Torture and the New Normal: Modern Legal Thinking on an Ancient Scourge

The Torture Papers: The Road to Abu Ghraib

by Karen Greenberg and Joshua Dratel, eds.

New York, Cambridge University Press, 2005. Pp. 1249.

Torture: A Collection

by Sanford Levinson, ed.

Toronto: Oxford University Press, 2004. Pp. 319.

I. INTRODUCTION

The psychiatrist Carl Jung once wrote that "[t]he healthy man does not torture others—generally it is the tortured who turn into torturers."[1] Jung got it wrong. Hannah Arendt was closer to the truth of torture when, in writing on the holocaust, she spoke of the "banality of evil".[2] Tragically, torture is among the most commonplace of scourges. In 2002, Amnesty International surveyed its research files from 1997 to mid-2000 and found that it had received reports of government torture or ill treatment in over 150 countries. People had been tortured to death in over 80 of these states.[3]

Given these figures, torture is not the product of a diseased and aberrant mind. It is a universally condemned social reality, but one that is endorsed quietly and consistently by most governments (or at least elements of these governments). As Mark Osiel chillingly details in his essay on Argentina's dirty war in *Torture: A Collection*[4], torturers are supported in their task by powerful social forces—in the case of Argentina, the authority of military orders, the ideological conviction that they battle an insidious enemy and the firm support of the Catholic Church with its doctrine of "just war".[5]

If torture is explained by sociology and not psychology, then it is exactly the sort of practice that should be amenable to legal intervention. Law does little to curb

1. C.G. Jung, "Return to the Simple Life" in *The Collected Works of C.G. Jung*, ed. by Sir Herbert Read et al., trans. by R.F.C. Hull (Princeton: Princeton University Press, 1968) vol. 18, 582 at 587.
2. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994).
3. Amnesty International, *Combating Torture: A Manual for Action* (London: Amnesty International Publications, 2003) at 2.
4. Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004) [*Torture: A Collection*].
5. Mark Osiel, "The Mental State of Torturers: Argentina's Dirty War" in *Torture: A Collection*, *ibid.* at 129.

the excesses of aberrant individuals. It should, however, be capable of regulating social conditions otherwise conducive to torture. Yet, both *Torture: A Collection* and *The Torture Papers*[6] demonstrate the law's limits in the post-9/11 era and, indeed, how law itself may be marshalled in defence of torture.

Torture: A Collection is a compilation of writings by lawyers and philosophers asking when and whether torture is permissible. *The Torture Papers* is a massive tome reproducing US government memoranda—many by government lawyers—and both government and non-government reports discussing standards of detention and interrogation of detainees in the "war on terror". Both books make for discomforting reading. The essay that follows highlights common themes and concerns running through these books, fleshing out this discussion with commentary and observations.

II. THE PROMISE—AND FAILURE—OF INTERNATIONAL LAW

Torture is banned by some of the world's most systematically ratified human rights treaties: the *International Covenant on Civil and Political Rights*, with 154 state parties, and the *United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment*, with 140 parties.[7] As Sanford Levinson suggests in his introduction to *Torture: A Collection*, "banned" is probably too weak a term to describe the requirements imposed by these treaties: the prohibition on torture is absolute. Unlike many other human rights protected by international law, the torture bar cannot be negated by any circumstance, no matter how extreme.[8] Torture is so repulsive that international law permits no utilitarian calculus, no discounting of an evil in favour of a greater good.

And yet, many of the most notorious torturing states are parties to the *Convention Against Torture*. In a study included in *Torture: A Collection*, Oona Hathaway concludes that "[a] state's ratification of the Convention . . . provides no guarantee that its actions will improve."[9] Indeed, because human rights-abusing states enjoy a reputational windfall by joining the poorly policed treaty, "those that ratify the Convention . . . are reported to engage in *more* torture than those that have not ratified."[10]

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6. Karen J. Greenberg & Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) [*The Torture Papers*].

7. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 (entered into force June 26 1987) art. 1 [*Convention Against Torture*]; *International Covenant on Civil and Political Rights with Optional Protocol*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force March 23 1976) art. 7 [*International Covenant*]. Ratification information for the *Convention against Torture* online: <http://www.ohchr.org/english/countries/ratification/9.htm>. Ratification information for the *International Covenant* online: <http://www.ohchr.org/english/countries/ratification/4.htm>.

8. See *Convention against Torture, ibid.*, art. 2(2): "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture". Meanwhile, art. 7 of the *International Covenant, ibid.*, (barring torture) is not among the rights that may be abrogated in the emergency anticipated by art. 4 (see art. 4(2)).

9. Oona A. Hathaway, "The Promise and Limits of the International Law of Torture" in *Torture: A Collection*, *supra* note 4, 199 at 204.

10. *Ibid.*

International law, in these circumstances, holds out a promise on which it fails to deliver. Hathaway sees some light in the dark: at least the *Convention Against Torture* has "contributed to the now almost universal view that torture is an unacceptable practice."[11] Other materials found in *Torture: A Collection* and *The Torture Papers* suggest that post-9/11 developments may belay even this accomplishment.

III. Lawful Torture

In the wake of September 11, 2001, torture remains an illegal social reality, condemned publicly and practiced quietly by governments. To that extent, the terrorist attacks on New York and Washington are no watershed. What *is* new is the credibility of torture to those who think seriously (and care deeply) about the rule of law. Torture and law were close collaborators in continental Europe until the late 18th and early 19th centuries. As John Langbein discusses in his essay on the legal history of torture in *Torture: A Collection*: "[f]or half a millennium the law courts of continental Europe tortured suspected persons to obtain evidence. They acted openly and according to law".[12]

The laws of evidence—and rules of morality—have since changed. Certainly, as Jerome Skolnick argues in his chapter on US police interrogation, coercive law enforcement strategies—like the famous "third degree" interrogation—were accepted tactics in the early 20th century. However, as Skolnick also suggests, there is probably "no longer any torture by American police detectives who are seeking evidence to be introduced at a trial."[13]

The laws of evidence are not, however, the only legal principles that implicate torture. If torture and the laws of evidence have long since parted company, what about torture and the legal doctrines of necessity and self-defence? It is on this issue that *Torture: A Collection* and *The Torture Papers* reflect new, often unsettling post-9/11 thinking about torture, morality and law.

IV. The Ticking Time Bomb's Lesser Evil

Remarkably, several contributors to *Torture: A Collection* accept that, at least in some circumstances, torture may be employed by the state. Civil libertarian Alan Dershowitz repeats (and augments) his famous 2002 argument that because it is already happening *sub rosa*, torture should be a regulated practice, available in extreme circumstances but governed by judicially issued warrants. For his part, Judge Richard Posner—although critical of Dershowitz's warrant idea—supports his

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11. *Ibid.* at 210.
12. John H. Langbein, "The Legal History of Torture" in *Torture: A Collection*, *supra* note 4, 93 at 93.
13. Jerome H. Skolnick, "American Interrogation: From Torture to Trickery" in *Torture: A Collection*, *supra* note 4, 105 at 123-24.

premises: "only the most doctrinaire civil libertarians [. . .] deny, that if the stakes are high enough torture is permissible. No one who doubts that should be in a position of responsibility."[14]

These commentators would agree that what Henry Shue calls *terroristic* torture—torture as a means of intimidating a person or population[15]—is morally odious. However, a common scenario running through these essays—and several others—is the famous "ticking time bomb" hypothetical or its near variants. The fact pattern runs something like this: imagine that a stolen, suitcase-sized thermonuclear device is set to detonate imminently somewhere in New York, London, or Toronto or some other large urban area of your choice, populated with people you care about. You have in your custody the terrorist who planned this attack and who is aware of the precise location of the weapon. That person refuses to cooperate and indeed is willing to die for his or her cause. Do you engage in what Henry Shue calls *interrogational* torture:[16] torture employed strictly to extract the critical information from the terrorist bomber and designed to save millions of innocent lives?

Post-9/11 popular culture appears to favour torture in these circumstances, in ways that parallel academic debates. As a columnist in the *Vancouver Sun* observed recently, the popular TV series *24*'s main character, US federal agent Jack Bauer, tortured at least six people in the 2005 season, always in response to a ticking time bomb scenario and almost always producing results that rescued the inhabitants of Los Angeles from certain destruction.[17] The needs of the many outweigh the rights of the one.

Grappling with a *24*-style ticking time bomb scenario, Shue also surrenders to utilitarian calculus in *Torture: A Collection*: "I can see no way to deny the permissibility of torture in a case *just like this*. To allow the destruction of much of a great city and many of its people would be almost as wicked as purposely to destroy it".[18] His conclusion is echoed by other contributors. Oren Gross writes: "legal rigidity in the face of severe crises", like the ticking time bomb scenario, "is not merely hypocritical but is, in fact, detrimental to long-term notions of the rule of law. It may also lead to more, rather than less, radical interference with individual rights and liberties."[19]

These conclusions are difficult to dispute but obviously deeply troubling. In *Torture: A Collection*, several defences are mounted to the ticking time bomb scenario's logic.

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14. Richard A. Posner, "Torture, Terrorism, and Interrogation" in *Torture: A Collection*, *supra* note 4, 291 at 295.
15. Henry Shue, "Torture" in *Torture: A Collection*, *supra* note 4, 47 at 53.
16. *Ibid.*
17. Douglas Todd, "The case against torture" The Vancouver Sun (4 June 2005) C5.
18. Shue, *supra* note 15 at 57.
19. Oren Gross, "The Prohibition on Torture and the Limits of the Law" in *Torture: A Collection*, *supra* note 4, 229 at 237.

V. Defusing the Time Bomb

First, Shue, like other thinkers, queries the premises underlying the ticking time bomb scenario, arguing that hard cases make bad law and that artificial cases make bad ethics.[20] In so doing, he makes a critical point.

As *24* illustrates, it is not impossible to imagine a scenario in which we *know* (not just suspect) that the detainee is the bomber, in which we *know* that the suspect *will* crack under pain and that torture *will* save the day, in which we *know* the bomb's detention is *certain* to happen; in which we *know* that other investigative techniques are *certain* to fail. Knowing all of this, the utilitarian calculus is impossibly weighted in favour of torture. Immanuel Kant—who rejected utilitarian ethics and famously claimed that he would tell no lie even to save his dearest friend from certain death—might reject torture in even this scenario. Chilean intellectual Arial Dorfman, in his essay in the Levinson book, endorses passionately this absolutist position:

> I can only pray that humanity will have the courage to say no, no to torture, no to torture under any circumstances whatsoever, no to torture, no matter who the enemy, what the accusation, what sort of fear we harbor; no to torture no matter what kind of threat is posed to our safety; no to torture anytime, anywhere; no to torturing anyone; no to torture.[21]

As noted above, the letter of international law stands with Dorfman. But faced with the ticking time bomb, many other right-minded people might ignore its admonishments. Indeed, if we numbered among the inhabitants of the city threatened with nuclear annihilation, we would likely hope—and demand—that our leaders torture. Our sympathies in *24* are usually with Jack Bauer, not with the fanatics he tortures. As its executive producer puts it, *24* expresses the public's "fear-based wish fulfillment" of having defenders like Bauer, willing to do what it takes to keep them safe.[22]

Put another way, it is critical that those charged with protecting us have what Michael Walzer calls "dirty hands".[23] Jean Bethke Elshtain makes this observation, in her chapter:

> Far greater moral guilt falls on a person in authority who permits the deaths of hundreds of innocents rather than choosing to 'torture' one guilty or complicit person. . . . Were I the parent or grandparent of a child whose life might be spared [in a ticking time bomb scenario], I confess, with regret, that I would want officials to rank their moral purity as far less important in the overall scheme of things than eliciting information that might spare my child or grandchild[. . .].[24]

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20. Shue, *supra* note 4 at 57.
21. Ariel Dorfman, "The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?" in *Torture: A Collection*, *supra* note 4, 3 at 17.
22. Bill Keveney, "24's Jack Bauer Brings Torture Home" The Calgary Herald (21 March 2005) C1-C2.
23. Michael Walzer, "Political Action: The Problem of Dirty Hands" in *Torture: A Collection*, *supra* note 4, 61 at 61-62.
24. Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands'" in *Torture: A Collection*, *supra* note 4, 77 at 87.

But the ticking time bomb scenario, like *24*, is fiction. The real world of national security has few of what US Defense Secretary Donald Rumsfeld famously called "known knowns"—things we know we know. As Rumsfeld noted: "We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones."[25]

In making these statements in 2002, Rumsfeld was pooh-poohing the absence of evidence linking Saddam's Iraq to terrorist organizations. However, his comments also put the finger on the flaw in the ticking time bomb scenario: that hypothetical imagines a state acting in response to "known knowns", and burdened with no Rumsfeldian "known unknowns" and "unknown unknowns". Remove this fictional certainty, and even the strictest utilitarian should pause before endorsing torture. Elaine Scarry, in her attack on the ticking time bomb's logic makes exactly this point:

> [Since 9/11,] five thousand foreign nationals suspected of being terrorist have been detained without access to counsel, only three of whom have ever eventually been charged with terrorism-related acts; two of those three have been acquitted. When we imagine the ticking time bomb situation, does our imaginary omniscience enable us to get the information by torturing one person? Or will the numbers more closely resemble the situation of the detainees: we will be certain, and incorrect, 4,999 times that we stand in the presence of someone with the crucial data, and only get it right with the five thousandth prisoner? Will the ticking time bomb still be ticking?[26]

This unease is shared by the public. A Fox News poll, conducted in 2003, suggested that Americans are almost evenly divided in response to the question: "Do you favor or oppose allowing the government to use any means necessary, including physical torture, to obtain information from prisoners that might protect the United States from terrorist attacks?" 44 percent of respondents answered "yes", while 41 percent responded "no".[27] However, a 2004 survey conducted by a public policy think-tank produced more nuanced results: public support for torture depends on the level of certainty one has that the detainee has critical information and the potential consequences of the attack averted.[28] Relax the assumptions of the ticking time bomb scenario—assumptions that have little place in the real world—and the public

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25. United States Department of Defense, News Briefing, "DoD News Briefing—Secretary Rumsfeld and Gen. Myers" (12 February 2002), online: <http://www.defenselink.mil/transcripts/2002/t02122002_t212sdv2.html>.
26. Elaine Scarry, "Five Errors in the Reasoning of Alan Dershowitz" in *Torture: A Collection*, *supra* note 4, 281 at 284.
27. Dana Blanton, "Poll: Steady Support for Action Against Iraq" *Fox News* (13 March 2003), online: Fox News <http://www.foxnews.com/story/0,2933,81023,00.html>. The balance were undecided or responded that their answer would depend on the circumstances.
28. Program on International Policy Attitudes & Knowledge Networks, *Americans on Detention, Torture, and the War on Terrorism* (Maryland: Program on International Policy Attitudes, 2004) at 9, online: <http://www.pipa.org/OnlineReports/Torture/Report07_22_04.pdf> [PIPA Poll].

appetite for torture abates. Seventy percent of those polled were persuaded by the argument "Because we often do not know for sure that someone actually has useful information or is in fact a terrorist, if torture or abuse is allowed, a significant number of innocent people will end up being tortured or abused".[29]

And yet, it is a cheap answer to the ticking time bomb hypothetical to point to its statistical improbability. As Gross argues, ticking time bomb problems "are real, albeit rare. Ignoring them completely, by rhetorically relegating them to the level of 'artificial,' is utopian or naive, at best."[30] Posner invokes an apparently real-life, proto-ticking time bomb example employed by Dershowitz: in 1995, Philippine authorities "tortured a terrorist into disclosing information that may have foiled plots to assassinate the pope and to crash eleven commercial airliners carrying approximately four thousand passengers into the Pacific Ocean."[31]

How then should lawyers deal with improbable scenarios and at the same time signal an abhorrence of torture? As noted, Dershowitz proposes judicial regulation of torture. If torture *is* happening and *will* happen, better to confine it to those truly extreme cases by ensuring that judges, and not overly enthused investigators, complete the utilitarian calculus.[32] His view is not shared by many other commentators, not even by those who accept the logic of the ticking time bomb. The response, for many of these commentators, is to somehow accommodate torture without normalizing it.

VI. Accepting the Abnormal

Thus, the second defence to the ticking time bomb scenario is to accept the possibility of torture without accepting *ex ante* its legitimacy. Posner does this when he rejects Dershowitz's model of judicial authorization: "It is better . . . to stick with our perhaps overly strict rules, trusting executive officials to break them when the stakes are high enough to enable the officials to obtain political absolution for their illegal conduct."[33]

It is this approach, in varying forms, that animates the response of several commentators in *Torture: A Collection*. Thus, Gross's proposal "calls for maintaining an absolute ban on torture while, at the same time, recognizing the possibility (but not certainty) of state agents acting extralegally and seeking ex post ratification of their conduct."[34] As Gross urges, "[w]ith the need to obtain ex post ratification from the public, the official who decides to use torture undertakes a significant risk because of the uncertain prospects for subsequent public ratification."[35] He explains: "ex post

29. *Ibid.* at 7.
30. Gross, *supra* note 19 at 234.
31. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2003) at 137. Also cited in Posner, *supra* note 14 at 195.
32. Alan Dershowitz, "Tortured Reasoning" in *Torture: A Collection*, *supra* note 4, 257 at 257ff.
33. *Ibid.* at 297-98.
34. Gross, *supra* note 19 at 244.

ratification may serve, at most, as an ad hoc, individualized defense to specific state agents against civil or criminal charges in particular cases. It cannot serve as a general, institutional, conduct-guiding rule to be relied upon ex ante."[36]

Other writers explore the form in which this *ex post* ratification might come. Shue urges that "[a]nyone who thinks an act of torture is justified should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied."[37] Several other commentators discuss in detail the criminal law defence of "necessity"—the doctrine that a person acting in an emergency may inflict a harm less serious than that which she or he averts. Famously, the Israeli Supreme Court, in its 1999 judgment on Israeli interrogation techniques reproduced in *Torture: A Collection*, accepted that the necessity defence might be open to an interrogator in the ticking time bomb scenario.[38]

In a partial critique of the Court's reasoning, Miriam Gur-Arye argues that there is no room for even a necessity defence in assessing interrogation tactics. Necessity, she urges, permits the infliction of harm on even innocent persons if necessary to avert a more serious harm to others. Thus, the torture of a terrorist's innocent children might be defended, an act that goes beyond the pale. For this reason, Gur-Arye favours instead self-defence (in likely practice, defence of a third person): a justification that limits use of force to the person precipitating the imminent harm.[39]

Either way, the point made by these thinkers echoes that voiced by Gross: defences—whether of necessity or self-defence—do not provide *ex ante* authorization for the use of coercive interrogation techniques. The self-defence and necessity defences are just that: defences to criminal charges. They are not a permission to commit the crime. As the Israeli Supreme Court put it, the necessity defence "does not authorize the use of physical means for the purposes of allowing investigators to execute their duties in circumstances of necessity. . . . The lifting of criminal responsibility does not imply authorization to infringe upon a human right."[40]

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35. *Ibid.*
36. *Ibid.* at 247.
37. Shue, *supra* note 15 at 58.
38. Supreme Court of Israel, "Judgment Concerning the Legality of the General Security Service's Interrogation Methods" in *Torture: A Collection*, *supra* note 4, 165 at 178.
39. Miriam Gur-Arye, "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience" in *Torture: A Collection*, *supra* note 4, 183 at 193-94.
40. Supreme Court of Israel, *supra* note 38 at 179.

VII. Is Defending Torture Defensible?

The Israeli Supreme Court makes a fine distinction, indisputable in logic and problematic in practice. If the defences are plausible, criminalizing the conduct is less of a deterrent. An expected *ex post* ratification of torture creates a slippery slope, demarcating a movable (and potentially expandable) zone in which torture is *de facto* permissible. And where it is permissible, it will be practiced. The existence of a plausible *ex post* justification *will* constitute *ex ante* authorization.

This is a real concern, as *The Torture Papers* illustrate with vigour. These documents leave no doubt that US government lawyers are playing footsie with torture. As Karen Greenberg writes in her introduction to *The Torture Papers*, "what the reader is left with after reading these documents is a clear sense of the systematic decision to alter the use of methods of coercion and torture that lay outside of accepted and legal norms".[41]

VIII. Above the Law

In their most radical guise, government lawyers urge in *The Torture Papers* that the laws barring torture do not apply. Thus, then-Assistant Attorney General (and now judge) Jay Bybee urges that "the information gained from interrogations may prevent future attacks by foreign enemies. Any effort to apply [the criminal provision outlawing torture] in a manner that interferes with the President's direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional."[42]

Meanwhile, then-Deputy Assistant Attorney General (and professor of law) John Yoo argues that the Geneva Conventions—with their important protections for prisoners of war—apply only to states, and thus do not attach to Al Qaeda detainees or even to the Taliban, the *de facto* government of a "failed state".[43] His assertion that Afghanistan under the Taliban "was without the attributes of statehood necessary to continue as a party to the Geneva Conventions" is presented without reference to authority.[44] This is not surprising given the disconnect between this statement and international law's doctrines of state continuity.[45] A state is not relieved of obligations—or disentitled to rights—in international law where governments are illegitimate.[46]

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41. Karen J. Greenberg, "From Fear to Torture" in *The Torture Papers*, *supra* note 6, xvii at xix.
42. Anthony Lewis, "Introduction" in *The Torture Papers*, *supra* note 6, xiii at xv.
43. John Yoo, "Memo 4" in *The Torture Papers*, *supra* note 6, 38 at 38-39, 50.
44. *Ibid.* at 50.
45. *Ibid.* at 30.
46. See e.g. *Great Britain v. Costa Rica* (1923), 1 R.I.A.A. 375 (Arbitrator: Willam H. Taft).

Other statements in *The Torture Papers* reflect the conceit of legal dualism: the notion that international law is a separate regime, both inapplicable to domestic actors unless incorporated in domestic law, and capable of being trumped by that domestic law. Any principle of customary international law barring torture, reports a Department of Defense memo, "cannot bind the Executive Branch under the Constitution because it is not federal law."[47]

All of these arguments are more than *ex post* ratification of an odious, but necessary act of torture. They amount to an *ex ante* authorization to ignore international and US domestic criminal law.

And if these approaches do not suffice, Bybee and other lawyers set out broad defences. Writes Bybee: "criminal law defenses of necessity and self-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens."[48] The context of these assertions is important: these defenses are included in Bybee's catalogue of reasons discounting the relevance of the prohibition on torture in US criminal law. They are not marshalled in defence of acts already completed, but in the course of planning a policy on interrogations. Again, this is *ex ante* authorization, not *ex post* ratification.

IX. Defining Away Torture

Bybee's arguments—and those of other lawyers authoring *The Torture Papers* memos—illustrate another concern: the potency of the lawyer's analytical razor in garbling moral clarity. As Richard Weisberg writes in his condemnation of a "legal discourse that slips dangerously close to the 'known-to-be-wrong'", torture's "post-modern apologist manages to forget history in an unwise and ironic rush to cloak the torturer's brutality in the language of utilitarianism."[49] Or, as *The Torture Papers* demonstrate prodigiously, lawyers mask the morally outrageous with fine (and suspect) distinctions.

Among the most disturbing trends reflected in *The Torture Papers*—and against which some contributors to *Torture: A Collection* warn—is a lawyerly toying with definitions of torture. Even in popular culture, torture does not come in one flavour. Yes, the 2004 think-tank poll cited above suggests that a majority of Americans would support sleep deprivation, hooding, loud noise and stress positions to induce cooperation by a suspect in order to foil the high consequence attacks, at least where there is high certainty that the detainee has critical information. Yet, only a minority would support the use of threatening dogs, deprivation of food and water, death threats and

47. Working Group on Detainee Interrogations in the Global War on Terrorism, "Memo 26" in *The Torture Papers*, *supra* note 6, 286 at 290.

48. Alberto Gonzales, "Memo 14" in *The Torture Papers*, *supra* note 6, 172 at 207.

49. Richard H. Weisberg, "Loose Professionalism, or Why Lawyers Take the Lead on Torture" in *Torture: A Collection*, *supra* note 4, 299 at 300.

exposure to heat or cold. And only single-digits would support electric shocks, beatings, water torture or sexual humiliation.[50] Put another way, the more pernicious the abuse, the less support it generates, even in extreme circumstances.

As these poll results suggest, much turns on what we mean by torture. And it is on this fragile definitional issue that contending camps have staked so much of their positions, and that lawyers have played their most problematic role. Article 1 of the *Convention Against Torture* defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for certain enumerated purposes, including obtaining information.[51] As John Parry discusses in his essay, international tribunals have pinpointed specific acts as torture: beatings, deprivation of food, electric shocks, being submerged in water to the brink of asphyxiation and the like.[52]

But the boundary between torture and cruel, inhuman and degrading (CID) treatment—a lesser offense—is fuzzy both in international law and, as Fionnuala Ní Aoláin notes, in the European Convention on Human Rights. In the European context, the European Court of Human Rights has grappled with the torture/CID treatment divide, sometimes unsatisfactorily as when it classified certain British interrogation techniques in Northern Ireland as CID treatment, but not as torture.[53]

The rich European case law on torture versus CID treatment is not reproduced in the jurisprudence of other, more universal tribunals. The resulting uncertain demarcation point has important policy consequences for governments prepared to skate close to the line. Thus, in a notorious August 1, 2002 memorandum, Jay Bybee confined the definition of torture to only the most egregious of acts, producing lasting psychological damage such as post-traumatic stress syndrome or physical pain of an "intensity akin to that which accompanies serious physical injury such as death or organ failure."[54] "Because the acts inflicting torture are extreme," writes Bybee, "there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture."[55]

The distinction between torture and CID treatment is significant. In the *Convention Against Torture*, the prohibition on torture is absolute. The bar on CID treatment is murkier in the *Convention Against Torture* (although not, it should be noted, in the *International Covenant*).[56] Moreover, since publication of *The Torture Papers*, the US

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50. PIPA Poll, *supra* note 28 at 9.
51. *Supra* note 7, art. 1(1).
52. John T. Parry, "Escalation and Necessity: Defining Torture at Home and Abroad" in *Torture: A Collection*, *supra* note 4, 145 at 147.
53. Fionnuala Ní Aoiláin, "The European Convention on Human Rights and Its Prohibition on Torture" in *Torture: A Collection*, *supra* note 4, 213 at 216.
54. Gonzales, *supra* note 48 at 214-15. The US government has since distanced itself from this interpretation. See Memorandum from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General (30 December 2004), online: FindLaw <http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf>.
55. Gonzales, *supra* note 48 at 214.

administration has apparently distanced itself from whatever prohibition on CID treatment the *Convention Against Torture* imposes.

Thus, on January 6, 2005, the current Attorney General of the United States was asked by Senators during his confirmation hearing whether "it is legally permissible for U.S. personnel to engage in cruel, inhuman, or degrading treatment that does not rise to the level of torture."[57] In response, Alberto Gonzales noted the reservation entered by the United States upon its ratification of the *Convention Against Torture* in 1994, which reads in part: "the United States considers itself bound by the obligation under article 16 . . . only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the [US Constitution's] Fifth, Eighth, and/or Fourteenth Amendments."[58] He then urged "that aliens interrogated by the U.S. *outside the United States* enjoy no substantive rights under the Fifth, Eighth and 14th Amendment."[59] This limited geographic scope was, therefore, incorporated into the *Convention Against Torture* by virtue of the US reservation. In a follow-up letter to US Senator Feinstein, Gonzales asserted squarely that "[t]here is no legal prohibition under the Convention Against Torture on cruel, inhuman or degrading treatment with respect to aliens overseas."[60]

X. Conclusion: Slippery Slope or Lesser Evil?

Just what, then, has all this lawyerly mulling on torture produced? *The Torture Papers*, in various legal and policy memos, describe interrogation techniques approved for use in overseas interrogations. Even in their more extreme forms, none amount to the medieval barbarity of racks and hot irons or the totalitarian inhumanity of electric shocks and sexual violence. However, the reports reproduced in *The Torture Papers* on happenings at Abu Ghraib prison in Iraq are quite different. At Abu Ghraib, concludes a US military report, unauthorized, but intentional, violent and sexual abuses included "acts causing bodily harm using unlawful force as well as sexual offenses

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56. In the *Convention Against Torture*, *supra* note 7, art. 2(2) (permitting no derogation from the bar on torture) does not apply to art. 16 (the provision precluding CID treatment). However, in the *International Covenant*, *supra* note 7, art. 4 (allowing derogations in certain emergencies) does not extend to *any* of the acts contained in art. 7, including both torture and CID treatment.

57. US, *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (Washington D.C.: United States Government Printing Office, 2005) at 121 (Sen. Durbin), online: <http://www.access.gpo.gov/congress/senate/pdf/109hrg/99932.pdf> [*Gonzales Confirmation*].

58. See reservations of the United States upon accession to the *Convention Against Torture*, online: Office of the United Nations High Commissioner for Human Rights <http://www.ohchr.org/english/countries/ratification/9.htm>.

59. *Gonzales Confirmation*, *supra* note 57 (Judge Gonzales) [emphasis added].

60. US, Cong. Rec., daily ed., vol. 151, 8, at S699 (1 February 2005) (Sen. Feinstein), online: <http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2005_record&page=S699&position=all>.

including, but not limited to rape, sodomy and indecent assault."[61] More recently, media reports have pointed to the use of extreme interrogation techniques at places like Bagram, Afghanistan and Guantanamo Bay, Cuba.[62]

Much ink has been spilled since 9/11 about "lesser evils": that sometimes a small evil must be done to avert a larger evil.[63] That may be true. No political leader may responsibly urge *fiat justitia et pereat mundus*—let justice be done, though the world perish. But the lesser evil remains just that: an evil. Where the lesser evil is nuanced and sanitized with authoritative invocations of legal principles and where careful legal lines are drawn that cannot be observed in real life, the lesser evil risks morphing into the greater evil, even if only in the hands of George W. Bush's "few bad apples" in Abu Ghraib, at Bagram and at Guantanamo Bay. In words reproduced in *The Torture Papers*, former US national security advisor Donald Gregg wrote that the government's lawyerly memos "cleared the way for the horrors that have been revealed in Iraq, Afghanistan and Guantánamo and make a mockery of administration assertions that a few misguided enlisted personnel perpetrated the vile abuse of prisoners. . . . I can think of nothing that can more devastatingly undercut America's standing in the world or, more important, our view of ourselves, than these decisions".[64]

As many contributors to *Torture: A Collection* urge, it may be that the absolute prohibition on torture is unsustainable and that leaders with dirty hands will authorize abuse in response to a ticking time bomb. That is the way of the world. The way of the *law* is, however, for punishment to follow crime. It is for political leaders to assess the gravity of ticking time bomb scenarios. It is for lawyers to stand for the other side of the utilitarian calculus: the one that cautions that in a world of "known unknowns" and "unknown unknowns", real-life Jack Bauers (and the officials who authorize their acts) *will* get it wrong and *must expect* to see the inside of a jail cell. That must be the lesson of *The Torture Papers,* and of the road to Abu Ghraib.

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61. Anthony R. Jones & George R. Fay, "The Fay-Jones Report" in *The Torture Papers*, *supra* note 6, 987 at 993.
62. See e.g. Tim Golden, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths" The New York Times (20 May 2005) A1, A12; David Johnston, "More of F.B.I. Memo Criticizing Guantánamo Methods Is Released" The New York Times (22 March 2005) A17. See also Seymour Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib (New York: Harper Collins, 2004).
63. See e.g. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Toronto: Penguin, 2004).
64. Donald P. Gregg, "Fight Fire With Compassion", Editorial, *The New York Times* (10 June 2004) A27.