bureaucratic culture is also relevant here. Sketching broadly, bureaucracies, including police and military command structures, channel the implementation of policy decisions even as they fragment or eliminate responsibility for them. Decisions to impose harsh conditions are made clear in a variety of ways to officials or soldiers on the ground even as responsibility or authorship of those decisions dissipates. The lower level officials end up becoming, first, the torturers (as opposed to their superiors,

---

79. In the context of the current torture controversy, it appears that civilian officials were far less concerned than were career military officials about controlling and channeling violence during detention and interrogation.

whose hands are clean) and, second, victims within the context of their bureaucratic role, because they become the only ones held accountable.

The recent “Church Report” by Vice Admiral Albert T. Church provides a good example.<sup>80</sup> Although the full report is classified, an unclassified executive summary states numerous times that the abuse of detainees had no connection at all with the actions of senior military and defense officials. So, Admiral Church insists:

the DoD officials and senior military commanders responsible for the formulation of interrogation policy evidenced the intent to treat detainees humanely, which is fundamentally inconsistent with the notion that such officials or commanders ever accepted that detainee abuse would be permissible. Even in the absence of a precise definition of “humane” treatment, it is clear that none of the pictured abuses at Abu Ghraib bear any resemblance to approved policies at any level, in any theater.<sup>81</sup>

In the Church report, the focus is on official forms. A number of abusive interrogation techniques were recommended in draft reports but never approved as final and official policy.<sup>82</sup> And, according to the report, while for extended periods no clear interrogation policies existed, the permissive practices that were in place evolved into a normal, deliberate review process in which humane standards were ultimately developed.<sup>83</sup>

---

80. Neither the exact title nor the date of the report has been made public. An unclassified executive summary explains that the report sets forth the results of a comprehensive review of DOD interrogation operations that was directed by Defense Secretary Rumsfeld on May 25, 2004. *Executive Summary (U)*, available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

81. *Id.* at 3; *see also id.* at 13, 15. Admiral Church also states, “we found no evidence to support the notion that the Office of the Secretary of Defense, the National Security Council staff, CENTCOM, or any other organization applied explicit pressure for intelligence, or gave ‘back-channel’ permission to forces in the field . . . to use more aggressive interrogation techniques than those authorized . . .” *Id.* at 11.

82. *See id.* at 5 (discussing the Working Group Report, *supra* note 32); *id.* at 7 (discussing interrogation techniques based on an “unsigned draft memorandum . . . which was never approved” and possibly never even seen by the Secretary of Defense but which somehow managed to influence lower level officials).

83. *See id.* at 7-9. Admiral Church states, with what appears to be concern, that in the absence of clear policies “interrogators fell back on their training and experience,” although he insists that, “with limited exceptions,” training and experience kept interrogators from committing abuses. *Id.* at 10. On the next page, however, he admits that “‘pressure’ [for ‘actionable intelligence’] was applied in Iraq through the chain of command,” and that the

Contrast that view with statements of Administration officials that “the gloves came off,”<sup>84</sup> with the interrogation memoranda prepared by Administration lawyers,<sup>85</sup> and with the steady stream in the news media of credible accounts of abuse. Notably, the news accounts have often included admissions by officials that U.S. forces have used coercive techniques. For example, one official endorsed using “a little bit of smacky-face” during interrogations,<sup>86</sup> and another declared, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”<sup>87</sup> Perhaps in the bureaucratic world of the Church report, official documents are what count; statements by officials should not be confused with official policy; and news reports are merely evidence of inevitable and regrettable lapses of discipline. Abuse and coercion, in short, are the work of bad apples, and the chain of command is liable at most for a sin of omission in failing to provide enough specific guidance.

Next, imagine the experience of torture. I have argued that torture is less about the infliction of severe pain and more about the use of pain to dominate the victim – sometimes to get information, but more often simply for the sake of power. The result is pain and anguish, wounded and even broken minds and bodies.

But, importantly, torture is also a relationship – between torturer and victim, and in some contexts between state and victim. Within the context of this relationship, the torturer can himself become almost a victim – the person with whose mental anguish we can identify as we evaluate and consider whether to justify his actions.<sup>88</sup> And the tortured detainee becomes a free, self-actualizing individual, who makes choices – whether to talk, and what to say – that lead either to relief or to more torture.<sup>89</sup> Worth noting as well is that this perverse dynamic persists in the relationship between human rights groups and torture victims. Humanitarian workers risk reenacting torture in the process of

---

pressure “was not properly managed by unit-level leaders at Abu Ghraib.” *Id.* at 11.

84. Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 56 (quoting testimony to Congress of State Department counter-terrorism coordinator Cofer Black).

85. See *supra* notes 26 & 32.

86. Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1.

87. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1.

88. For a related and insightful discussion of how torturers can see their actions as justified, see Mark Osiel, *The Mental State of Torturers: Argentina’s Dirty War*, in TORTURE, *supra* note 12, at 129.

89. See ELAINE SCARRY, THE BODY IN PAIN 35, 46-47 (1985); Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in TORTURE, *supra* note 12, at 153.

interviewing and gathering information from victims, and the anguish of the humanitarian, who must not only distinguish between more or less serious claims of abuse but must also persuade torture victims to talk, becomes a separate and important subject of concern.<sup>90</sup>

Finally, photos and testimony from Abu Ghraib make clear that the abuse of prisoners was not only about interrogation; nor was it simply about dominating Iraqis expressly in the name of state power. Rather, as Private Lynndie England explained, it was “just for fun.”<sup>91</sup>

There are several ways to understand this statement. The actions of U.S. forces could be carnivalesque – the inversion or parodying of (military) authority and the suspension of official rules, combined with profane physical excess, in all of which the bodies of Iraqi prisoners were mere props.<sup>92</sup> This approach suffers to some extent from the fact that the guards were still acting as state agents, so their violence remained state violence. Although they inverted some aspects of military authority, their conduct and circumstances are fairly distinct from the popular revelries of Renaissance festivals that form the basis of theories of carnival. Nonetheless, to the extent that their conduct was a reaction to the stress of their experiences in Iraq and their position within a military hierarchy, the guards may indeed have been exhibiting carnivalesque behavior in the creation of a temporary “second world and a second life outside officialdom.”<sup>93</sup>

Second, we could put these actions within the ancient practice of pillaging after a military victory. Soldiers are rewarded for their valor and their battle mentality is redirected by letting them loose on “the others” – the people whom they have defeated. And these actions, this release, may even have a larger objective – to make clear the extent of the domination that results from defeat, to cow a subject population through terror, perhaps even to find specific objects or information. So the fun turns out to be state domination after all.

90. See James Dawes, *Atrocity and Interrogation*, 30 *CRITICAL INQUIRY* 294 (2004).

91. See James Polk, *Testimony: Abu Ghraib Photos “Just for Fun,”* CNN.COM, Aug. 3, 2004 (reporting a military investigator’s testimony that England described the taking of photographs as “‘just for fun.’ They didn’t think it was that serious. . . . They didn’t think it was that big a deal. They were joking around.”), available at <http://www.cnn.com/2004/LAW/08/03/england.hearing/index.html>. Others have noted this aspect of Abu Ghraib. See, e.g., Susan Sontag, *Regarding the Torture of Others*, N.Y. TIMES, May 23, 2004, §6 (Magazine), at 25 (arguing that “it was all fun . . . [an] easy delight taken in violence”).

92. See MIKHAIL BAKHTIN, *RABELAIS AND HIS WORLD* 10-11 (Hélène Iswolsky trans., 1984). D’Cruze and Rao recently made a similar suggestion. See D’Cruze & Rao, *supra* note 10, at 497 (noting “the carnivalesque atmosphere that pervaded the cells in Abu Ghraib as hooded bodies were degraded and subjected to sexual violence”).

93. Bakhtin, *supra* note 92, at 6.

Third, these actions can be interpreted through more general theories of spectacle, as a way of highlighting and controlling difference. U.S. soldiers, raised in the United States on a steady diet of American exceptionalism, Third World political danger, and Islamic menace, find themselves in Iraq, charged with guarding native prisoners. In this context, the abuse of prisoners, and especially the overt deployment of sexual imagery and the use of photography to document it, functioned to expose, contain, and demean a frightening “other.”<sup>94</sup>

Fourth, and most significantly, we could take Private England at her word and link her comments to her actions. Remember that she had a baby in mid-October 2004, and that the father was one of the other guards.<sup>95</sup> If you count back, you find that the baby likely was conceived in January, that is, at roughly the same time that the two were abusing prisoners. I do not think the child’s conception and the abuse of prisoners are distinct. The “fun” that Private England described was also sex. The link between sex and torture, or rather, characterizing torture as a form of sexual activity and sex as a violent activity, helps explain why traditional explanations of torture fall short.<sup>96</sup> It further suggests that any effort to understand torture, in the sense of defining it rationally as a problem that can be solved through the intervention and coercion of states and other institutions, can never wholly succeed.

For some commentators, the characterization of the Abu Ghraib abuses as “fun,” and particularly the sexual aspect of the abuse (assuming it is possible to have torture that is not sexual), demonstrates the special status – the

94. Writing about photography of women’s bodies in the nineteenth century, Abigail Solomon-Godeau describes an “economy of the spectacle,” of which “a major part . . . is populated by more or less eroticized images of women” that support “fantasies of imaginary possession.” Abigail Solomon-Godeau, *The Legs of the Countess*, in *FETISHISM AS CULTURAL DISCOURSE* 266, 294-295 (Emily S. Apter & William Pietz eds., 1993). Further:

In the female nude of Western culture, patriarchy produces a representation of its desire: sexual difference, like the structure of fetishism, is both there and not there. Nothing to see and nothing to hide. Pornography emphatically exhibits the physical sign of that difference, even to the extent of making the woman’s genitals the subject of the image. But any potential threat is neutralized by the debased situation of the woman thus portrayed and the miniaturization and immobilization inherent in photographic representation. The mastery and possession accorded the spectator’s look, a mastery doubled in the structure of the photograph itself, dispels whatever menace or unpleasure the sight of the woman might provoke.

*Id.* at 304. These passages, it seems to me, apply to Abu Ghraib with little alteration.

95. *Soldier in Iraq Abuse Photos Has Baby*, ASSOCIATED PRESS, Oct. 13, 2004.

96. For the classic contemporary legal discussion of links between sex and violence, see CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987), especially pages 85-92.

exceptionality – of the abuse at Abu Ghraib. It was not “ordinary” torture and coercion (which was also being inflicted by U.S. forces in Iraq and elsewhere), and in some sense it was not state-sponsored. In traditional common law terms, it was a “frolic and detour.” I find claims like these, whether or not linked to defenses of official interrogation and detention policies, to be unconvincing in their effort to draw such a clear line between personal conduct – easily condemned as perverse, immoral, or disgusting – and the proper, upright conduct of the normal state actor.<sup>97</sup> One of the significant characteristics of the modern state is its ability to co-opt (some would argue, define) our emotions, passions, and perversions, so that a guard who, seemingly on a personal, sadistic whim, strips a prisoner naked and puts him on a leash to be photographed in a position of subservience, simultaneously channels the sovereign power of the state (uncorseted from rule-of-law constraints).<sup>98</sup> Not a pretty sight but – like pornography – possibly with more devotees than we are willing to acknowledge in polite company.

#### IV. WHO REALLY CARES ABOUT TORTURE?

When we try to understand torture, we also have to consider popular attitudes about it, including reactions to the images from Abu Ghraib,<sup>99</sup>

---

97. I do not think I stray too far from Lord Acton’s dictum that power corrupts if I claim that being a state actor in any sense that includes the ability to wield power over others is not a condition that automatically equates with abstract notions of propriety and decency.

98. Worth noting in this context is the possibility that “[s]adism is not a name finally given to a practice as old as Eros; it is a massive cultural fact which appeared precisely at the end of the eighteenth century.” MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 210 (Richard Howard trans., 1965). That is, as Karen Halttunen argues, the creation of the concept “sadism” is linked to the rise of a humanitarian sensibility and a corresponding desire for reform, see Karen Halttunen, *Humanitarianism and the Pornography of Pain in Anglo-American Culture*, 100 *AM. HIST. REV.* 303 (1995), which in turn is an episode in the rise of the modern liberal state. See also Thomas W. Laqueur, *Bodies, Details, and the Humanitarian Narrative*, in *THE NEW CULTURAL HISTORY* 176 (Lynn Hunt ed., 1989) (linking the development of humanitarian narratives to rationalism, empiricism, and reform).

99. In this context, I find particularly interesting the commodification of those images by using them on the covers of books for the apparent purpose of gaining attention and increasing sales. See MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); THE ABU GHRAIB INVESTIGATIONS (Steven Strasser ed., 2004); MERON BENVENISTI ET AL., *ABU GHRAIB: THE POLITICS OF TORTURE* (2004); THE TORTURE PAPERS, *supra* note 26. All of these books condemn the events at Abu Ghraib because, of course, the use of these images to sell books that articulate other perspectives would be outrageous, pornographic, or fascist. See Halttunen, *supra* note 98 (discussing the problematic role that the “pornography of pain” plays as part of the literature of humanitarian reform); see also Joan

significant approval of domestic state violence, and relative indifference toward the excesses abroad in the war on terror.

During the 2004 presidential campaign, the Abu Ghraib abuses and the evidence of mistreatment of detainees at other locations in Iraq, as well as in Afghanistan and at Guantánamo Bay, received little attention. In October 2004, *The Washington Post* ran an editorial entitled, *Remember Abu Ghraib?*, which argued that these abuses should be an issue in the election.<sup>100</sup> Understandably, President Bush was not going to initiate this discussion. Senator Kerry was not willing to say much either, perhaps in part because he thought it would resonate badly with his experiences as a war protestor, perhaps too because it might appear that he was not supporting the troops, but even more, I think, because he realized it was not a winning issue with the American public.<sup>101</sup>

Since then, news articles continue to provide information about abuses, and writers sometimes ask why the issue is not receiving greater attention.<sup>102</sup> During the same period, the Senate confirmed Alberto Gonzales to be Attorney General and Michael Chertoff to be Secretary of Homeland Security, despite concerns about their roles in the formulation of Administration policies on abusive interrogation. Although there was some opposition to the nominations, particularly to that of Gonzales, the confirmations were never in jeopardy.<sup>103</sup>

---

Sayre, *Book Review*, 16 CONTEMP. SOC. 543 (1987) (suggesting in a review of an earlier book on torture that “the inclusion of photographs of torture rack[s] and exhumed bones of victims seem[s] unnecessarily lurid” because “one needs little persuasion to condemn” torture). For a different, more complex use of these images, in which they are merged with popular advertising motifs (for example, ads for the Apple I-Pod) in a form of protest that includes a dose of irony that itself extends the boundaries of what is being protested, see <http://www.angelfire.com/vamp/warposter/>.

100. Editorial, *Remember Abu Ghraib?*, WASH. POST, Oct. 15, 2004, at A22.

101. For other discussions of this issue, see Levinson, *supra* note 7, at 237; Tom Curry, *Why Torture Issue Hasn't Had Political Traction*, MSNBC.COM, Feb. 15, 2005, at <http://msnbc.msn.com/id/6970081>.

102. See Frank Rich, *On Television, Torture Takes a Holiday*, N.Y. TIMES, Jan. 23, 2005, §2, at 1; Anne Applebaum, *Does the Right Remember Abu Ghraib?*, WASH. POST, Jan. 5, 2005, at A17.

103. A political cartoon on the Gonzales nomination captures my point. The cartoon shows the Democratic Party – represented by a donkey – asking President Bush, “Why on earth would you nominate an attorney general who wrote the memo denigrating the Geneva Convention & endorsing torture? Won't you risk a backlash from law-abiding Americans everywhere, rising up in moral outrage?” President Bush looks at the donkey and thinks, “Boy, the Democrats really are out of touch.” Matt Davies, JOURNAL NEWS (Westchester County, N.Y.), Nov. 13, 2004, available at <http://www.thejournalnews.com/cartoons/davies/111304.html>.

My sense is that, although human rights advocates, most law professors, and many journalists in the United States are appalled by Abu Ghraib and the abuses that are part of the war on terror, the public as a whole is far less aggrieved.<sup>104</sup> Many Americans, after all, already live with the knowledge that police violence is widespread, yet one rarely sees us – and especially not middle-class, suburban dwellers – marching in the streets against it or, for that matter, punishing elected officials who fail to crack down on it.<sup>105</sup> This inertia need not derive from indifference. Rather, it could be linked to an impression that, although excesses occur, they are rarely egregious and in any event are almost always visited upon the guilty. So, too, it could reflect a rough calculus that some excess is necessary to ensure overall security.

If we muster little concern for people mistreated in our own communities, we are unlikely to care too much about the treatment overseas of people who are allegedly threats to our communities. Nor are we likely to feel compelled to care about state violence in general if we think that it makes us more secure. Perhaps we are happy if we can look the other way while our government does what we think or are told it must do. We are not overly bothered if torture is hidden or is at most an open secret, and torture remains hidden because we push it down and out of sight rather than being forced to confront and discuss it.<sup>106</sup>

Popular culture likely plays an important role in the formation or reinforcement of this attitude. Taken as a whole, news reports tend to buttress

---

104. Some recent polling data suggest that public opinion disfavors not just torture in the abstract but specific tactics, such as “forcing prisoners to remain naked and chained in uncomfortable positions in cold for several hours,” “having female interrogators make physical contact with Muslim men during religious observances that prohibit such contact,” “threatening to transfer prisoners to a country known for using torture,” “threatening prisoners with dogs,” “strapping prisoners on boards and forcing them underwater until they think they are drowning,” and “depriving prisoners of sleep for several days.” See *USA TODAY/CNN/Gallup Poll Results*, USA TODAY, May 20, 2005, available at <http://www.usatoday.com/news/polls/tables/live/2005-01-10-poll.htm>; see also Marty Lederman, *Administration Confirms Its View that CIA May Engage in “Cruel, Inhuman and Degrading Treatment,”* BALKINIZATION, Jan. 12, 2005 (describing and discussing the poll results), available at <http://balkin.blogspot.com/2005/01/administration-confirms-its-view-that.html>. These results only go so far, however. Most respondents probably think torture is wrong in the abstract, and they gave “desirable” answers to the poll results. Despite the fact that the poll asked about the permissibility of torture where obtaining information would prevent future terrorist attacks, I suspect many people would answer differently if they were presented with a concrete situation. Finally, although the poll indicates general attitudes, it says nothing about how high a priority the issue is compared to other issues.

105. On the acceptance by some communities of police violence, see Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1, 2000, §6, at 62.

106. See Parry, *What Is Torture*, *supra* note 12, at 261.

the Administration's claims that we are in a war on terror, fail to discuss in any meaningful way the political issues that underlie terrorism, and suggest that Islam is an extremist religion that is particularly well-suited to producing radical ideologies and willing martyrs, who must be combated with extraordinary measures.<sup>107</sup> Espionage dramas such as "24" and "Threat Matrix" have portrayed coercive interrogation as a necessary, if unfortunate, tool in the struggle against a terrorist threat generally portrayed as Islamic or Arab.<sup>108</sup> This is far from a complete or nuanced description, yet I would argue that it is accurate as a general statement of the tendency of media coverage, and it leaves us even less likely to sympathize with the victims of abuse – or, indeed, even to see them as victims.<sup>109</sup>

My suspicion, in short, is that law fails to regulate torture and other state violence because it is designed to fail and because, at least sometimes, we want it to fail.

---

107. Some further support for this claim can be found in Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS, Feb. 26, 2004, which discusses the uncritical regurgitation by leading reporters of the Administration's claims about Iraq's alleged biological and nuclear weapons programs.

108. For a discussion of "24" and torture, see Bill Keveney, *Fictional "24" Brings Real Issue of Torture Home*, USATODAY.COM, March 13, 2005, available at [http://www.usatoday.com/life/television/news/2005-03-13-24-torture\\_x.htm](http://www.usatoday.com/life/television/news/2005-03-13-24-torture_x.htm). Episode 7 of ABC's "Threat Matrix," which aired on October 30, 2003, features the trial of an agent who killed a suspect during an interrogation. While she is on trial, her partner pores over the tapes of the interrogation, discovers that the victim let slip a crucial piece of information, and foils an assassination in the nick of time. Apparently because her tactics led to valuable information and thus were necessary, the interrogator is acquitted and is greeted by the applause of her co-workers when she returns to work. For a general description of the episode, see *Threat Matrix: Season 1: Episode 7 – "Alpha 126"* (n.d.), at <http://abc.go.com/primetime/threatmatrix/episodes/2003-04/7.html>.

109. See, e.g., *supra* note 7 (collecting statements by public figures that downplay abuse).