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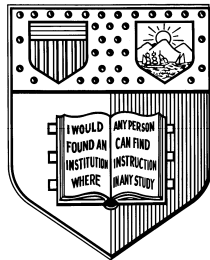
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Torture as a Problem of Ordinary Legal Interpretation

By Alan Hyde*

Torture, writes Louis Michael Seidman, is hard to talk about.¹ The numbers bear him out. Revelations that torture has been officially practiced as United States policy² have engendered a pathetically small response from intellectuals and scholars.³ Legal scholars have done somewhat better; the best scholarship is outstanding, and I will refer to it noncomprehensively below.

Still, the American national discourse on torture, such as it is, seems to me to take for granted some, usually all, of the following propositions, and I propose that it is these starting points that make discussion of torture more difficult than it should be. Torture is assumed to present unusually difficult problems of definition, full of vague concepts, fine lines, gray areas, murky moral dilemmas, “dirty hands.” This vagueness is thought to be even more of a problem for the attendant concept of “cruel, inhuman, and degrading treatment.” The legal sources of either prohibition are assumed to be dubious under American law. Prohibiting torture is, perhaps for these reasons, thought to require moral justification not necessarily required of other legal prohibitions discussed in legal scholarship. This moral justification, in turn, is thought to be quite difficult. The advocate of prohibiting torture must be prepared to analyze hypothetical situations in which torture might be appropriate, and the supposed presence of these hypothetical situations casts doubt on the moral justification of the prohibition.

I reject all of these starting points. This Article will demonstrate that they are all false. The prohibition of torture is firmly established in American, let alone international, law. As legal concepts go, it is rather well-defined. Its reach may be understood through ordinary techniques of legal interpretation. Torture is best understood exclusively through the normal range of its practice and prohibition. The moral appeal of prohibiting torture is intuitive, even a sort of obvious case for legal regulation, and calls for no special moral justification not required in the application of any fairly ordinary legal

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¹ Louis Michael Seidman, *Torture's Truth*, 72 U.Chi.L.Rev. 881 (2005).

² Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (2004).

³ On March 8, 2006, I conducted a search in the JSTOR database of academic journals for all articles containing “torture” and “Abu Ghraib” and retrieved thirteen results, eleven of them in the American Journal of International Law. The same search in the Web of Knowledge database retrieved eighteen results.

prohibition. It is neither necessary nor helpful to imagine highly unrealistic hypothetical situations in order to understand when, and how, law prohibits torture.

I mean this, in short, to be a simple, technical, doctrinal study. I cannot believe that it has not already been done—but it hasn't. I cannot believe that I am the one to do it.

The purpose of this Article is to put into as many hands as possible a simple treatment of the treatment of torture in American law. I will make no attempt at a comprehensive survey of the academic writing, nearly all of which concerns other aspects of the topic, such as moral justification. Nor is it feasible at the time of this writing to present a comprehensive picture of American torture practices, as much remains unknown and new revelations occur literally weekly.⁴

Instead I shall proceed in the following order. In Part I, to illustrate current problems in the U.S. discourse on torture, I shall briefly review a single example: the press coverage of the recent enactment of the so-called McCain Amendment, prohibiting “cruel, inhuman, or degrading treatment or punishment” of any “individual in the custody or under the physical control of the United States Government.”⁵ This illustrates all the themes mentioned above: ignorance of international law; ignorance of American law; belief that these concepts are vague and difficult to define; require special moral justification; and are best approached through imagining highly unrealistic hypothetical cases. In Part II I will show the firm illegality of torture and related practices in international and U.S. law; some examples of their application to particular cases, showing the ordinariness of the legal method involved. In Part III I will discuss three bad ways of thinking about, or, more likely, not thinking about torture. The worst, and best-known, is the approach of the Bush administration, which treats the concept as open to redefinition in bizarre ways. However, this approach shares uncomfortable ground with the two leading academic approaches to discussion of torture: treating its prohibition as requiring unusual and difficult moral justification, and hypothetical application to unrealistic invented scenarios.

While this paper may be at a tangent from others in this volume, I think it helpful, in considering the discursive creation of criminality, to consider an ongoing debate making just that assessment. In particular, I expect that most readers of this volume will approach most of its essays, as I certainly do, with a skepticism about the discursive creation of criminality, and considerable sympathy for the person being constituted and reconstituted as a criminal subject. It might therefore be of value to analyze the discursive construction of criminality in a context in which the reader's sympathy may lie instead with the victim of conduct that might be criminal, and thus the reader may be rooting for, rather than against, the discursive creation of criminality, specifically, a discourse under which torture is unambiguously a crime.

⁴ See, e.g., Eric Schmitt & Carolyn Marshall, In Secret Unit's "Black Room," A Grim Portrait of U.S. Abuse, *New York Times*, March 19, 2006, at 1; Jane Mayer, The Memo, *The New Yorker*, Feb. 27, 2006.

⁵ Detainee Treatment Act of 2005, National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, 119 Stat. 3163, Sections 1401-1405.

I. Some American Understandings of “Cruel, Inhuman, or Degrading Treatment”

The United States Congress recently adopted the following legislation:⁶

Section 1401. Short Title

This title may be cited as the “Detainee Treatment Act of 2005”.

....

Section 1403. Prohibition on Cruel, Inhuman, or Degrading Treatment or Punishment of Persons Under Custody or Control of the United States Government

(a) In General.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(b) Construction.—Nothing in this section shall be construed to impose any geographical limitation on the applicability of the prohibition against cruel, inhuman, or degrading treatment or punishment under this section.

(c) Limitation on Supersedure.—The provisions of this section shall not be superseded, except by a provision of law enacted after the date of the enactment of this Act which specifically repeals, modifies, or supersedes the provisions of this section.

(d) Cruel, Inhuman, or Degrading Treatment or Punishment Defined.—In this section, the term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

⁶ Cited in n.5. Section 1402, which I’ve omitted here, limits treatment and interrogation of persons “in the custody or under the effective control of the Department of Defense” or in one of its facilities to techniques in the United States Army Field Manual on Intelligence Interrogation. Section 1404 provides government personnel some defenses against criminal or civil liability, and Section 1405 provides for review of the status of detainees at Guantanamo Bay, Cuba; Afghanistan, and Iraq. The last two are quite controversial but beyond the scope of this Chapter.

The point of the legislation is obvious after recent revelations of some U.S. interrogation techniques, well-documented elsewhere, and it is not inherently difficult to understand unless one lacks any will to do so.⁷ The terms “cruel, inhuman, or degrading treatment or punishment” are terms of art in both international and U.S. law.⁸ The legislation says so explicitly, referring to the 1984 United Nations Covenant Against Torture, as interpreted by the U.S. But even had it said nothing, the terms would still be understood to mean what they mean in relevant international and U.S. law. I shall explain momentarily what that meaning is.

I could not find a single reference in the press coverage of this legislation that recognized this technical aspect of the phrase “cruel, inhuman, or degrading treatment or punishment.” Both the friends and opponents of the legislation treated this language as vague, bordering on meaningless. All assumed that its origins were American and that it would be defined solely by American officials, with respect to American phenomena.

One of the few attempts to explain the language, by a sympathetic observer, got all this completely wrong. Joseph Lelyveld, writing in the *New York Times* as the legislation was taking shape, equated “cruel, inhuman, and degrading treatment or punishment” with “lightly coercive interrogation” and “counterresistance strategies.” “This broad category of abuse was originally deemed by agile government lawyers to be just inside the realm of what is legal for foreigners held abroad.”⁹ But the category was not invented by U.S. government lawyers and is not limited to interrogation.

As the legislation neared passage, the alleged lack of clarity of the terms became a frequent theme of comment by neutral or sympathetic observers. “But what’s ‘cruel, inhuman, and degrading’?...The real issue is the definitional issue.”¹⁰ “...[I]t depends on how the Justice Department decides to define cruel, inhuman, and degrading.”¹¹ The idea that somebody besides the Justice Department might have some authority here—U.S. federal courts, to pick the least controversial example—did not occur to the writer.

Meanwhile, opponents of the legislation seized on this alleged vagueness and have continued to do so since its adoption. “...if you take it literally the way McCain pretends it means, it means nothing inhuman, nothing cruel, nothing degrading, then it means we have to abolish all of our interrogations.”¹² “Of course, the phrase ‘degrading

⁷ Josh White & Carol D. Leonnig, U.S. Cites Exception in Torture Bar: McCain Law May Not Apply to Cuba Prison, *Washington Post*, March 3, 2006, at A4. The government position would be true only if words have no meaning at all. Compare Sec. 1403(a)(“...regardless of nationality or physical location...”); 1403(b)(“nothing...construed to impose any geographical limitation...”).

⁸ “term of art. A word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts.” *Black’s Law Dictionary* (8th ed. 2004).

⁹ Joseph Lelyveld, *Interrogating Ourselves*, *New York Times*, June 12, 2005, Magazine at 36.

¹⁰ Peter Grier, Congress moves toward clear policy against torture, *Christian Science Monitor*, Dec. 16, 2005, at 3.

¹¹ David Ensor, CNN National Security Correspondent, Dec. 15, 2005 (read on-line).

¹² Charles Krauthammer, Fox Special Report with Britt Hume, Dec. 16, 2005 (read on-line).

treatment' will now appear in every brief filed by some ACLU lawyer claiming torture on behalf of his terrorist client."¹³

The most bizarre explanation was by the Vice-President of the United States, asked in an interview: "What's the President's prerogative on the cruel treatment of prisoners?":

There's a definition that's based on prior Supreme Court decisions and prior arguments. And it has to do with the 4th, 13th, and – three specific amendments to the Constitution. And the rule is whether or not it shocks the conscience. If it's something that shocks the conscience, the court has decreed that crosses over the line. Now, you can get into a debate about what shocks the conscience and what is cruel and inhuman. And to some extent, I suppose that's in the eye of the beholder.¹⁴

I mention these examples by way of excuse for the very elementary discussion of the legal status of torture that follows. As we shall see, torture is extensively regulated, tolerably well-defined, and unambiguously illegal. The legal standards have nothing to do with "shocking the conscience." I shall argue later that academics who dwell on the supposed difficulty of defining torture are closer to the Vice-President than they might like.

II. Torture in International and U.S. Law

A. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The principal international law instrument that outlaws torture is the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The United States is party to this treaty. The U.S. law against torture is found in the treaty itself, the American reservations to the Convention, U.S. legislation implementing the Convention (as required by its terms), and, most significantly, U.S. judicial cases that interpret the Convention and the U.S. implementing legislation.

As comprehensive accounts of this Convention exist elsewhere, these remarks will focus on two aspects that are particularly relevant to recent torture by the United States.¹⁵ The two principal aspects create a paradox. First, the Convention's specificity as to enforcement, individual liability, and restricted defenses, continue to create justified anxiety in American officials that they may be war criminals. This concern, as we shall

¹³ Mark R. Levin, John McCain, Weak on Defense, National Review Online, Jan. 23, 2006.

¹⁴ Interview of the Vice-President by ABC News, White House Documents and Publications, Dec. 18, 2005.

¹⁵ See, e.g., Ahcene Boulesbaa. THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT (1999).

show in Part III, prompted those officials to commission legal memoranda justifying their use of torture. Second, and paradoxically, the Convention's vague definition of torture invited the strategy of those U.S legal memoranda, which attempted to give an idiosyncratic and bizarrely narrow definition of the meaning of torture. While these memoranda are unconvincing, indeed subprofessional, on their own terms, among their greatest professional deficiencies is their ignoring the relevant U.S. judicial decisions that had already given meaning to the Convention's vaguer formulations.

1. The Convention's Structure and Plan

The substantive provisions of the Convention against Torture, Part I, are set out in the margin.¹⁶ (Part II creates a Committee on Torture to enforce the document, and Part III deals with processes for its ratification and efficacy).

¹⁶ PART I

Article 1

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

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

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

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 3 **General comment on its implementation**

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where

applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Article 4

1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

Article 5

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
 - (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State;
 - (c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Article 6

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
2. Such State shall immediately make a preliminary inquiry into the facts.
3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.
4. When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this

article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 7

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

Article 8

1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of such offences. Extradition shall be subject to the other conditions provided by the law of the requested State.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.

4. Such offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the States required to establish their jurisdiction in accordance with article 5, paragraph 1.

Article 9

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10

1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

2. Each State Party shall include this prohibition in the rules or instructions issued in regard to the duties and functions of any such person.

Article 11

Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12

Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13

Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Article 15

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The Convention is a treaty, binding on countries that have ratified it, including the United States. From an international law perspective, the Convention did not outlaw torture and other cruel, inhuman and degrading treatment and punishment, which were already illegal.¹⁷ Rather the aim of the Convention, to an international lawyer, was to strengthen the existing prohibition.¹⁸ However, the United States does not regard any of the earlier prohibitions as binding law. The Convention, however, as a treaty, has the force of law. It also requires and has received specific implementing legislation. Thus, from a U.S perspective, the Convention does represent a new prohibition on torture.

The Convention makes torture a crime. It requires each State Party to “ensure that all acts of torture are offences under its criminal law.”¹⁹ It specifies that there are no justifications for torture. “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.”²⁰ “An order from a superior officer or a public authority may not be invoked as a justification of torture.”²¹ The Convention specifically forbids State Parties from expelling, returning, or extraditing a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²² Finally, State Parties commit to extending jurisdiction over the crime of torture. Those who torture may be subject to criminal penalties, not only in their own countries, but in any country in which they are present,²³ as well as the State of which their victim is or was a national “if that State considers it appropriate.”²⁴ As

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

¹⁷ The Universal Declaration of Human Rights (1948) provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Similar prohibition is contained in the International Covenant on Civil and Political Rights(1966), some regional human rights covenants, and a Declaration of the United Nations General Assembly (1975), on which the Convention was based.

¹⁸ J. Herman Burgers & Hans Danielus, THE UNITED NATIONS CONVENTION AGAINST TORTURE 1 (1988)(hereafter Burgers & Danielus).

¹⁹ Art.2, par.1.

²⁰ Art.2, par.2.

²¹ Art.2, par.3.

²² Art.3, par.1.

²³ Art.5, par.2.

²⁴ Art.5, par.1(c).

mentioned, the Convention also creates a Committee against Torture to receive reports and investigate complaints.²⁵

The Convention also requires that each State Party shall also “undertake to prevent ... other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 ...”²⁶ This, of course, is the origin, unrecognized in recent American press coverage, of the language of the McCain Amendment. States are not obligated to treat such cruel and inhuman treatment as a crime. However, they commit to prohibiting it in the training of law enforcement and military personnel; to keeping records of interrogation rules, methods, and practices; and to receive and investigate complaints, as they would with torture.²⁷

The United States has been a party to the Convention since 1994.²⁸ As part of compliance with the Convention, it made three amendments to federal law. First, the U.S. amended its federal criminal code to make torture committed by US nationals to be a federal crime.²⁹ Second, it created a Torture Victims Protection Act to provide a civil remedy in damages for some victims of torture.³⁰ Third, it amended the immigration laws to provide that fear of torture would be a specific grounds by which an alien might resist deportation.³¹

2. Defining Torture and “Cruel, Inhuman or Degrading Treatment or Punishment”

a. Torture

Recent discussions in the US have concerned the definition of torture. Curiously, the term is not really defined in the Convention.

To be sure, the Convention includes a purported definition:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is

²⁵ Arts 17-24.

²⁶ Art. 16.

²⁷ Arts. 10-16.

²⁸ In acceding to the Convention, the United States made some reservations that U.S. officials have treated as limiting its scope. I do not think they are so important. I will discuss them later.

²⁹ 18 U.S.C. §2340A.

³⁰ Torture Victims Protection Act of 1991, P.L. 102-256, 106 Stat. 73, codified as a note to the Alien Tort Statute, 28 U.S.C. § 1350.

³¹ P.L. 105-277, 121 Stat. 2681-822, codified as a note following 8 U.S.C.S. §1231.

suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.³²

One need not be a literary scholar to note that most of this language is not a definition. Indeed, the only parts of the definition that actually define are the phrases “severe pain or suffering,” “intentionally inflicted,” and the requirement that torture involve a public official. Thus, the actual definition might be rewritten, with no ostensible loss of meaning, as: “Torture means any intentional infliction of severe pain and suffering by, or with the involvement of, a public official.”

The rest of the Convention’s language is a series of examples of purposes for which torture has been conducted, such as interrogation, obtaining confession, punishment, or intimidation. (There is also a puzzling reference to “discrimination.”) However, none of this list is either necessary, or sufficient, to make a particular government act torture. These purposes are not necessary, for example, because subjecting a prisoner to acts that would otherwise constitute torture would not cease to be torture if the torturers were motivated by some other purpose entirely, such as sadism or brutality. They are not sufficient, because some of the listed purposes of torture are legitimate governmental functions, such as interrogating suspects, obtaining confessions, or criminal punishment. The list of purposes thus adds nothing to the understanding of torture.³³

One might conclude that the definition of torture should be independent of the purpose for which pain is inflicted, and it is possible to read the Convention this way. Philosophers of the criminal sanction will tell us that this is not the best way to read the Convention. They would say that the actor’s purpose must be relevant to the definition of torture. Some kinds of surgery necessarily inflict pain, but are not torture, even if conducted by government officials, perhaps on a battlefield. We might say of such cases that the infliction of the pain is not “intentional.” It is the unfortunate consequence of the surgery, foreseeable to the actor, but not “specifically intended.” That is, the surgery is not performed *in order to* inflict pain. Or we might say that the “purpose” of the pain infliction matters, and that a therapeutic purpose is not like the purposes for which torture is conducted. This difference matters to philosophers of the criminal sanction. However, it does not appear to me to matter for the real-world cases I will discuss. So, consistent with my promise not to pursue purely academic hypothetical questions, I will not explore it here.

³² Art. I, par. 1.

³³ Burgers and Danelius explain (at 118) that this list of “purposes” was a “compromise” between those who thought it relevant and those who did not. The drafting history makes clear that the list is not exhaustive; other purposes could be torture.

A definition of torture as “severe pain” is puzzling. It unavoidably suggests degrees of pain. We might imagine a kind of geographic or spatial metaphor, a mental image of a continuum, spectrum, or axis of pain.³⁴ Pain *simpliciter* is not necessarily torture. At some “point” however on the continuum, spectrum, or axis, the pain’s severity crosses the line, so to speak, and becomes torture. Any subsequent increase in the severity of pain does not change its status, which became torture when that earlier line was crossed. That is, the convention does not recognize degrees of torture (for example, “aggravated” or “extreme” torture). An act either is torture, or it is not, and that normally reflects the severity of pain.³⁵

Of course, this continuum or spectrum is only a metaphor. There is in fact no spectrum of pain. There is no medically-recognized way, no other good way, of measuring the intensity of pain even for one individual. Comparisons across individuals are hopeless. To point out the metaphor of the spectrum is not necessarily to criticize. “Of course, one cannot think without metaphors. But that does not mean there aren’t some metaphors we might well abstain from or try to retire.”³⁶ The metaphor of the spectrum of pain would do no harm if in fact everyone happily agreed on what was, and was not, torture. As we shall see, however, this is not so. In practice, the spectrum metaphor is a poor choice. It suggests an arbitrariness in the definition of torture that need not be there, for any line on a spectrum might as easily be moved a degree or two to the right or left.

In the drafting history of the Convention, there was little discussion of the definition of torture. Ultimately, it did not change from the initial, Swedish, draft of 1978. In that draft, the definition, in terms of “severe pain,” had been carried over directly from the United Nations General Assembly’s 1975 Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. At the first meeting of the Working Group of the Commission on Human Rights in 1979, to discuss the Swedish draft, some delegates called for a definition of “more clarification and precision, since what was acceptable in a *Declaration* was not necessarily acceptable in a binding legal instrument such as a convention.”³⁷ However, no such clarification emerged.

³⁴ I have written elsewhere about spatial metaphors for the body. Alan Hyde, *Bodies of Law* (1997); see also Elaine Scarry, *The Body in Pain* (1985).

³⁵ Jeremy Waldron, in the most brilliant of recent writing on torture, is highly critical of metaphors like the spectrum, or crossing the line. “There are some scales one really should not be on, and with respect to which one really does not have a legitimate interest in knowing precisely how far along the scale one is permitted to go.” Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 *Colum.L.Rev.* 1681, 1701 (2005). While I am totally sympathetic to this remark as a matter of political theory, it is in tension with both the drafting history of the Covenant, emphasizing that as a treaty requiring implementing criminal law it had to be precise, and its actual text, which defines torture in terms of the severity of the pain inflicted.

³⁶ Susan Sontag, *AIDS and Its Metaphors*, in *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 93 (1990).

³⁷ Burgers & Danelius 39.

Some alternative formulations were proposed but were not accepted. The United States, in written comments on the Swedish draft, proposed restricting torture to “*extremely* severe pain or suffering, whether physical or mental, ... *deliberately and maliciously* inflicted on a person by or with the consent or acquiescence of a public official.”³⁸ Similarly, the United Kingdom proposed “*systematic and intentional* infliction of *extreme* pain or suffering ...”³⁹ These formulations were not adopted, although, as we shall see, government lawyers in the United States later pretended they had been. These retain the spectrum metaphor but would have signaled, had they been adopted, a decision to cover fewer cases.

France offered a more categorical or philosophical definition of torture which, however, was also not adopted. “France advocated a clear distinction to be made between, on the one hand, penalties affecting the person and honour of the criminal (*peines afflictives et infamantes*), which could legitimately be imposed as punishment and, on the other, treatment which, by causing violent physical pain or extreme mental suffering, altering the physical capacity of the victim or making the victim an object of derision or hatred, tortures the person to whom it is applied.”⁴⁰

Another possible form of legal definition relies more heavily on specific examples. This permits a definition that includes those examples and other things like the examples. However, there was little discussion in the drafting of the Convention of specific techniques of interrogation or punishment. Barbados suggested specific language on medication such as “truth drugs.” Portugal suggested abuse of psychiatry. Switzerland submitted a proposal to include medical and scientific experiments without therapeutic purpose.⁴¹ There appears to have been little discussion of these proposals, and the Convention as adopted does not discuss any specific acts or techniques.

³⁸ Id. 41

³⁹ Id. 45

⁴⁰ Burgers & Danelius 46. Compare definition of torture in Inter-American Convention to Prevent and Punish Torture, Art.2 (1985):

For the purposes of this convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts of use of the methods referred to in this Article.

⁴¹ Id. 42-45.

Why is the Convention so reticent about defining torture? Again, this is not simply a problem in hindsight. During the drafting process, it was noted that the Convention was intended to, and did, lay the foundation for criminal prosecution of torturers. It was specifically objected that the definition of torture, carried over from earlier documents, might not be precise enough to support criminal prosecution. Why was this objection not met? The spectrum metaphor, implicit in the phrase “severe pain” (or the rejected versions), is at odds with the norms of criminal law that require specificity in the definition of criminal offenses. In particular, why does the Convention discuss no specific cases or examples? I have located no explanation for this reticence in any of the secondary literature on the Convention. However, we still have work to do in reading the very text of the Convention.

b.. The “lawful sanctions” proviso

We are not done with the Convention’s definition of torture, which contains one more sentence:

It [Torture] does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴²

What does this mean? The term “lawful” begs the question, making the whole Convention circular. This sentence was “probably the most controversial element of the whole article”⁴³ since it seems to open the prospect that country might torture at will once such practices were authorized by its own law of sanctions. This conclusion is clearly at odds with the entire purpose of the Convention, which is clearly designed to make certain practices violations of international law even when authorized by national law. Yet the text of the Convention does not offer any indication of how this paradox is to be addressed, let alone resolved.

It appears that the earliest versions of this language, from Sweden and the U.S., were not paradoxical. The intent was to exempt from the definition of torture certain practices that were legal under *international*, not *national* law. The initial (1979) Swedish draft:

It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

However, this language was objected to on the principle that a binding Convention should not be based on a non-binding instrument such as Standard Minimum Rules.⁴⁴

⁴² Art. I, par. 1.

⁴³Burgers & Danelius 121.

⁴⁴Burgers & Danelius 46. This objection was made by the Federal Republic of Germany, the German Democratic Republic, Spain, the United Kingdom, and United States.

An early U.S. (1979) proposal:

Torture does not include pain and suffering arising only from, inherent in or incidental to, sanctions lawfully imposed; but does include sanctions imposed under color of law but in flagrant disregard of accepted international standards.

“However, it was not possible to reach agreement on any reference to accepted international standards, since it was widely considered that no such standards exist.”⁴⁵

Given this history, it seems to make most sense to read the “lawful sanctions” proviso as adding nothing substantive to the Convention. Rather, it merely clarifies that practices not outlawed by the Convention may be employed by member states according to law. As we shall see, even recent U.S. legal memoranda, that do everything they can to misunderstand the Convention, make nothing of its “lawful sanctions” proviso, so it is possible that even in the U.S. government, this suggested reading has been silently adopted.

c. Cruel, inhuman or degrading treatment or punishment

Art. 16 of the Convention requires member states to prevent “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” This provision was controversial from the start, both in its meaning and in its relation to the prohibition on torture. The operative point is that, while states agree to prevent cruel, inhuman, or degrading treatment, they do not commit to making it a crime.⁴⁶ This reflects a continuing theme in the debates that, inasmuch as the Convention was to be the basis for criminal legislation, its terms had to be defined.

The relationship between cruel, inhuman, and degrading treatment, and torture, was never clarified, although interestingly the United States took the position that “torture is the gravest form of cruel, inhuman or degrading treatment or punishment.”⁴⁷ The context of this remark was a successful U.S. initiative to replace reference to acts

Boulesbaa 28 n.96. On the Standard Minimum Rules, see generally Roger S. Clark, *THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION* (1994). The Standard Minimum Rules were adopted at the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva 1955) and later by resolution of the U.N. Economic and Social Council (1957). They have always been treated as nonbinding, and there are no current efforts toward their incorporation into a Convention.

⁴⁵Burgers & Danelius 47.

⁴⁶ Id. 71.

⁴⁷ Id.80

“which do not constitute torture,” substituting instead “which do not amount to torture.” (As we shall see, recent U.S. documents have instead adopted the position of the former Soviet Union that there is a sharp distinction between torture on the one hand, and “cruel, inhuman or degrading treatment or punishment” on the other.)

“It should be observed that article 1 contains no definition of cruel, inhuman or degrading treatment or punishment, although, according to the title of the *Convention*, it also deals with such treatment or punishment. In fact, it has been found impossible to find any satisfactory definition of this general concept, whose application to a specific case must be assessed on the basis of all the particularities of the concrete situation.”⁴⁸

B. U.S. Law Implementing the International Conventions

If the development of the law of torture had stopped here, a government lawyer, asked to opine on whether particular interrogation techniques constituted torture or cruel, inhuman, or degrading treatment, might indeed have faced some uncertainty. As we have seen, the relevant documents of international law define torture only in terms of “severe pain,” which leaves unclear how one even measures “severe” (or “pain,” for that matter). They provide no definition of “cruel, inhuman, or degrading treatment or punishment.”

Our hypothetical government lawyer might pursue the definition of these terms in international law documents such as the important decision of the European Court of Human Rights finding certain interrogation techniques employed by the United Kingdom in Northern Ireland to be cruel and inhuman but not torture.⁴⁹ An American governmental lawyer, however, would face the problem that her country does not automatically recognize international law decisions as binding.

Nevertheless, she would not be free—that is, U.S. lawyers in 2002 were not free—to make up her own plausible definition. Three distinct bodies of U.S. law bound government lawyers in 2002 yet received little attention from them: the law of “cruel and unusual punishment,” the statutes implementing the Convention, and the judicial interpretation of those statutes.

First, the U.S. Senate, in ratifying the Covenant Against Torture, attached a number of reservations, including one understanding its prohibition on cruel, inhuman, and degrading treatment or punishment to be the same as U.S. Constitutional norms prohibiting “cruel and unusual punishment.”⁵⁰ While international law scholars are never happy about national reservations of this type, this particular reservation does not

⁴⁸Id. 122.

⁴⁹ Ireland v. United Kingdom, (1978) 2 EHRR 25.

⁵⁰ (1) That the United States considers itself bound by the obligation under article 16 to prevent ‘cruel, inhuman or degrading treatment or punishment’, only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.
<http://www.unhchr.ch/html/menu2/6/cat/treaties/convention-reserv.htm>

strike me as alarming inasmuch as the constitutional prohibition is by no means narrow. While most recent U.S. jurisprudence interpreting “cruel and unusual punishment” deals with the administration of the death penalty, the clause is clearly understood as prohibiting “unnecessary and wanton infliction of pain,” such as beating a prisoner.⁵¹ Largely for reasons of space, I will not be exploring the U.S. jurisprudence of “cruel and unusual punishment” here.

Much more significant are the three U.S. statutes enacted to comply with the Covenant against Torture. These statutes, and their judicial interpretation, provide definitions and examples of torture that have been amazingly overlooked both in Bush administration legal memoranda and, more surprisingly, in the academic critiques. That is, they approach the definition of torture—as the Covenant itself did not—through the discussion of specific techniques and practices.

As required by the Covenant, the U.S. has made torture a crime under federal criminal law, though, oddly, only when committed outside the United States.⁵² The criminal statute adopts the international law definition of torture, adding a requirement of intent (which we argued above was probably implicit even in the Covenant): an act committed “under color of law” and “specifically intended to inflict severe physical or mental pain or suffering.”⁵³ The statute’s use of the international law definition makes that definition relevant under U.S. law. So far, however, there are no cases construing the criminal statute.

Second, Congress created a tort remedy for damages for victims of foreign torture.⁵⁴ Unlike the criminal statute, the damages statute had been judicially construed at the time of the Bush administration memos on torture, and had clearly been applied to cover the kinds of conduct that the U.S. was engaged in or soon to be engaged in.

I will limit myself to two examples. *Cicippio v. Islamic Republic of Iran*⁵⁵ was a suit by one of the American hostages held in the embassy in Teheran in 1980. It found that he had been tortured because he had been isolated, blindfolded, beaten, and threatened with death. Even more poignant is *Daliberti v. Republic of Iraq*,⁵⁶ brought by four Americans, doing business in Kuwait, imprisoned in Saddam Hussein’s Iraq in the early to mid-1990s. The court found that they had been tortured by being blindfolded, threatened with a gun and with electrocution, physically abused, and held in a prison without lights, water, or a proper bed.

⁵¹ *Hudson v. McMillian*, 503 U.S. 1 (1992).

⁵² 18 U.S.C. §§2340-2340B.

⁵³ 18 U.S.C. §2340.

⁵⁴ Torture Victims Protection Act of 1991, P.L. 102-256, 106 Stat. 73, codified as a note to the Alien Tort Statute, 28 U.S.C. § 1350. Federal courts had already found such a right to exist for alien plaintiffs, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); the 1991 legislation approved this doctrine and extended it to U.S. plaintiffs as well. Victims of torture by the U.S. government are already covered by the general Federal Tort Claims Act, 28 U.S.C. §2671-2680, but as this has no specific language on torture I will not discuss it further.

⁵⁵ 18 F.Supp.2d 62 (D.D.C. 1998).

⁵⁶ 97 F.Supp.2d 38 (D.D.C. 2000).

Third, and most significantly for the development of the legal concept of torture, Congress amended the immigration laws to provide that the U.S. will not send an alien to a country as to which “there are substantial grounds for believing the person would be in danger of being subjected to torture.”⁵⁷ Since this amendment, persons seeking to avoid deportment often allege fear of torture separately from other claims (such as political asylum), so immigration law is the context in which U.S. courts have made their most thorough discussion of what is torture.⁵⁸

Once again, the most relevant decision found torture in Saddam Hussein’s Iraq. “Al-Saher testified that he was subjected to sustained beatings for a month on the first arrest. On the second arrest he suffered severe beatings and was burned with cigarettes over an 8-to-10 day period. These are not practices ‘inherent in or incidental to lawful sanctions.’ These actions were specifically intended by officials to inflict severe physical pain on Al-Saher.”⁵⁹ Since the Bush administration memos, courts have continued to expand the definition of torture used in the immigration laws.⁶⁰

While more thorough discussion of these cases is possible, the point is simple and obvious. Torture, though unpleasant and distasteful, is not inherently more difficult to think about than other legal concepts. It lends itself to the normal range of legal interpretive techniques. Potentially vague definitions are made lucid by concrete examples. It is puzzling, therefore, how frequently academics join the Bush Administration in finding torture hard to define, and perpetually open for redefinition. The Bush Administration’s motivation for making this claim is, of course, obvious, so we start with that.

III. Some Bad Ways to Think About (or, worse yet, Not Think About) Torture

A. Political Vices: Treating Torture as Open to Redefinition

Much has been written tracing the path by which torture became US practice and policy.⁶¹ Much remains unknown. For this brief discussion of some of the discursive

⁵⁷ P.L. 105-277, 121 Stat. 2681-822, codified as a note following 8 U.S.C.S. §1231. The implementing regulations track the Covenant’s definition, including the U.S. reservations, 8 C.F.R. §1208.18(a).

⁵⁸ One of the few scholars to note the relevance of the immigration cases is W. Bradley Wendel, Professionalism as Interpretation, 99 Nw.U.L.Rev. 1167, 1228 n.219 (2005), though his discussion is brief. Penny Venetis first pointed out their relevance to me.

⁵⁹ Al-Saher v. Immigration and Naturalization Service, 268 F.3d 1143, 1146 (9th Cir. 2001).

⁶⁰ Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003)(government refusal to intervene to stop private torture of which it was aware); Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003)(rape is torture); Shu Ling Ni v. Board of Immigration Appeals, 439 F.3d 177 (2d Cir. 2006)(forced sterilization can be torture).

⁶¹ Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror (2004); The Torture Papers: The Road to Abu Ghraib (Karen J. Greenberg & Joshua L. Dratel eds. 2005).

aspects of the construction of torture as a concept, I will deal only with a now-notorious legal memorandum and its consequences.

The best-known of the Bush Administration's legal discussions of torture is a memorandum dated August 1, 2002, from Jay S. Bybee to Alberto R. Gonzales.⁶² At the time, Bybee was Assistant Attorney General in charge of the Office of Legal Counsel, which provides legal advice to units of the federal government. He has since been named to be a judge on the United States Court of Appeals. It has been widely reported, however, that the memorandum was largely drafted by John Yoo, at the time serving in the Office of Legal Counsel but since returned to his professorship at the law school of the University of California at Berkeley.⁶³ Yoo signed the cover letter to the memorandum. The nominal recipient, Alberto Gonzales, was at the time Counsel to the President. He now serves as Attorney General of the United States. It has been reported that he took an active role in shaping the memorandum.⁶⁴

The memorandum responds to a request from the White House for advice concerning "interrogations outside of the United States." It is apparent from the text of the memorandum that its main purpose was to provide a potential defense in the case of future criminal prosecution under national or international law; there is no single sentence that makes this clear, but the entire focus was on arguments and defenses that might be raised in hypothetical criminal prosecutions. The White House request has not been made public, and it is still not known exactly why Gonzales asked for a memorandum on the Covenant against Torture. (Nobody asked him at his subsequent confirmation hearings for Attorney General). At those confirmation hearings, Gonzales repeatedly claimed not to remember details of the memo, just as if he hadn't been briefed on it. The memorandum no longer reflects official policy; the Department of Justice rescinded it the week before Gonzales' confirmation hearings.⁶⁵

At the time the memorandum was written, the war in Iraq still lay in the future; the U.S. was engaged in hostilities in Afghanistan and prisoners were being taken to Guantanamo Bay and other locations. We do not know the precise interrogation techniques contemplated or already employed at these locations, or precisely why the White House was concerned that these might constitute torture. We may be sure that the White House was concerned about specific interrogation practices. It is unlikely that Yoo was researching a law review article. It has been reported that the memorandum was requested from George Tenet, then head of the Central Intelligence Agency (CIA).

⁶² The memorandum has been reprinted in many sources, e.g. Danner, *supra* n.2; *The Torture Debate in America* 317-360 (Karen J. Greenberg ed. 2006); *The Torture Papers: The Road to Abu Ghraib* (2005). My page references will be to Danner.

⁶³ Michael Isikoff and Daniel Klaidman, *Gonzales's Views on the Question of Torture*, *Newsweek*, Nov. 22, 2004, <http://www.msnbc.msn.com/id/6479334/site/newsweek/>

⁶⁴ *Id.*

⁶⁵ <http://www.usdoj.gov/olc/dagmemo.pdf> (Dec. 30, 2004). For an argument that the successor memorandum is no better than the 2002 memorandum, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *Va.L.Rev.* 1425, 1456-60 (2005).

The text of the memorandum was released to the public in June 2004, after photographs of the abuses of prisoners at Abu Graib had been made public. It was almost exposed two years earlier, in June 2002, when John Walker Lindh, an American captured in Afghanistan in December 2001, was scheduled to testify as to the voluntariness of his confession. We now know that Lindh, seriously wounded, was kept blindfolded and duct-taped to a stretcher for days in an unheated and unlit shipping container, deprived of food, water, and medication, and threatened with death, before signing his confession. Lindh was prepared to testify to his torture when Michael Chertoff, then head of the Criminal Division of the Department of Justice, now Secretary of Homeland Security, offered to drop the most serious charges and offer 20 years of imprisonment if Lindh would sign a statement that he had “not been intentionally mistreated” and waived any future right to claim mistreatment or torture. This kept news of torture from leaking out for two more years.⁶⁶

Since I have written about the discursive construction of the body in American law,⁶⁷ I first read the memorandum in the expectation that it would contain interesting discursive constructions of the body. I anticipated the kind of cold, clinical language that torturers use to deny the pain they cause, and, of course, that is just what we find. However, like others who have read it, I was more powerfully struck by its complete inadequacy as a legal analysis, its ignorance of the relevant law.⁶⁸ Confronting this document has reminded me that there are tasks for the progressive commentator of the law besides the deconstruction of its texts.

The memorandum defines torture as including “only extreme acts.”⁶⁹ “Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of bodily function or even death.”⁷⁰ “The victim must experience intense pain and suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result.”⁷¹

The reader will see at once that this definition is totally unknown to law, invented by this memo. It is not the definition of the Covenant to which the United States is party, or U.S. tort or immigration law, certainly as applied against Saddam’s Iraq. Under this

⁶⁶Dave Lindorff, *Chertoff and Torture*, THE NATION, Feb. 14, 2005, at 6.

⁶⁷ Alan Hyde, *Bodies of Law* (1997).

⁶⁸ Peter Brooks, *The Plain Meaning of Torture?*, Slate, Feb. 9, 2005, <http://www.slate.com/id/2113314>; Harold Hongju Koh, *A World Without Torture*, 43 Colum.J.Transnat’l L. 641 (2005); Wendel (cited in n.58); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L.Rev. 1681 (2005).

⁶⁹ Conclusion, Danner 155.

⁷⁰ Danner 115.

⁷¹ section I.B.4; Danner 126.

definition, torture would not include cutting off a limb, or “waterboarding,” reportedly used against Khalid Shaikh Mohammed: submerging prisoner until near death.⁷²

The steps in the reasoning were as follows:

1. Insularity. The memorandum first asks what violates the U.S. criminal statute passed to implement the Covenant against Torture, rather than asking what violates the Covenant, or what constitutes an actionable tort under U.S. law. The memo then addresses how to interpret the statutory phrase “severe physical or mental pain or suffering,” without recognizing that this precise phrase comes verbatim from the Covenant that it implements.
2. Dictionaries. In interpreting the phrase “severe physical or mental pain or suffering,” the memorandum discusses dictionary definitions. It then conflates two distinct examples from the Oxford English Dictionary. It quotes that dictionary as saying that “severe pain” means pain that is “grievous, extreme”, and that “severe circumstances” are “hard to sustain or endure.” It then concludes, competely illogically, that “severe pain” must be pain that is “difficult for the subject to endure,” though the quoted passage disagrees.
3. Use of the word “severe pain” in other U.S. laws. This is where the memorandum finds its definition. It finds this phrase used in statutes authorizing payment for emergency medical conditions, of which “severe pain” is given as one example of a symptom. The statutes go on to define “emergency medical condition” as one that, if left untreated, might result in serious jeopardy to health, or impairment to bodily functions, or serious dysfunction of a bodily organ or part. The memorandum thus concludes, completely illogically, that the “severe pain” which is the symptom of these conditions exhausts the category of “severe pain,” and that Congress must have meant, by defining torture in terms of “severe pain,” only such pain as would be symptomatic of an emergency medical condition—that is, pain at “the level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions...”⁷³

There are several obvious things wrong with this.⁷⁴ First, Congress did not use the term “severe pain” in the torture statute because it had used that term in the statute on medical reimbursement. It used it because it is a term of art in international law, part of the definition in the treaty that the criminal statute implements. Second, even that medical definition permits reimbursement for conditions that “might result in serious jeopardy to health,” language that the memorandum simply skips. Third, the statute simply refers to “severe pain” as one example of a symptom of the underlying “emergency medical condition.” “This is not a definition of severe pain in terms of organ dysfunction. It is a definition of emergency in terms of organ dysfunction with possible accompanying severe pain. Imagine a definition of ‘winter’ as ‘a season whose manifestations include snow, ice, and cold weather.’ It does not follow from that

⁷² New York Times, May 13, 2004.

⁷³ Sec. I.B, Danner 120.

⁷⁴ See also Waldron, 105 Colum.L.Rev. at 1708.

definition that cold weather is weather in which there is snow - obviously enough it can be cold outside and not snowing.”⁷⁵

4. Misunderstanding the relevant international law. Only after this bizarre excursion into irrelevant U.S. statutes does the memorandum turn, in its own fashion, to the Covenant against Torture from which the statutes derive their language and definitions. It starts, as this Chapter did, with the Covenant’s definition of torture, and with its distinction from cruel, inhuman, or degrading treatment or punishment. I would not say, as the memorandum does, that torture is “distinct and separate” from the latter, particularly since the U.S. position during the negotiations was that torture was “the gravest form” of the latter. However, I agree that the relationship between the two is, at least in the Covenant, unclear.

The Memorandum then takes a bizarre turn. Consistent with its later deferential view of Presidential power, it turns, not to the negotiating history of the Covenant, but to the interpretations of it submitted to the U.S. Senate by the Reagan administration. The Covenant was not in fact ratified by the U.S. until Reagan had been succeeded by the first President Bush, so, if executive interpretations are relevant at all, it is those of the George H.W. Bush administration, and these differed from the Reagan submissions. Nevertheless, the memorandum goes on for pages on the Reagan version, stating that torture “must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”⁷⁶ This definition was never used by anyone, including the U.S. Senate, and was never heard from again. In light of later events at Abu Ghraib, however, the grimly amusing aspect of the Reagan administration’s interpretation is that even it continues on, illustrating torture as: “sustained systematic beatings, application of electric currents to sensitive parts of the body and tying up or hanging in positions that cause extreme pain.”⁷⁷ Every one of these has become US practice and policy. The memorandum does not discuss them.

A brief section on the “Negotiating History” of the Covenant (which might logically have preceded the section on U.S. ratification) refers only to U.S. and U.K. proposals that were *rejected* by the drafters.⁷⁸ A section entitled “U.S. Judicial Interpretation” discusses a single case, under the Torture Victims Protection Act, which found torture by a Bosnian Serb against a Muslim (beating with blunt objects, boots to injured parts, forced extraction of teeth tied upside down, beat him, dunked head in toilet, knife carving in prisoner).⁷⁹ The memorandum says (without any authority) that the court was wrong to find booted kicks to the stomach of a man on his knees to constitute torture.⁸⁰ (An Appendix lists but does not discuss other TVPA cases with

⁷⁵ Wendel, 99 Nw.U.L.Rev. at 1228.

⁷⁶S. Treaty Doc. No. 100-20, at 4-5, quoted in Sec. II.A, Danner 128.

⁷⁷ S. Exec.Rep. No. 101-30, at 14, quoted in Sec. II.A, Danner 128.

⁷⁸ Sec. II.B, Danner 132-33.

⁷⁹ *Mehinovic v. Vuckovic*, 198 F.Supp.2d (N.D. Ga. 2002),

⁸⁰ Sec. III, Danner 138. As mentioned, we do not know which proposed or actual U.S. interrogation techniques prompted the memorandum. It is curious that it went out of its way to discuss kicks to the

broader definition of torture, including holding incommunicado, denial of food and water, limited access to toilet, shared toilet with 200 people).⁸¹ Finally, the memorandum concludes that the law of torture doesn't matter, because the President, as Commander in Chief, isn't bound by any law anyway.⁸²

The memorandum soon had an impact; it did not merely sit in the files as a potential defense to war crimes charges that have not yet been brought to trial.⁸³ Within a few months, lawyers from all the security agencies met to form policy on interrogations. The resulting document, Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (April 4, 2003),⁸⁴ is a chilling discussion of thirty-five specific interrogation techniques. Mentioning, but not analyzing, the international and U.S. law on torture, the report authorizes, among other techniques, 20-hour interrogations, prolonged standing, sleep deprivation, physical training, face slaps, stomach slaps, removal of clothing, and use of dogs and other factors to create fear.

The best-known application of these techniques was in Abu Ghraib prison in Iraq, but focus on that prison, apart from the underlying U.S. policies, has obscured more than revealed. Curiously we know much more about how enlisted personnel “softened up” for interrogation than we know about the interrogations themselves, as actual interrogation techniques are still classified. Among the practices that have become public: in Guantanamo, the FBI refers to “torture techniques” in a memorandum of December 5, 2003, designed mainly to deflect blame to others.⁸⁵ We have learned that in Iraq, interrogators employed “strangulation, beatings, placement of lit cigarettes into the detainees [sic] ear openings, and unauthorized interrogations.”⁸⁶ Other documents describe covering detainee’s hands in alcohol and igniting; shocking with electric transformers; four juveniles made to kneel in mock execution then pistol discharged; kneeling, hooded in burlap bag, in empty swimming pool for up to 24 hours.⁸⁷ Finally,

stomach. As noted, even the Reagan administration, in documents rejected for their narrowness, took the position that “sustained systematic beating” was torture.

⁸¹ Danner 156-60.

⁸² Section V, Danner 142-49. The Supreme Court has since rejected this argument. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁸³ But see Andreas Fischer-Lescano, *Torture in Abu Ghraib. The Complaint against Donald Rumsfeld under the German Code against Crimes under International Law (Völkerstrafgesetzbuch)*, 6 German L.J. No. 3 (March 2005).

⁸⁴ Danner 187-98.

⁸⁵ “Subject: Impersonating FBI at GTMO....These tactics have produced no intelligence of a threat neutralization nature to date and CITF believes that techniques have destroyed any chance of prosecuting this detainee. If this detainee is ever released or his story made public in any way, DoD interrogators will not be held accountable because these torture techniques were done [sic] the ‘FBI’ interrogators. The FBI will be left holding the bag before the public.” www.aclu.org/torturefoia/released/FBI_3977.pdf

⁸⁶ FBI Report 6/25/04, www.aclu.org/torturefoia/released/FBI_4910_4912.pdf .

⁸⁷ www.aclu.org/SafeandFree/SafeandFree.cfm?ID=172068&c=206

there has been much discussion of the U.S. practice of transporting prisoners for torture elsewhere.⁸⁸

What can the scholar learn from this shocking episode? Are there lessons here of more lasting value than the obvious truths that some powerful people feel entitled to do whatever they please, irrespective of the law? I think that there are.

A powerful lesson from these memoranda is that discussion of torture is not, in fact, difficult. One need not be vague, or euphemistic, or find oneself perpetually lost in a gray zone without definition or guidance. The memoranda, like the judicial cases, communicate when they discuss actual practices, which they do in remarkably and shockingly blunt and specific terms. People who torture want memos that say what they can and can't do.

People who would like to see less torture in the world can profit from this example. There are three types of people who might become more specific in their discussions of torture, more willing to discuss specific practices, less content with vague formulations like "severe pain" or "cruel, inhuman, or degrading." These are: diplomats, judges, and academics.

We may put the judges aside. At least in the U.S. cases under the Torture Victims Protection Act or immigration law, they have, as we have seen, been quite ready to discuss specific practices in precise and graphic language. The fact that the Bush administration memos simply ignored all these cases (but one) suggests that they could have ignored a more precise treaty, too.

Still, the question remains why the Covenant against Torture is so vague, which in turn raises the larger question of why international human rights documents often prefer the general to the specific, the adjective to the verb, the abstract to the graphic. No doubt vague language permits the reaching of agreement that would be frustrated by excessive focus on the specific, and the omission may not be serious if domestic and international courts stand ready to apply the vague words of treaties to the raw facts of experience. In this context I can only raise the question of whether we are all best served by a human rights discourse of the general.

The problems that academic writers have discussing torture, however, deserve separate treatment.

B. Academic Vices: is a ban on torture morally problematic? must it apply to ticking bombs?

⁸⁸John Barry, Michael Hirsh, & Michael Isikoff, The Roots of Torture, Newsweek, May 24, 2004, <http://msnbc.msn.com/id/4989436/>

Academic writing on torture, at least in my country, seems to me to suffer from two principal vices, apart from the principal vice that there is very little of it: amazingly few cultural leaders and intellectuals have addressed the problem, despite recent revelations. It seems plausible to me that the paucity of writing may reflect the reticence of intellectuals to enter a field dominated by two questions that, to me, do not merit the ink spilled on them. The questions are: may a ban on torture be justified in moral theory? must such a ban apply without exceptions, or might torture be used to extract information that would prevent a much greater harm (the so-called “ticking bomb” scenario)?

1. Torture as a problem in moral justification

An amazingly large literature debates why torture is immoral and thus deserving of legal prohibition.⁸⁹ While this might seem obvious, it turns out to make a good academic question. There are numerous reasons for outlawing or criminalizing torture; none of them excludes any of the others; so one can generate a pointless academic debate about which is primary. Is torture illegal because it is cruel? painful? destroys the personal integrity or personality of the victim in a way not found among other criminal punishments or interrogation techniques? because it “is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most”?⁹⁰ because it demonstrates a truth that we would prefer to ignore, that ultimately the will is slave to the body?⁹¹ gives too much pleasure to the torturer?

While I admire the brilliance behind some of the analyses that I have cited, I find this discussion extremely odd. It assumes that torture is in some kind of unique category that requires some kind of special justification. My point in this Chapter is that this is not true. Torture is one among many cruel practices rejected in civilized society, outlawed through normal processes of law-making. In the case of torture, the normal law-making went from human rights covenant, to a more specific covenant requiring member states to change domestic legislation, to that legislation, and subsequent administrative and judicial interpretation and implementation.

It requires no sophisticated moral theory to explain why societies, organized as political units, act collectively to eliminate pain, suffering, cruelty, or tyranny. Most legislation shares this motivation. If, someday, the world legislated an effective global minimum wage, this might stem from the very same impulse: to try, however one can, to minimize pain and cruelty. Such a global minimum wage might or might not be efficacious, or result in fair economic distributions, but it would not, on its face, require extraordinary moral justification. Torture should be, and is, obviously a more important case for moral condemnation than low wages. Yet it is torture that appears to many moral philosophers to require sophisticated arguments to support its abolition.

It’s not my job to forbid anyone else from writing, or destroy any academic’s harmless fun. I believe, however, that the debate about the moral case for outlawing

⁸⁹ See, e.g., *Torture: A Collection* (Sanford Levinson ed. 2004).

⁹⁰ David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 *Va.L.Rev.* 1425, 1430 (2005).

⁹¹ Louis Michael Seidman, *Torture’s Truth*, 72 *U.Chi.L.Rev.* 881 (2005).

torture has actually become counterproductive. It feeds the rhetorical case of the Bush administration and its supporters that torture is some kind of exceptionally squishy subject: hard to define, lacking clear definition and boundaries, an irritant to moralists and international law prudes who are not quite in the real world. I think it a mistake to respond to this challenge by accepting it, and then trying to supply that definition, those boundaries. It is a mistake in this context to give away the austerity of normal law for the vagaries of moral discourse. The philosophical discourse suggests that one must be a moral philosopher in order to have a respectable opinion against torture. I suggest that the revulsion of ordinary citizens is worth quite a bit more than moral theory, particularly when it takes such an obviously implausible turn as suggesting, as Louis Seidman does, that such revulsion needs explaining as a kind of psychological resistance.

This is obviously what I mean by calling torture a problem of ordinary legal interpretation. If there were no law against torture, its opponents would be obliged to get busy and create one. But, since there is law against torture, of normal-to-better specificity and efficacy, opponents of torture would do better to protect that law, than cast doubt on its existence or foundations. By “protect that law,” I mean educate legal and public audiences about it (for, as I showed in Part I, journalists in the U.S. seem quite ignorant of it), build a culture of support for it, and seek its application and enforcement.

Some of the literature on the moral case against torture suggests that special moral justification is needed in order to justify a ban on torture that is absolute and deontological. I will close by disagreeing with this idea, too.

2. Does the “ticking bomb” scenario show that the ban on torture is either not absolute, or requires special moral justification to make it so?

One particular hypothetical case dominates the academic literature on torture to such a degree, as to suggest that one cannot possibly write about torture unless one has a position on the hypothetical. In the hypothetical, the origins of which I have been unable to identify with certainty, a captured terrorist knows the location at which a bomb has been planted that, when detonated, will kill hundreds; the question is whether the police may torture the suspect in order to determine the location of the bomb. The range of answers includes (1) never; (2) perhaps, but only after considering that they may face criminal charges; (3) perhaps, if a judge issues a warrant; (4) of course, under the relentless summing up of utilitarianism under which a hundred lives always count a hundred times more than one life, and what’s wrong with you for not seeing this? Another response, which I share, is that the hypothetical is so unrealistic as to be of no relevance to the kinds of torture one actually encounters in practice, largely because of the unrealistic assumption that the potential torturers were sure that the prisoner had this information, and the treatment of the decision to torture as a matter of ad hoc moral

decision, rather than the real world we have seen, of policies, protocols, handbooks of interrogation practice.⁹²

I wish to raise a different objection to the hypothetical. Once again, it suggests, without actually arguing, that the abolition of torture is some kind of unique legal act that must meet unique standards of justification. The “ticking bomb” hypothetical is equally relevant to any field of regulation, but for some reason has become associated with the ban on torture. I lecture ten times a year or so on topics in the law of labor and employment. I have never been asked to discuss the impact on my topic of a ticking bomb planted under an industrial establishment.

David Luban is quite correct to argue that the function of the “ticking bomb” hypothetical is to force the opponent of torture to admit one potential use of torture, assuming that this would destroy the absolutism of the current ban and put the opponent “in the mud with everyone else.”⁹³ This, of course, is not true, and scholars as diverse as Michael Walzer and Richard Posner have pointed out that an absolute ban is well worth having even in the ticking bomb scenario, for the restraint it would place on those tempted to deviate for anything less.⁹⁴

I would also suggest that another function of the ticking bomb scenario, one shared with the discourse of moral justification, is a kind of silencing of potential discussion of torture. My point, for the last time, is that it is not necessary, in order to discuss the law of torture, to have a position on the ultimate moral justification of the ban, or whether in some possible world there might be an exception to it.

Rather, it is more important for legal scholars and other students of the law, particularly in the insular, self-absorbed country where I live, to build a popular culture in which everyone understands that there are both international and domestic laws prohibiting torture; that those laws create individual civil and criminal liability in torturers; that they admit no exceptions or defenses of following orders; and that they apply, and will be applied before too long, to the lawyers and other government officials who created a culture of torture, and whose co-citizens will yet reap the violence they have sown.

⁹² Elaine Scarry, Five Errors in the Reasoning of Alan Dershowitz, in *Torture: A Collection* (Sanford Levinson ed. 2004); Luban.

⁹³ Luban.

⁹⁴ in Levinson collection.

2. Ticking Bombs: the allure of the absurd hypothetical

IV. Thinking About Torture