

Torture Nation, Torture Law

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TABLE OF CONTENTS

I.	U.S. TORTURE AT HOME AND ABROAD	1004
A.	TORTURE AND FOREIGN POLICY	1004
1.	The Philippines	1005
2.	From the Allied Victory into the Cold War	1008
3.	Vietnam	1011
4.	Latin America	1014
B.	TORTURE IN THE HOMELAND	1016
1.	“Domestic” Police Violence	1016
2.	Torture and Violence in U.S. Prisons	1022
3.	Immigration	1028
II.	U.S. LAW AND THE INTERNATIONAL LAW OF TORTURE	1031
A.	IS INTERNATIONAL LAW “PART OF OUR LAW”?	1031
B.	U.S. RATIFICATION OF THE CONVENTION AGAINST TORTURE AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS	1034
1.	A False Start	1034
2.	The Convention Against Torture	1036
3.	The International Covenant on Civil and Political Rights	1046
C.	STATUTORY INCORPORATION OF INTERNATIONAL LAW ON TORTURE	1048
D.	MINIMIZING INTERNATIONAL LAW	1051
	CONCLUSION	1052

In 1999, the U.S. Department of State submitted its *Initial Report* on U.S. compliance with the Convention Against Torture. The report included the following statement:

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Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification for torture. United States law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a “state of public emergency”) or on orders from a superior officer or public authority¹

The *Second Periodic Report*, submitted in 2005 by the Bush Administration, makes the same general assertions that “the United States stands against and will not tolerate torture under any circumstances.”² Once again, “[n]o circumstance whatsoever, including war, the threat of war, internal political instability, public emergency, or an order from a superior officer or public authority, may be invoked as a justification for or defense to committing torture.”³

To the extent it differs from the *Initial Report*, the *Second Periodic Report* is even more emphatic:

All components of the United States Government are obligated to act in compliance with the law, including all United States constitutional, statutory, and treaty obligations relating to torture and cruel, inhuman or degrading treatment or punishment. The U.S. Government does not permit, tolerate, or condone torture, or other unlawful practices, by its personnel or employees under any circumstances. U.S. laws prohibiting such practices apply both when the employees are operating in the United States and in other parts of the world.⁴

The *Second Periodic Report* admits that “with the attacks against the United States of September 11, 2001, global terrorism has fundamentally altered our world,” and that “[i]n fighting terrorism, the U.S. remains committed to respecting the rule of law, including the U.S. Constitution, federal statutes, and international treaty obligations, including the Torture Convention.”⁵

In light of the documented abuses of prisoners in the “war on terror,” some of which plainly rise to the level of torture, it is tempting to read the *Second Periodic Report* simply as an exercise in political hypocrisy. Yet, as this Article

1. U.S. DEP’T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE ¶ 6 (1999).

2. U.S. DEP’T OF STATE, SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE AGAINST TORTURE ¶ 6 (2005).

3. *Id.*

4. *Id.* ¶ 7.

5. *Id.* ¶ 4.

will demonstrate, reading the *Second Periodic Report* in this way also requires asking whether the *Initial Report* deserves the same treatment. The better course is to read both reports as exemplary of the ways in which our legal and political culture thinks—and fails to think—about law, violence, and history.

U.S. law plainly forbids “torture,” although a precise definition of the term remains elusive.⁶ Jeremy Waldron argues that this prohibition is foundational to the idea of the United States as a liberal democratic state committed to individual rights and the rule of law.⁷ The revelations of mistreatment by U.S. forces thus bring “dishonor” on the country and undermine “American leadership” on human rights.⁸ Similarly, Seth Kreimer insists that the debate over torture involves questions not only of “constitutional law . . . and institutional structure,” but also of “national identity.”⁹ Harold Koh—one of the authors of the 1999 report—maintains that the use of torture in the “war on terror” threatens the collective soul of the nation: “The United States can retain its soul as a people and its moral leadership as a nation, but only if it remains unalterably committed to a world without torture.”¹⁰ Finally, David Luban asserts that “[t]orture used to be incompatible with American values” and warns that a “torture culture” has emerged in response to the September 11 attacks.¹¹

Most readers will sympathize with these claims. This Article, by contrast, suggests that torture may be compatible with American values in practice and with the legal system we have constructed to serve those values. Further, the creation of what Luban correctly calls a “torture culture” began well before September 11. Put another way, many fear that the revelations of abuses committed in the war on terror put the United States at risk of becoming a torture nation. This Article explores the ways in which the United States is already a torture nation and suggests that being a torture nation could be as important a part of the U.S. legal and political system as the ban on torture.

To guide that exploration, I illustrate some of the ways in which past practice and mainstream legal doctrine provide a solid foundation for the abuses of the war on terror.¹² My goal is neither to make a normative argument about the condition of U.S. law and practice, nor to suggest that they are pernicious or evil. At most, I am arguing that the United States is an entirely typical modern

6. My discussion of the ratification of the United Nations Convention Against Torture illustrates this point. See *infra* notes 222–67 and accompanying text.

7. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1682, 1726–27, 1746 (2005).

8. *Id.*

9. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 300 (2003).

10. Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641, 661 (2005).

11. David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1461 (2005).

12. For a similar analysis, see James Forman, Jr., *Exporting Harshness: How the War on Crime Has Made the War on Terror Possible*, __ N.Y.U. REV. OF L. & SOC. CHANGE (forthcoming 2009).

state in its use of torture.¹³ I seek primarily to fix the distorted picture sketched by rhetorical responses to the abuses of the war on terror. The examples I offer are not themselves a complete picture, of course. The Obama Administration's executive orders on interrogation and detention indicate that appeals to "American values" and "moral leadership" can have a real impact.¹⁴ Still, these actions do not address the persistent accommodation of violence by U.S. legal and political discourse, and no account of the recent torture controversy can afford to ignore that accommodation. Grappling with a more complex representation of how violence colors U.S. law and politics is difficult, but scholarly analysis of these issues requires the effort. What, if anything, readers do with the resulting picture is a question beyond the scope of this Article.

The first Part of this Article traces some of the history of torture and related forms of abuse in U.S. foreign policy, followed by a description of the law and practice of police and prison violence, and concluding with immigration. Part II examines the interaction of U.S. and international law in the context of torture, primarily through a detailed examination of U.S. ratification of the Convention Against Torture and the International Covenant on Civil and Political Rights. Part III concludes the Article by drawing explicit connections between these precedents and the perceived excesses of the war on terror.

I. U.S. TORTURE AT HOME AND ABROAD

A. TORTURE AND FOREIGN POLICY

This section discusses some of the ways in which U.S. officials have used torture as a tool of foreign policy since 1900—roughly the period of time in which the United States has been an acknowledged imperial power. Of course, to take two examples, the treatment of Native Americans and African Americans throughout U.S. history could provide additional episodes of state violence deployed to create and sustain a particular set of local and national policies. Torture, corporal punishment, population control or concentration, mass or reprisal killing, and summary execution come up repeatedly in accounts of slavery and the displacement of Native Americans, and they return in the examples I discuss here. Indeed, it may be that the treatment of Native Americans, linked as it is to decades of military conflict, provided a template for the operations of U.S. forces in other countries, particularly when counterinsur-

13. For discussion of recent uses of torture by England, France, Israel, and Spain, see John T. Parry, *Torture in the Modern West* (Dec. 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899113. For a more specific discussion of how rule of law ideals accommodate state violence (if not necessarily torture), see John T. Parry, *Torture Warrants and the Rule of Law*, 71 ALB. L. REV. 885 (2008).

14. See Exec. Order No. 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (rescinding a 2007 Executive Order passed by former President George W. Bush and redefining the standards and practices for the interrogation of individuals in the custody of the United States); Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 27, 2009) (calling for the closure of the detention facilities at Guantánamo Bay Naval Base and dictating the disposition of detainees).

gency tactics became the chosen means of engagement.¹⁵

1. The Philippines

Beginning in 1896, Filipino revolutionaries sought independence from Spain. At the same time, however, Spain was losing the Spanish-American War, and it ceded the Philippines to the United States in 1898. Hostilities between U.S. and Filipino forces broke out in 1899, and the McKinley Administration moved quickly to assert control over its new colony. During the conflict, officials and journalists portrayed Filipinos as uncivilized and “absolutely unfit for self-government.”¹⁶ They also depicted the Philippines as a place peopled by “bandits” who employed guerilla tactics and attacked unoffending victims (usually U.S. soldiers).¹⁷ Soldiers on the ground tended to agree with this characterization of their enemy: at best, the natives were “wayward and violent children who needed to be coerced into behaving properly”; at worst, they were an unscrupulous enemy that had forfeited the right to civilized tactics.¹⁸ Either way, harsh tactics were warranted—practices similar to those of “Injun warfare.”¹⁹

In short, as Paul Kramer asserts:

[The conflict in the Philippines quickly turned into] a war whose ends were rationalized in racial terms before domestic publics, one in which imperial soldiers came to understand indigenous combatants and noncombatants in racial terms, one in which race played a key role in bounding and unbounding the means of colonial violence, and in which those means were justified along racial lines.²⁰

15. Sources on the treatment of Native Americans and enslaved African Americans are numerous. For a recent brief account that emphasizes the construction of a civilization-savage dichotomy and links it to the war on terror, see Charles R. Venator-Santiago, *From the Insular Cases to Camp X-Ray: Agamben's State of Exception and United States Territorial Law*, 39 *STUD. L., POL. & SOC'Y* 15, 24–25, 32–35 (2006).

16. *Mr. Hull on the Filipinos: Iowa Congressman Says They Are Not Fit for Self Government—Spooner Bill a Mistake*, N.Y. TIMES, Aug. 29, 1901.

17. See, e.g., *Court to Try a Filipino: A Military Commission Will Sit in Judgment on a Bandit at Calamba To-day*, N.Y. TIMES, Feb. 21, 1900, at 4; *Death for Filipino Bandits*, N.Y. TIMES, Sept. 4, 1901, at 6; *Death for Luzon Bandits: Guerillas Caught by Col. Smith Will Be Shot or Hanged*, N.Y. TIMES, Dec. 13, 1899, at 1; *Filipino Bandits' Methods: Gen. MacArthur's Remarks on Their Inhuman Ways—Several To Be Hanged*, N.Y. TIMES, Jan. 14, 1901, at 1; Frederick W. Eddy, *Obstacles to Order in the Philippines: Natives Abandon Open Warfare and Resort to Guerilla Methods*, N.Y. TIMES, Oct. 7, 1900; *Roosevelt Speaks to Republican Clubs*, N.Y. TIMES, July 18, 1900, at 7.

18. BRIAN McALLISTER LINN, *THE PHILIPPINE WAR, 1899–1902*, at 300 (2000); see also STUART CREIGHTON MILLER, *BENEVOLENT ASSIMILATION: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903*, at 15, 91–93, 134, 179, 245–48 (1982).

19. MILLER, *supra* note 18, at 179–80, 188, 195, 241; see also *Death for Luzon Bandits*, *supra* note 17 (“Some of the American officers think it worse than fighting Indians, owing to the difficulties of the country and the trouble of locating the enemy, who resort, when hard pressed, to the amigo dodge and hide their guns.”).

20. PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES* 89 (2006); see also Oscar V. Campomanes, *Casualty Figures of the American Soldier and*

The tactics of individual troops and their commanding officers reflected these attitudes. U.S. forces displayed remarkably little concern about collateral damage or the treatment of people in custody. Some officers told their men to take no prisoners during certain operations, and one general ordered a subordinate to kill every male capable of bearing arms, which he defined as every male over ten years old.²¹ More generally, torture (often in the form of the “water cure”²²), mass or reprisal killing, property destruction, and the use of concentration camps became common tactics.²³ Brian Linn confirms not only that the “use of torture steadily increased” over the course of the war, but also that the army loosened its judicial processes, “which now proceeded with far more dispatch and sent prisoners to the gallows with far more regularity.”²⁴

The revelation of these tactics to a domestic public through letters and newspaper articles led to an uproar. The Anti-Imperialist League published a collection of “Soldiers’ Letters” in 1899 that included numerous descriptions of shooting and killing unarmed, fleeing, or helpless Filipinos.²⁵ A representative of the International Committee of the Red Cross concluded at roughly the same

the Other: Post-1898 Allegories of Imperial Nation-Building as “Love and War,” in VESTIGES OF WAR: THE PHILIPPINE-AMERICAN WAR AND THE AFTERMATH OF AN IMPERIAL DREAM, 1899–1999, at 140 (Angel Velasco Shaw & Luis H. Francia eds., 2002) (stressing the archive of materials that defined the Philippines and Filipinos as savage and incapable of governing themselves).

21. See Court-Martial of General Jacob H. Smith (Apr. 1902), in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY 801 (Leon Friedman ed., 1972) [hereinafter THE LAW OF WAR]. General Smith was court-martialed, but his only punishment was immediate retirement. See *id.* at 799.

22. One soldier described the water cure in this way:

“Now, this is the way we give them the water cure,” he explained. “Lay them on their backs, a man standing on each hand and each foot, then put a round stick in the mouth and pour a pail of water in the mouth and nose, and if they don’t give up pour in another pail. They swell up like toads. I’ll tell you it is a terrible torture.”

Quoted in Paul Kramer, *The Water Cure: Debating Torture and Counterinsurgency—A Century Ago*, NEW YORKER, Feb. 25, 2008, at 38, 38.

23. See KRAMER, *supra* note 20, at 141–42, 152–54; LINN, *supra* note 18, at 215; MILLER, *supra* note 18, at 188–89, 203–08, 220, 225–26, 230, 238; Andrew J. Birtle, *The U.S. Army’s Pacification of Marinduque, Philippine Islands, April 1900–April 1901*, 61 J. MIL. HIST. 255, 265 (1997); see also Court-Martial of Major Edwin F. Glenn (Apr. 1902), in THE LAW OF WAR, *supra* note 21, at 814, 814–16; Reports Regarding the Death of Father Augustine de la Pena (Nov. 1902), in THE LAW OF WAR, *supra* note 21, at 830, 830–41.

24. LINN, *supra* note 18, at 215, 223; see also *Court to Try a Filipino*, *supra* note 17 (reporting on use of a military commission to try “a Filipino member of [a] guerilla band” and noting that “[t]he case is important as foreshadowing the policy of treating guerillas as bandits”); *Death for Filipino Bandits*, *supra* note 17 (demonstrating the looseness of the terms “bandit” and “guerilla”); *Death for Luzon Bandits*, *supra* note 17 (“It is expected that they will be speedily tried and either shot or hanged as an example, if convicted.”).

25. See generally ANTI-IMPERIALIST LEAGUE, SOLDIERS’ LETTERS: BEING MATERIALS FOR THE HISTORY OF A WAR OF CRIMINAL AGGRESSION (Boston, Rockwell and Churchill Press 1899). Paul Kramer suggests this collection is “questionable as a primary document.” KRAMER, *supra* note 20, at 445 n.5. Indeed, the introduction to the collection states, “As it is often unable to verify their statements, or even to identify the writers, [the League] disclaims responsibility for their truthfulness. The letters are given for what they are worth.”

time that “American soldiers are determined to kill every Filipino in sight.”²⁶ One soldier wrote of using the water cure “on 160 Filipinos, all of whom save twenty six [sic] had died from the ordeal.”²⁷ As stories of mistreatment accumulated, Massachusetts Senator George Hoar demanded an investigation, and supporters of the war complied by referring the matter to the existing committee on the Philippines, chaired by Senator Henry Cabot Lodge (also of Massachusetts, but a supporter of the war).²⁸ Witnesses who testified before the Committee—including the Governor of the Philippines and future President and Chief Justice of the United States, William Howard Taft—admitted that U.S. forces had used the water cure and other tactics to obtain information.²⁹

While the Committee was conducting its investigation, Secretary of War Elihu Root published a report purporting to describe the results of an investigation into “charges . . . of cruelty . . . toward natives of the Philippines.”³⁰ The report admitted that forty-four genuine cases existed but justified them by stating that Filipino forces acted

with the barbarous cruelty common among uncivilized races, and with general disregard for the rules of civilized warfare That the soldiers fighting against such an enemy, and with their own eyes witnessing such deeds, should occasionally be regardless of their orders and retaliate by unjustifiable severities is not incredible. Such things happen in every war, even between two civilized nations, and they always will happen while war lasts.³¹

Secretary Root also adopted a set of arguments about the use of the water cure that prefigures the responses of present day political figures: it did not happen; if it did happen, it was the fault of someone else (probably a native); and in any event, it was not so bad.³²

The revelations of torture and other forms of abuse led to a few prosecutions,

26. MILLER, *supra* note 18, at 94.

27. *Id.* at 213. *But see id.* (suggesting few people actually died from the water cure).

28. *Id.* at 212.

29. *Id.* at 213–15; *see also Tell of “Water Cure” Cases: Witnesses Give Further Testimony Before the Senate Committee on the Philippines Regarding Filipino’s Treatment*, N.Y. TIMES, June 13, 1902, at 3; *Testified on “Water Cure”: Grover Flint of Cambridge, Mass., Was a Witness Before the Senate Philippines Committee*, N.Y. TIMES, Apr. 22, 1902, at 2; *The Water Cure Described: Discharged Soldier Tells Senate Committee How and Why the Torture Was Inflicted*, N.Y. TIMES, May 4, 1902, at 13 (also asserting commanders were aware that torture was being used).

30. U.S. DEP’T OF WAR, CHARGES OF CRUELTY, ETC., TO THE NATIVES OF THE PHILIPPINES, S. DOC. NO. 205, at 1 (1902).

31. *Id.* at 2; *see* MILLER, *supra* note 18, at 217. For a response to the Root report, *see* MOORFIELD STOREY & JULIAN CODMAN, SECRETARY ROOT’S RECORD: “MARKED SEVERITIES” IN PHILIPPINE WARFARE—AN ANALYSIS OF THE LAW AND FACTS BEARING ON THE ACTION AND UTTERANCES OF PRESIDENT ROOSEVELT AND SECRETARY ROOT (1902).

32. *See* S. DOC. NO. 205, at 3; *see also* KRAMER, *supra* note 20, at 140–41, 146–50 (discussing rationales for using the water cure and other forms of abuse, including that such conduct was rare, that it was natives who actually committed the abuses, that Filipino forces had gone outside civilized standards and so surrendered all claims to mercy, and that these methods were a tactical choice for

most of which resulted in acquittals. Military officials confirmed that use of the water cure ordinarily violated the laws of war, but they took care to stress that they were not ruling on cases of “emergency” or “exceptional circumstances.” Convicted soldiers—including at least one who used the water cure—received minor sentences, and President Roosevelt commuted the one significant sentence handed down for a charge of murder.³³

In the course of the war, torture, detention and concentration, killing, and destruction of property worked together to define the Philippines as a dependent colony of uncivilized natives in need of guidance. Torture was one of the processes by which the local population learned what civilization meant and what their relationship to it would be.

2. From the Allied Victory into the Cold War

After the surrender of Germany in 1945, U.S. forces joined their allies in meting out brutal treatment to German civilians and former soldiers. Propaganda, which “taught the soldiers that Germans—particularly German soldiers—were subhuman,” made this task easier.³⁴ Some of this violence was a variation

whites as opposed to a racial necessity for Filipinos). Root based his assertions on a letter written by Brigadier-General Frederick Funston, which Root quoted prominently and at length:

I never had personal knowledge of the so-called “water cure” being administered to a native, or any other form of torture being used to extract information from them. Statements of this kind made by returned soldiers are simply braggadocio, and a desire to attract attention to themselves. It is my belief that the “water cure” was very rarely, if ever, administered by American soldiers. It was a matter of common knowledge that occasionally the Macabebe Scouts, when not under the direct control of some officer, would resort to this means of obtaining information as to the whereabouts of concealed arms and ammunition. They did this, however, on their own responsibility and without orders from their superiors The so-called “water cure,” as it has been described to me by Macabebe soldiers, was by no means so severe an ordeal The method was merely to throw a native on his back, hold his nose with one hand, and pour water down his throat from a canteen or other vessel. It occasioned nothing more than a few moments of strangling, and never resulted fatally.

S. DOC. NO. 205, *supra* note 30, at 3.

33. See BRIAN MCALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899–1902*, at 57–58 (1989); MILLER, *supra* note 18, at 218, 258–59. For the records of the water cure and murder court-martials, see Court-Martial of Major Edwin F. Glenn, *supra* note 23 (imposing sentence of one-month suspension from command and fifty-dollar fine for use of the water cure “not as an exceptional circumstance, but as the habitual method of obtaining information from suspected insurgents”); Court-Martial of Lieutenant Preston Brown (June 1902), in *THE LAW OF WAR*, *supra* note 21, at 820–29 (imposing sentence of dismissal from the Army, five years of hard labor, commutation to a reduction in rank on the first lieutenants’ list, and half-pay for nine months for a murder conviction); see also Reports Regarding the Death of Father Augustine de la Pena, *supra* note 23, at 837 (concluding use of the water cure was not “justified by military necessity, and that there did not exist, at the time of its commission, a condition of emergency so instant, imperious, and overwhelming in its character as to justify” its use, but also finding no jurisdiction to bring charges).

34. GILES MACDONOGH, *AFTER THE REICH: THE BRUTAL HISTORY OF THE ALLIED OCCUPATION 1945–1947* (2007).

on the looting and pillaging that has often accompanied military victories.³⁵ Yet the violence of the occupation did not stop at the familiar. Just as the Bush Administration adopted the terms “enemy combatant” and “detainee” to avoid the obligations of national and international law during the war on terror, so too the Allies coined new terms for the members of the disbanded German army and denied them the status of prisoners of war. More than three million captured German soldiers were designated “surrendered enemy persons” or “disarmed enemy persons,” which arguably placed them outside the protections of international law and made them eligible for such things as forced labor.³⁶ Many of these “persons” were housed in former death camps, and as many as 40,000 died in American custody.³⁷ Starvation, beatings, and other forms of brutality were common in the revived camps, while higher ranking officials, such as the former S.S. officers accused in the Malmédy massacre, were subjected to solitary confinement, extremes of heat and cold, mock trials and mock executions, as well as kicks, beatings, and deprivation of food and sleep.³⁸

As the occupation wound down and the Cold War got under way in the late 1940s and early 1950s, CIA officials began to gather information about the interrogation methods of communist countries. They became convinced that Russian and Chinese intelligence services had developed sophisticated tactics that could undermine U.S. intelligence-gathering efforts.³⁹ In response to this perception, CIA officials sponsored research into techniques for obtaining information from unwilling subjects, with a focus on psychological approaches. The eventual result was the *Kubark Counterintelligence Interrogation* manual of July 1963. The manual proclaims that its guidelines are “based largely upon the published results of extensive research, including scientific inquiries conducted by specialists in closely related subjects,” and its authors explicitly claim to be bringing “pertinent, modern knowledge to bear [on the] problems” of interrogation.⁴⁰ In keeping with this rhetoric, the manual contains a section on “The

35. For discussion of indiscriminate killing by American servicemen, see *id.* at 237. For discussion of rape, see *id.* at 240. Discussion of destruction and theft of property by U.S. forces appears throughout the first half of the book.

36. *Id.* at 392–93; see also Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 118 L.N.T.S. 343; GEORGE G. LEWIS & JOHN MEWHA, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY, 1776–1945, at 237 (1955) (discussing creation of the category “Disarmed German Forces” and the lesser rights they were granted outside the Geneva Conventions).

37. MACDONOGH, *supra* note 34, at 394.

38. *Id.* at 395, 397–404, 406–07. The majority of interrogators did not use these tactics. See, e.g., Petula Dvorak, *A Covert Chapter Opens for Fort Hunt Veterans*, WASH. POST, Aug. 20, 2006, at A1.

39. See ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 21–25 (2006); MICHAEL OTTERMAN, AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB 42–50 (2007).

40. CIA, KUBARK COUNTERINTELLIGENCE INTERROGATION 1–2 (1963), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm#kubark> [hereinafter KUBARK] (an online redacted version of the manual was made available to the public in 1997). For discussion of the research that led to Kubark, see MCCOY, *supra* note 39, at 21–53; OTTERMAN, *supra* note 39, at 42–58. “Kubark” is a code name for the CIA. See OTTERMAN, *supra* note 39, at 54.

Non-Coercive Counterintelligence Interrogation.”⁴¹ The techniques in this section are designed to have an “unsettling effect” that “disrupt[s] radically the familiar emotional and psychological associations of the subject” and creates “feelings of guilt”—with the goal of generating cooperation instead of resistance.⁴²

Yet the manual did not expect that all interrogations would be free of pain. *Kubark*'s introduction provides that interrogators must get prior approval “if bodily harm is to be inflicted,” or “if medical, chemical, or electrical methods or materials are to be used to induce acquiescence.”⁴³ And the section that immediately follows the materials on non-coercive interrogation is titled “The Coercive Counterintelligence Interrogation of Resistant Sources.”⁴⁴ Indeed, if an interrogator believes that the suspect “has the skill and determination to withstand any non-coercive method or combination of methods, it is better to avoid them completely” and proceed directly to coercive methods.⁴⁵

In its discussion of coercive methods, *Kubark* speaks in a modern tone, seeking to make clear, for example, that indiscriminate use of force is irrational. To the contrary, the chances of success “rise steeply . . . if the coercive technique is matched to the source's personality Moreover, it is a waste of time and energy to apply strong pressures on a hit-or-miss basis if a tap on the psychological jugular will produce compliance.”⁴⁶ Further, the goal of coercion is not to inflict pain but instead “to induce regression” and break down the prisoner's defenses, which in turn will create feelings of guilt and dependence in the prisoner as part of a relationship with the interrogator.⁴⁷

The manual then addresses several coercive tactics: “arrest, detention, deprivation of sensory stimuli through solitary confinement or similar methods, threats and fear, debility, pain, heightened suggestibility and hypnosis, narcosis, and induced regression.”⁴⁸ For detention, the interrogator should manipulate “diet, sleep pattern, and other fundamentals” so that the prisoner will not have “a routine to which he can adapt and from which he can draw some comfort—or at least a sense of his own identity.”⁴⁹ Sensory deprivation is also useful because it accelerates the production of anxiety and regression, which the interrogator can use to reinforce the prisoner's subservience and encourage the prisoner to see

41. KUBARK, *supra* note 40, at 52–81.

42. KUBARK, *supra* note 40, at 65–66. To that end, the manual recommends several tactics, many of which would be familiar to students of domestic police interrogation and many—perhaps most—of which comport with U.S. constitutional law. This is not to say that these techniques are not coercive in important respects; they place enormous pressure on a suspect to disclose information.

43. *Id.* at 8.

44. *Id.* at 82.

45. *Id.* at 65.

46. *Id.* at 83.

47. *See id.*

48. *Id.* at 85.

49. *Id.* at 87.

the interrogator as “benevolent” or as “a father-figure.”⁵⁰

Threats of coercion are useful because they will often be more effective than actual coercion. Because “most people underestimate their capacity to withstand pain,” the threat of pain can produce compliance.⁵¹ Threats also allow the prisoner “to protect [his] self-autonomy or ‘will’” by complying and providing information “voluntarily.”⁵² With respect to the infliction of physical pain, *Kubark* states that “whereas pain inflicted on a person from outside himself may actually focus or intensify the will to resist, his resistance is likelier to be sapped by pain which he seems to inflict on himself.”⁵³ The manual therefore advises against creating a simple contest between interrogator and prisoner. Instead, tactics such as forced standing are useful because they require the prisoner to be complicit in the infliction of pain. “Intense pain,” by contrast can be counterproductive because it can lead to “false confessions, concocted as a means of escaping from distress.”⁵⁴

Thus, in the competitive atmosphere of the Cold War, CIA officials funded research into psychologically coercive interrogation tactics—not to replace physical coercion but rather to supplement it—and in so doing sought to create a science of coercive interrogation and new technologies of torture.⁵⁵ The results of that research were not only influential; they also became an international commodity, part of the global market in torture methods.

3. Vietnam

Many of the abuses that accompanied the conflict in Vietnam had nothing to do with the CIA or the *Kubark* manual. Indeed, it seems unlikely that *Kubark* methods could have been used on a large scale in Vietnam, given the level of training, judgment, and available time—not to mention secure facilities—that these methods require of interrogators. Other, more “traditional” methods of interrogation and abuse appeared. For example, a 1968 *Washington Post* article on interrogation included a picture of soldiers holding down a suspected Vietcong operative, “clad in the black pajamas typical of the Vietnamese peasant and the Vietcong,” while one poured water onto a towel over the man’s face.⁵⁶ According to the article, “This induces a fleeting sense of suffocation

50. See *id.* at 90; see also *id.* at 50 (“[A] subject who has finally divulged the information sought and who has been given a reason for divulging which salves his self-esteem, his conscience, or both, will often be in a mood to take the final step of accepting the interrogator’s values and making common cause with him.”).

51. See *id.* at 90.

52. *Id.* at 91.

53. *Id.* at 94.

54. See *id.*

55. I am not claiming the CIA actually created a science of torture, only that *Kubark* adopts a scientific tone. For the argument that there is no science of torture, see DARIUS REJALI, TORTURE AND DEMOCRACY 373–84 (2007).

56. *Interrogation*, WASH. POST, Jan. 21, 1968, at A1. The victim in the photograph is notable for his indistinctiveness. Not only is he anonymous, but he is a Vietnamese everyman, clad in “black pajamas”

and drowning which is calculated to make [a suspect] talk.”⁵⁷ Nor was this incident unique; “[t]he water technique [was] said to be in fairly common use among Allied troops in Vietnam. Those who practice[d] it said it combine[d] the advantages of being unpleasant enough to make people talk while still not causing permanent injury.”⁵⁸

Recently declassified Army files flesh out these statements by revealing 141 instances in which U.S. soldiers tortured civilian detainees or prisoners of war with fists, sticks, bats, water, or electric shock.⁵⁹ Few of the soldiers involved in these incidents received any significant punishment.⁶⁰ U.S. forces and their proxies also used the infrastructure that French forces left behind, such as the “tiger cages” at the Con Son island penal colony.⁶¹

Abuses in Vietnam were not limited to the armed forces. The CIA played a special role in developing and implementing counterinsurgency strategies during the conflict. CIA officials trained over 85,000 South Vietnamese police officers in “stringent wartime measures,” including interrogation tactics.⁶² Beginning in 1964, CIA officials tried to build up South Vietnam’s intelligence operations by training interrogators who would work at that country’s National Interrogation Center (NIC) and the regional Provincial Interrogation Centers. The Vietnamese interrogators “were already well versed in ‘the old French methods’ of interrogation—namely water torture and use of electricity,” but CIA officers attempted to retrain them in some of the more “sophisticated” *Kubark* methods.⁶³ Under CIA supervision, interrogations at the NIC combined *Kubark* and French methods, while interrogations at the provincial centers

that identify him as a peasant, as Vietcong, or both. No space exists between the enemy and the general population. They simply blur together, so that anyone in black pajamas is always the subject both of protection and of suspicion.

57. *Id.*

58. *Id.*

59. Deborah Nelson & Nick Turse, *A Tortured Past: Documents Show Troops Who Reported Abuse in Vietnam Were Discredited While Military Was Finding Evidence of Worse*, L.A. TIMES, Aug. 20, 2006, at A1; Nick Turse & Deborah Nelson, *Vietnam Horrors: Darker Yet; Declassified Papers Show U.S. Atrocities Went Far Beyond My Lai*, L.A. TIMES, Aug. 6, 2006, at A1. For a good discussion of the evidence of torture in Vietnam, as well as the difficulty of sorting it out, see REJALI, *supra* note 55, at 172–74, 581–91.

60. REJALI, *supra* note 55, at 174. Gary Solis suggests the sentences handed down in cases that went to trial were fairly severe, but he notes that many cases were never investigated or prosecuted, and that appeals and clemency led to significant sentence reductions. *See generally* Gary D. Solis, *Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam*, 10 TRANSNAT’L L. & CONTEMP. PROBS. 59 (2000).

61. *See* Don Luce, *The Tiger Cages of Viet Nam*, in TORTURE, AMERICAN STYLE 9 (Margaret Power ed., 2004), available at <http://www.historiansagainstwar.org/resources/torture/luce.html>; Robert N. Strassfeld, *American Innocence*, 37 CASE W. RES. J. INT’L L. 277, 295–96 (2006); *The Cages of Con Son Island*, TIME, July 20, 1970, at 20, 21.

62. McCOY, *supra* note 39, at 60–61.

63. OTTERMAN, *supra* note 39, at 64. Of course, in the Philippines, U.S. forces claimed the water cure was a local or Spanish practice. *See supra* note 32. For discussion of European use of water torture, see REJALI, *supra* note 55, at 280–85.

tended to rely on more violent methods.⁶⁴ In addition to interrogation and counterintelligence activities, CIA officials also organized counterinsurgency groups “to use Viet Cong techniques of terror—assassination, abuses, kidnappings, and intimidation—against the Viet Cong leadership.”⁶⁵

In 1967 and 1968, the CIA reorganized its efforts into the Phoenix program, which “was an attempt to combat . . . Vietcong support organizations by identifying their members, welcoming defectors, capturing members, and killing members.”⁶⁶ According to Alfred McCoy, “[f]or all its technological gloss, the program’s strategy remained grounded in [a] vision of physical and psychological counterterror,” in which numerous prisoners were tortured in the Provincial Interrogation Centers and “summarily executed without trial or due process.”⁶⁷ By the time the House of Representatives held hearings on Phoenix in 1971, CIA and South Vietnamese officials associated with the program had killed more than 20,000 suspected Viet Cong suspects.⁶⁸ The vast majority were almost certainly not Viet Cong operatives, and torture compounded the inevitable problem of false positives.⁶⁹

Mark Moyar’s account of Phoenix maintains that most of the torture and killing was carried out by the South Vietnamese officials who had been trained by the CIA. Yet Moyar also notes that “CIA advisors in the Province Interrogation Centers, where many important nonmilitary prisoners went for questioning, watched over the Special Police interrogations there, hired their own South Vietnamese interrogators to work in the centers, and conducted some interrogations themselves through interpreters.”⁷⁰ Indeed, “almost all advisors” witnessed the use of violent interrogation methods, such as “beating, electric shock, and water torture,” as well as the infliction of summary execution on suspected Viet Cong.⁷¹

In short, even if one would like to blame local officials for the bulk of the problem, the fact remains that they did not act alone, and that the torture of suspected Viet Cong cannot be compartmentalized as the sovereign act of an

64. MCCOY, *supra* note 39, at 63; *see also* MARK MOYAR, PHOENIX AND THE BIRDS OF PREY: THE CIA’S SECRET CAMPAIGN TO DESTROY THE VIET CONG 90, 92, 96 (1997); OTTERMAN, *supra* note 39, at 65–66.

65. JOHN RANELAGH, THE AGENCY: THE RISE AND DECLINE OF THE CIA 439–40 (1986) (quoting former U.S. Dep’t of State official Wayne Cooper).

66. *Id.* at 438.

67. MCCOY, *supra* note 39, at 64–65.

68. *Id.* at 66–67. William Colby, who helped oversee Phoenix and later served as CIA director, admitted in congressional testimony that more than 20,000 were killed under the program from 1968 to 1971, but he later claimed in his memoirs that most of these deaths were in military combat. *See* RANELAGH, *supra* note 65, at 440 (citing WILLIAM COLBY & PETER FORBATH, HONORABLE MEN: MY LIFE IN THE CIA 270–72 (1978)).

69. Rejali discusses a study that concludes, “the most optimistic (i.e., most accurately selective scenario) is that about 4.7 innocent persons were killed for every Vietcong agent. In the intermediate case, we have about 10.3 innocents killed for every rebel participant.” REJALI, *supra* note 55, at 471 (quoting Stathis Kalyvas & Mathew Kocher, Violence and Insurgency: Implications for Collective Action 27 (Apr. 10, 2006) (unpublished manuscript, on file with original authors)).

70. MOYAR, *supra* note 64, at 88.

71. *Id.* at 90–93.

independent South Vietnamese government. U.S. officials taught physically and psychologically coercive methods to South Vietnamese forces who used those methods with the knowledge, and often under the supervision, of their teachers.

4. Latin America

“Between 1898 and 1934 the United States launched more than thirty military interventions in Latin America.”⁷² After World War I, spurred in part by scandals over human rights abuses committed by U.S. soldiers in Haiti and the Dominican Republic, U.S. policymakers moved away from military intervention in favor of “alliance[s] with local military chieftains.”⁷³ By the end of the 1930s, long-term military dictatorships had emerged in Cuba, the Dominican Republic, El Salvador, Guatemala, and Nicaragua—as Peter Smith comments, “precisely in those countries where the United States had intervened or inter-meddled to the greatest degree.”⁷⁴ U.S. policy followed a general pattern of supporting military intervention and dictatorships in Latin America for the next fifty years, punctuated by occasional second thoughts at the end of World War II, the early Kennedy Administration, and the Carter Administration.⁷⁵

Nor was U.S. policy limited to general support or disapproval of specific regimes. During the Cold War, U.S. military officials began to develop stronger ties with their counterparts in many Latin American countries.⁷⁶ Beginning in the early 1960s under the Kennedy Administration, CIA agents began training police officers in Central and South American countries, just as they had trained police in Vietnam. In the early 1970s, congressional investigations looked into allegations that these training programs had included instruction in torture, and in 1975 Congress cut all funding for police training overseas.⁷⁷ By that time, however, the agency had already “shift[ed] its torture training to the Army’s Military Adviser Program.”⁷⁸ Indeed, U.S. Department of Defense officials, working through a secret program with the incredible name “Project X,” determined to “transmit[] Vietnam’s lessons to South America,” in part by “develop[ing] a complete counterinsurgency curriculum based on seven training manuals, all in Spanish, that addressed key tactical problems—including *Handling of Sources, Interrogation, Combat Intelligence, and Terrorism and the Urban Guerilla*.”⁷⁹

72. PETER H. SMITH, *TALONS OF THE EAGLE: DYNAMICS OF U.S.-LATIN AMERICAN RELATIONS* 50 (2d ed. 2000).

73. LARS SCHOULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* 258 (1998). For the furor over human rights abuses in Haiti and the Dominican Republic, see *id.* at 253–56.

74. SMITH, *supra* note 72, at 71.

75. See generally *id.* at 130–88 (discussing various U.S. approaches to Latin American relations).

76. *Id.* at 131.

77. MCCOY, *supra* note 39, at 73. U.S.-financed training programs for police involved many other countries in addition to those in Latin America. See Strassfeld, *supra* note 61, at 298.

78. MCCOY, *supra* note 39, at 73–74.

79. *Id.* at 86.

The U.S. Southern Command used these materials until 1991, distributing “as many as a thousand copies” “to military personnel and intelligence schools in five Latin American countries (Columbia, Ecuador, El Salvador, Guatemala and Peru).”⁸⁰ In addition, the Army’s School of the Americas provided hundreds of copies to “military students from 10 Latin American countries attending intelligence courses (The students came from Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Peru, and Venezuela.)”⁸¹ Thousands of military and police officials received training from the School of the Americas during this period, and graduates of the program include “some of the region’s most notorious human rights abusers.”⁸² The information in the School of the Americas manuals does not aspire to the scientific knowledge of the *Kubark* manual. To the contrary, Army officials admitted that the *Handling of Sources* manual “refers to motivation by fear, payment of bounties for enemy dead, beatings, false imprisonment, executions, and the use of truth serum.”⁸³

Alongside the straightforwardly violent methods of the School of the Americas manuals, the *Kubark* approach survived in a 1983 *Human Resource Exploitation Training Manual* that CIA officials used in Honduras and which may have been the template for similar courses in other countries. Large sections of the 1983 manual paraphrase or directly quote *Kubark*. Like the earlier document, the 1983 manual advocates the primary use of psychological methods, but it also recognizes that coercive techniques can assist an interrogation by creating “debility (physical weakness),” “dread (intense fear [and] anxiety),” and “dependency.”⁸⁴

In addition to documentation about training in physically and psychologically coercive interrogation techniques, sufficient direct and circumstantial evidence exists to establish that U.S. officials were generally aware that interrogators in many Latin American countries supported by the United States were using

80. Memorandum from Werner E. Michel, Assistant to the Sec’y of Def. (Oversight Div.), to Richard Cheney, Sec’y of Def. Regarding Improper Material in Spanish-Language Intelligence Training Manuals 2 (Mar. 10, 1992).

81. *Id.* at 2; see also McCoy, *supra* note 39, at 86–88.

82. Dana Priest, *U.S. Instructed Latins on Executions, Torture*, WASH. POST, Sept. 21, 1996, at A1. For details on the activities of School of the Americas graduates, see Timothy J. Kepner, *Torture 101: The Case Against the United States for Atrocities Committed by School of Americas Alumni*, 19 DICK. J. INT’L L. 475 (2001). In 2000, the Department of Defense renamed the school and reorganized its curriculum to include more courses on human rights and due process. It now operates under the name Western Hemisphere Institute for Security Cooperation. *Id.* at 528.

83. Michel, *supra* note 80, at 2–3. See generally OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE/PUBLIC AFFAIRS OFFICE, FACT SHEET CONCERNING TRAINING MANUALS CONTAINING MATERIALS INCONSISTENT WITH U.S. POLICY (1996), <http://www.gwu.edu/~nsarchiv/nsa/archive/news/dodmans.htm>.

84. CIA, HUMAN RESOURCE EXPLOITATION TRAINING MANUAL: 1983 ¶¶ L-3–L-5, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/index.htm#hre>; see also McCoy, *supra* note 39, at 99 (“Army Special Forces had conducted at least seven ‘human resources exploitation’ courses in Latin America between 1982 and 1987 . . .”).

rough and coercive methods on political and military prisoners.⁸⁵ Testimony of torture victims and anecdotal evidence indicate that U.S. officials sometimes were present during interrogations that included torture, although a CIA investigation declared with respect to Honduras that “[n]o evidence has been found to substantiate the allegation . . . that . . . any . . . CIA employee was present during sessions of hostile interrogation”⁸⁶ Worth noting in this context is that despite the fact that the CIA had promulgated human rights directives as early as the Ford Administration, “no explicit CIA policy statement regarding interrogations has been found prior to 1985.”⁸⁷

In sum, U.S. officials pioneered a torture by proxy approach in Latin America. The lack of any significant public furor when these practices were revealed in detail by journalists in the late 1980s and the 1990s indicates that as a political strategy the idea of outsourcing abuse was quite successful.⁸⁸

B. TORTURE IN THE HOMELAND

In this section, I discuss the importance of physical abuse to domestic law enforcement and prison discipline, including immigration law and detention. My goal here is simply to demonstrate that the landscape of arbitrary process, detention in difficult conditions, and deliberate abuse were part of the U.S. legal landscape well before September 11, 2001. These doctrines and forms of abuse provided a direct source for many of the methods used by U.S. forces in Afghanistan, Iraq, and Guantánamo.⁸⁹

1. “Domestic” Police Violence

Police violence was widespread in the late nineteenth and early twentieth centuries. Lawrence Freidman describes it as “a whole world of torture and abuse”:

85. McCoy, *supra* note 39, at 95–96; *see also* Kepner, *supra* note 82, at 486–92 (discussing American involvement in training School of the Americas officers to use torture techniques).

86. CIA INSPECTOR GEN., REPORT OF INVESTIGATION: SELECTED ISSUES RELATING TO CIA ACTIVITIES IN HONDURAS IN THE 1980s, DOC. NO. 96-0125-IG, at 204 (1997) (ellipses in the quotation indicate material that was redacted when the report was released); *see also* JENNIFER K. HARBURY, TRUTH, TORTURE, AND THE AMERICAN WAY 31, 56–104 (2005) (discussing the testimony of Central American torture victims and noting that the CIA has denied involvement); DIANNA ORTIZ, THE BLINDFOLD’S EYES: MY JOURNEY FROM TORTURE TO TRUTH 31–33 (2002) (American missionary recalling her capture, rape, and torture by security forces while working in Guatemala and claiming that an American oversaw the torturers’ actions).

87. CIA INSPECTOR GEN., *supra* note 86, at 18.

88. *See* James LeMoyné, *Testifying to Torture*, N.Y. TIMES, June 5, 1988, § 6, at 45 (focusing on Honduras); Mireya Navarro, *Guatemalan Army Waged “Genocide,” New Report Finds*, N.Y. TIMES, Feb. 26, 1999, at A1 (focusing on Guatemala); Priest, *supra* note 82 (reporting that “U.S. Army intelligence manuals used to train Latin American military officers from 1982 to 1991 advocated executions, torture, blackmail and other forms of coercion against insurgents”).

89. For a discussion of additional continuities between the practices of the war on terror and those of the domestic criminal justice and prison systems, *see* Forman, *supra* note 12.

[T]he police enjoyed an enormous amount of discretion as far as the lower levels of society were concerned. Southern blacks were always fair game. And what the police did to drunks, hoboes, and the poor in general was largely invisible. It happened in the back alleys, in the station houses, on the streets, out of sight of the bright lights and boulevards of due process.⁹⁰

Police in many states also used their ability to detain people as witnesses as a device to hold people, including suspects, for interrogation or general detention.⁹¹ The 1931 Wickersham Commission report, titled *Report of the National Commission on Law Observance and Enforcement*, famously documented and exposed “in enormous and grisly detail the arbitrary coercive character of police practices in the USA.”⁹² The report revealed that police interrogators in many cities routinely employed tactics such as punching suspects, twisting their arms painfully, beating them with rubber hoses, or subjecting them to starvation and exhaustion.⁹³ These revelations galvanized efforts to reform police interrogation practices.⁹⁴ Reform also gathered steam from Supreme Court decisions holding that certain confessions were involuntary in violation of the due process clause, and from the *Miranda* decision requiring police to provide suspects with information about their legal rights—including a right to remain silent—prior to interrogation.⁹⁵

Police often must use force as part of their job, and it can be difficult to sort out whether a particular use of force is appropriate or not. For example, a recent Bureau of Justice Statistics study reported that 2002 people died “in the process of arrest” by state and local police from 2003 to 2005.⁹⁶ Of those deaths, 54.7% were homicides, the vast majority of which authorities determined were justified under the circumstances.⁹⁷ Importantly, however, the conclusion that a particular killing was justified is made against the background of constitutional rules that distinctly avoid second-guessing the use of force.

Under the Fourth Amendment, all uses of force in the context of a search or seizure (which includes arrests) must be reasonable.⁹⁸ The Supreme Court has

90. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 361–62 (1993).

91. See Wesley McNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J. L. & LIBERTY 727, 747 (2005); Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. (forthcoming 2009).

92. EDWARD PETERS, *TORTURE* 111–12 (expanded ed. 1996).

93. See LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 209–10 (2002); WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 14–22 (2001).

94. See PETERS, *supra* note 92, at 112; WHITE, *supra* note 93, at 21–22.

95. See *Miranda v. Arizona*, 384 U.S. 436, 467–73 (1966); WHITE, *supra* note 93, at 39–59.

96. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SPECIAL REPORT: ARREST-RELATED DEATHS IN THE UNITED STATES, 2003–2005*, at 1–2 (2007).

97. *Id.* Note that “80% of law enforcement homicides involved the use of a weapon by the arrest subject,” *id.* at 2, which supports (although it does not confirm) the conclusion that many of these homicides were justified or excused.

98. U.S. CONST. amend. IV.

said that application of this standard requires assessing the reasonableness, not just of the force itself, but of an official's belief about the need to use force.⁹⁹ In theory, then, the Fourth Amendment bars unreasonable force, but in practice, officials receive a great deal of latitude when they make decisions about how much force to use, because reasonable mistakes about whether to use force and how much force to use do not violate the Constitution. A police officer's belief that he must use deadly force to prevent the escape of a suspect, for example, will receive little second-guessing from courts.¹⁰⁰ This deferential review not only weakens the deterrent value that the Fourth Amendment has on officers considering whether to use deadly force; it also makes clear that the right to be free of excessive force is uncertain and fluid.

When police officers execute a search warrant, they have a "categorical" authority to detain people on the premises for the duration of the search.¹⁰¹ This authority also includes the power to restrain people with handcuffs or other "reasonable" force where the situation is "inherently dangerous."¹⁰² Justice Stevens has said that in such situations "it may well be appropriate to use both overwhelming force and surprise in order to secure the premises as quickly as possible."¹⁰³ The categorical power to detain thus licenses increasing state violence. Even more, the use of force, even overwhelming force, is part of the baseline police conduct that the Fourth Amendment permits, subject only to a reasonableness assessment that usually favors the government. Finally, even when the use of force in executing a valid warrant might be unreasonable, courts may still allow admission into evidence of the things seized during the search.¹⁰⁴ The result is that force becomes conceptually separate from the legal processes to which it is attached, despite the physical injury that may take place in carrying out those processes.

Turning to interrogation, the Fifth Amendment's Self-Incrimination Clause was drafted in part to prevent torture and related practices.¹⁰⁵ Today, most

99. *Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably but mistakenly believed that a suspect was likely to fight back . . . the officer would be justified in using more force than in fact was needed."); *Graham v. Connor*, 490 U.S. 386, 398 (1989).

100. Under *Tennessee v. Garner*, 471 U.S. 1 (1985), deadly force claims received special treatment. More recently, the Court held that deadly force claims are no different from any other excessive force claim and turn on the same assessment of reasonableness. See *Scott v. Harris*, 550 U.S. 372, 382–85 (2007). For discussion of the change from *Garner* to *Scott*, and the idea of rights that it embraces, see John T. Parry, *Rights and Discretion in Criminal Procedure's War on Terror*, 6 OH. ST. J. CRIM. L. 323 (2008).

101. See *Michigan v. Summers*, 452 U.S. 692, 702–03, 705 n.19 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 219–20 (1979) (White, J., concurring)).

102. *Muehler v. Mena*, 544 U.S. 93, 98–100 (2005).

103. *Id.* at 108 (Stevens, J., concurring).

104. See *United States v. Ankeny*, 490 F.3d 744, 752 (9th Cir. 2007) (use of flash bang devices, rubber bullets, and other force to execute search warrants, which burned the defendant and damaged his home, did not require exclusion of evidence obtained in the search even if such use may have been unreasonable).

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

self-incrimination issues concern the admission in a criminal trial of allegedly coerced statements.¹⁰⁶ Most of these issues, in turn, fall under the doctrine of *Miranda v. Arizona*,¹⁰⁷ which holds in essence that before interrogating a suspect, police must inform that person of his rights to remain silent and have the assistance of counsel.¹⁰⁸ *Miranda*'s goal was to dispel some of the coercion inherent in custodial interrogation, yet the Court also held that suspects could waive their rights voluntarily, even though waiver takes place in the same atmosphere of psychological coercion that characterizes police interrogation generally.¹⁰⁹ Not surprisingly, most suspects waive their rights.¹¹⁰

Over the years, the Supreme Court has created several exceptions to the *Miranda* doctrine, such as the "public safety" exception which allows police to question a suspect without giving the warnings—and also allows prosecutors to introduce the statement in court—if they have a legitimate concern about public safety.¹¹¹ Contemporary interrogators have also, in Welsh White's phrase, "adapted to *Miranda*" by developing permissible methods for obtaining waivers of the right to remain silent, followed by confessions.¹¹² While not physically violent, these methods are often extremely coercive in the ways in which they deceive suspects and manipulate their fear, uncertainty, and deference to authority.¹¹³ Put plainly, intense and psychologically coercive interrogation is common, and it derives from the same kinds of psychological research and desire for professionalism that informed the *Kubark* manual's discussion of noncoercive tactics.¹¹⁴ More to the point, U.S. interrogation law allows—perhaps even condones—this kind of interrogation and the mental suffering it produces. The reason is simple; these methods produce confessions that police and prosecutors believe are accurate and allow the prosecution of people suspected of commit-

106. Admissibility of statements in criminal trials also falls under the due process voluntariness test, which predates incorporation of the Self-Incrimination Clause. A confession is involuntary in violation of due process if, under the totality of the circumstances, "'a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson v. United States*, 530 U.S. 428, 434 (2000). Not only is the voluntariness test famously difficult to apply, see WHITE, *supra* note 93, at 44, but few courts will find a confession involuntary under due process if the suspect received the *Miranda* warnings, waived them, and thus apparently spoke free of Fifth Amendment compulsion, see *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004).

107. *Miranda v. Arizona*, 384 U.S. 436 (1966).

108. *Id.* at 444.

109. *Id.*

110. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653–54 (1996) (finding as many as seventy-eight percent of suspects waive their *Miranda* rights).

111. *New York v. Quarles*, 467 U.S. 649, 655 (1984).

112. WHITE, *supra* note 93, at 99.

113. For a good summary of these tactics, see Richard J. Ofshe & Richard A. Leo, *The Decision To Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 985–86 (1997).

114. For discussion of the development of the *Inbau Manual* and its reliance on professionalism and sophisticated psychological strategies, see WHITE, *supra* note 93, at 25–36. Although there is a clear resemblance between the two manuals at a general level, *Kubark* goes further than *Inbau* in terms of the degree of psychological control and manipulation it seeks to promote.

ting crimes.¹¹⁵ That is to say, prosecutors, courts, and perhaps, too, the general public, appear to accept that the societal benefit of these interrogations outweighs the harm that these methods inflict on people subjected to them.

Going beyond the question of admissibility, some cases from the mid-twentieth century suggest that the privilege against self-incrimination also provides substantive protection against coercive interrogation practices regardless of whether the government ever seeks to use the information ascertained from the interrogation in court.¹¹⁶ More recently, however, four justices stated clearly in *Chavez v. Martinez*¹¹⁷ that the privilege against self-incrimination applies only to efforts to introduce coerced testimony in a legal proceeding and otherwise has no relevance to police conduct outside the court.¹¹⁸ Two concurring justices agreed that the privilege does not apply outside the courtroom, except in extreme cases in which plaintiffs make “‘powerful showing[s].’”¹¹⁹ Presumably they had something like torture in mind, but given the facts of *Chavez*—in which a severely wounded man who believed he might be dying was interrogated relentlessly in a hospital emergency room by police who sought to take advantage of his pain and fear¹²⁰—their definition of torture is not expansive.

The result is that judicial regulation of coercive interrogation when the government does not seek to introduce testimony in court relies on Fifth and Fourteenth Amendment substantive due process doctrine, which provides two types of claims. First, conduct that “shocks the conscience” violates the Constitution, so long as it is “unjustifiable by any government interest.”¹²¹ Three Justices applied this doctrine in a very straightforward way in *Chavez*: “the need to investigate whether there had been police misconduct constituted a justifiable government interest [allowing interrogation of Martinez] given the risk that key evidence would have been lost if Martinez had died without the authorities ever hearing his side of the story.”¹²² Only three of the remaining six Justices were

115. *Id.* at 25.

116. *E.g.*, *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting); *Chambers v. Florida*, 309 U.S. 227, 239–41 (1940); *cf.* *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (explaining that due process does not permit use of “confessions obtained by violence” to obtain a conviction and describing the interrogation at issue as “revolting to the sense of justice”).

117. *Chavez v. Martinez*, 538 U.S. 760 (2003).

118. *Id.* at 766–67 (plurality opinion).

119. *Id.* at 778 (Souter, J., concurring) (quoting *Miranda v. Arizona*, 384 U.S. 436, 515, 517 (1966) (Harlan, J., dissenting)). By contrast, Justice Stevens considered the conduct in *Chavez* to be “the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous means,” although he did not say that damages should be available for violation of the privilege. *Id.* at 783 (Stevens, J., concurring in part and dissenting in part). For extensive discussion of *Chavez*, see John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733 (2005).

120. *Chavez*, 538 U.S. at 764 (plurality opinion).

121. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 849 (1998).

122. *Chavez*, 538 U.S. at 774 (plurality opinion).

willing to disagree clearly and publicly with that conclusion.¹²³ Indeed, the “any interest” language suggests that individual claimants who were victims of state violence cannot win simply because they prove that their interests outweigh those of the government. Even if they can do so in theory, they will have difficulty showing that their interests outweigh those of the government when it articulates some public purpose in support of its actions.

The second way that conduct can offend substantive due process is by violating a fundamental right. Although this doctrine seems to provide stronger protection than the “shocks the conscience” test, it still makes room for exceptions. Conduct narrowly tailored to serve a compelling state interest is constitutional even if it violates what might otherwise be described as an individual’s fundamental right.¹²⁴ Add to that the sometimes-enforced requirement that the claimed right must be described with particularity, and the doctrine becomes malleable enough to allow at least some forms of coercion.

In short, the question of when police violence is justified turns on the application of legal rules that make considerable room for violence. And, in fact, even though some police violence is certainly justified under any standard, unnecessary police violence continues to be a significant problem in the United States. Further, in the decades-old war on crime, a public willingness to accept police violence as the price of safe communities helps to mute concern over excesses; certainly, there is little if any public outrage over any but the most egregious events.¹²⁵ In a report issued in 1999, Amnesty International discussed numerous examples of police brutality and summarized the problem in this way:

Police use of excessive force and questionable shootings are reported with alarming regularity in a variety of situations, sometimes cutting across racial lines Suspects continue to die in police custody after being held in dangerous restraint holds or subjected to other force. Although some police agencies have taken measures to tackle these problems, the evidence suggests

123. *Id.* at 775 (opinion of Thomas, J., joined by Rehnquist, C.J., and Scalia, J.); *id.* at 787–89 (Stevens, J., concurring in part and dissenting in part); *id.* at 796–99 (Kennedy, J., concurring in part and dissenting in part). Justice Ginsburg joined the relevant portions of Justice Kennedy’s opinion. *See id.* at 799 (Ginsburg, J., concurring in part and dissenting in part).

124. *See id.* at 775–81; *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Justice Thomas treated the “shocks the conscience” and “fundamental rights” approaches as distinct tests in *Chavez*, but *Lewis* suggested that the “fundamental rights” approach applies to legislative action, while executive action is judged under the “shocks the conscience” test. *See Lewis*, 523 U.S. at 845–46, 847 & n.8. I also want to acknowledge the argument that torture is “outrageous government conduct” requiring dismissal of the prosecution. *See United States v. Toscanino*, 500 F.2d 267, 274 (2d Cir. 1974). No federal court has ever dismissed an indictment on this basis, and *Toscanino* may no longer be good law. *See United States v. Best*, 304 F.3d 308, 312–13 (3d Cir. 2002). The Supreme Court’s statement in *Hudson v. Michigan*, 547 U.S. 586, 596 (2006)—“When . . . a confessed suspect in the killing of a police officer, arrested (along with incriminating evidence) in a lawful warranted search, is subjected to physical abuse at the station house, would it seriously be suggested that the evidence must be excluded . . . ?”—seems also to undercut *Toscanino*.

125. *See, e.g., JOHN CONROY, UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* 225–41 (2000); Lou Cannon, *One Bad Cop*, N.Y. TIMES, Oct. 1, 2000, (Magazine), at 62.

that police brutality and excessive force remains both persistent and widespread across the USA.¹²⁶

Although many incidents of excessive force can be classified as aberrant, the sheer number of complaints suggests a more nuanced conclusion: excessive force may not be everyday fare for any specific police officer or department, but it is on the menu of potential responses to suspicious behavior. Further, at least some police violence is systematic, as demonstrated by the recent examples of the Rampart scandal in Los Angeles and the widespread use of torture and other abuse in the Chicago Police Force's Area 2.¹²⁷

Despite these incidents, efforts to control police violence have had some significant successes.¹²⁸ Police interrogation practices, in particular, have shifted from a reliance on physical methods to a reliance on psychological tactics.¹²⁹ But the problem of abusive conduct by law enforcement officers is not limited to claims of excessive force, whether isolated or systematic. As I noted above, interrogation law provides significant leeway for police to use psychologically coercive tactics.¹³⁰ Even if the label of torture is not appropriate for this conduct in most cases, the fact that these methods leave no marks makes them both attractive to law enforcement and difficult to combat, and they can cause serious harm.

2. Torture and Violence in U.S. Prisons

Once a defendant has been convicted of a crime, the focus shifts from investigation and interrogation—and the legal rules attached to those practices—to punishment and the law that regulates it. Although there are many reasons for imposing criminal sanctions and many ways to impose them, in practice, punitive incarceration or its threat (through probation or suspended sentence) is the overwhelming choice in the contemporary United States.

According to the Bureau of Justice Statistics,

126. AMNESTY INT'L, RACE, RIGHTS AND POLICE BRUTALITY § 4 (1999), available at <http://www.amnesty.org/en/library/asset/AMR51/147/1999/en/dom-AMR511471999en.html>. For additional incidents, see REJALI, *supra* note 55, at 242, 341; John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT'L L. 73, 78–79 (2002).

127. See CONROY, *supra* note 125, *passim*; REJALI, *supra* note 55, at 240–41; Parry, *supra* note 126, at 78.

128. Compare Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Litigation*, 89 MICH. L. REV. 442, 446, 483–92 (1990) (noting an increase since 1975 in the promulgation of written guidelines for police practices), with Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1278–79 (2000) (claiming that many police departments continue to lack policies to control law enforcement practices).

129. See WHITE, *supra* note 93, at 25–36, 76–101.

130. See *supra* note 113 and accompanying text.

- As of December 31, 2001, there were an estimated 5.6 million adults who had ever served time in State or Federal prison, including 4.3 million former prisoners and 1.3 million adults in prison.
- Nearly a third of former prisoners were still under correctional supervision, including 731,000 on parole, 437,000 on probation, and 166,000 in local jails.
-
- If recent incarceration rates remain unchanged, an estimated 1 of every 15 persons (6.6%) will serve time in a prison during their lifetime.¹³¹

As the prison population has increased, the understanding of the goals that prison and its related infrastructure should serve has also changed. As David Garland explains,

In the last few decades, the prison has been reinvented as a means of incapacitative restraint, supposedly targeted upon violent offenders and dangerous recidivists, but also affecting masses of more minor offenders. Probation and parole have de-emphasized their social work functions and give renewed weight to their control and risk-monitoring functions. Sentences that are higher than would be justified by retributive considerations are made available and even mandatory. Community notification laws publicly mark released offenders, highlighting their past misdeeds and possible future dangers. There is a relaxation of concern about the civil liberties of suspects, and the rights of prisoners, and a new emphasis upon effective enforcement and control.¹³²

What one sees, in other words, is an emphasis on the idea of crime and the risk of crime as central to everyday life and experience in modern society, such that dealing with criminals—and dealing with them *as* criminals—is one of the overriding tasks of the state. Yet at the same time, the fear remains that the government is failing to control crime, so that more efforts are needed, greater toughness is necessary, and individual security becomes paramount, yet also elusive. The fear of crime and the war on crime are thus near-perfect analogues of the war on terror.

Not surprisingly in light of these developments, the prison conditions that this large part of the U.S. population experiences are not good. In the early twentieth century, conditions in many places were very harsh, and it was not until the 1960s that a general effort to improve prison conditions gathered steam—

131. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDERS STATISTICS, <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Dec. 22, 2008).

132. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 12 (2001).

spurred primarily by litigation.¹³³ The doctrinal vehicle for these changes was the Eighth Amendment, which bans “cruel and unusual punishments.”¹³⁴ The Supreme Court has interpreted that language along two tracks, one dealing with physical violence and the other addressing more general conditions of prison life.

With respect to violence, the Court has interpreted the Eighth Amendment to prohibit the “unnecessary and wanton infliction of pain” in the course of incarceration or other punishment imposed as part of the criminal process.¹³⁵ Applied in any serious way, this standard seems clearly to outlaw abusive treatment of prisoners, including conduct that people likely would characterize as torture. For example, in *Hope v. Pelzer*,¹³⁶ the Supreme Court held that Alabama corrections officials violated the Eighth Amendment when they handcuffed an inmate to a hitching post in the sun for seven hours with his hands above his head as a punishment for misbehavior on a work squad.¹³⁷ Still, the “unnecessary and wanton” standard for applying the Eighth Amendment explicitly leaves open the possibility of justifying the infliction of pain. “Unnecessary” uses of force are banned, but officials may still inflict severe pain on prisoners if that pain is related to a legitimate goal, such as maintaining prison discipline. In *Whitley v. Albers*,¹³⁸ for example, the Supreme Court said officials are not liable in damages if “force was applied in a good faith effort to maintain or restore discipline,” but they will be liable if they act “maliciously and sadistically for the very purpose of causing harm.”¹³⁹ Thus, in *Hope*, the Court did not ban the hitching post outright; it simply held that its use was “gratuitous” given “the clear lack of an emergency situation” and the fact that “[a]ny safety concerns had long since abated.”¹⁴⁰

Put differently, a prisoner seeking to establish in court that officials violated the Eighth Amendment by using too much force cannot succeed merely by proving a purpose to cause harm—because there might be legitimate reasons for such a purpose and perhaps too because distinguishing a purpose to cause harm from mere knowledge that harm would result might be too difficult. A prisoner claiming an Eighth Amendment injury in use of force cases must instead prove a “malicious and sadistic” purpose. Officials are likely to receive a great deal of latitude when prison order is—or “reasonably” appears to be—at stake and where a ruling against them would have the consequence of calling their

133. For discussion of prison conditions in the nineteenth and early twentieth centuries, as well as an outline of efforts to reform prisons, see FRIEDMAN, *supra* note 93, at 92–95, 214–17; FRIEDMAN, *supra* note 90, at 158, 310.

134. U.S. CONST. amend. VIII.

135. *Hudson v. McMillian*, 503 U.S. 1, 6–9 (1992); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

136. *Hope v. Pelzer*, 536 U.S. 730 (2002).

137. *Id.* at 735–36, 744–46.

138. *Whitley v. Albers*, 475 U.S. 312 (1986).

139. *Id.* at 320–321; see also *Hudson*, 503 U.S. at 6.

140. *Hope*, 536 U.S. at 738.

fundamental decency into question and branding them as deviant.

Similar problems arise with “conditions of confinement” claims. Inmates must prove two things in order to prevail. First, the conditions must be so bad that they deprive inmates of “the minimal civilized measure of life’s necessities.”¹⁴¹ Second, plaintiffs must show that prison officials were “deliberately indifferent” to those conditions, which requires proof that an official “knows of and disregards an excessive risk to inmate health or safety.”¹⁴² Thus, “an official’s failure to alleviate a significant risk that he should have perceived but did not . . . cannot under [the Court’s] cases be condemned as the infliction of punishment.”¹⁴³ In recent years, and at the same time that public policy approaches to crime have turned increasingly punitive, the trend of court decisions has run against prisoner claims, and federal legislation has imposed significant procedural roadblocks.¹⁴⁴

The Bureau of Justice Statistics has managed to compile information that confirms the violence of prison life.¹⁴⁵ Litigation has also documented the fact that prison conditions remain poor and that violence and abuse are common in many facilities. The Texas prison system provides a good example. In 1999, a federal district judge found that conditions in Texas prisons violated the Eighth Amendment in several ways.¹⁴⁶ Among other things, the court documented the existence of “a prison underworld in which rapes, beatings, and servitude are the currency of power” and to which officials were deliberately indifferent.¹⁴⁷ Nor were corrections staff merely indifferent. The court also found that “the pattern of ‘slamming,’ hitting, and kicking by corrections officers in the cell-blocks . . . is so prevalent as to implicate the Constitution. Simply stated, the culture of sadistic and malicious violence that continues to pervade the Texas prison system violates contemporary standards of decency.”¹⁴⁸

Drawing from the court’s finding of a violent and sexually charged prison

141. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

142. *Id.* at 837.

143. *Id.* at 838.

144. See Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996); Kreimer, *supra* note 9, at 283–84; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003).

145. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DATA BRIEF: MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001–04, at 1 (2007); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: MEDICAL PROBLEMS OF INMATES, 1997, at 1 (2001); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 3 (2007); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS (2005). My point in citing this information is simply to confirm that violence is more common in prison than in life on the outside. I do not mean to suggest, however, that violence in prison is static or only increases. To the contrary, it ebbs and flows.

146. See *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 940 (S.D. Tex. 1999), *rev’d sub nom. Ruiz v. United States*, 243 F.3d 941 (5th Cir. 2001), *rev’d in part sub nom. Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (affirming district court’s 1999 finding with regard to poor conditions of confinement, prisoner safety, and use of force).

147. *Ruiz*, 37 F. Supp. 2d at 915.

148. *Id.* at 929.

culture in Texas, the issue of sexual assault in prison is worth considering in more detail. Congressional findings in the Prison Rape Elimination Act of 2003 included the “conservative” estimate that “thirteen percent of inmates in the United States have been sexually assaulted in prison,” and “young first-time offenders and inmates with mental illness are at the greatest risk for victimization.”¹⁴⁹ Recent studies of Midwestern prisons found that:

[A]pproximately 20 percent of male inmates are pressured or coerced into unwanted sexual contact; approximately 10 percent are raped. Rates of sexual abuse in women’s facilities, where the perpetrators are most likely to be male staff, seem to vary more by institution but are as high as 27 percent of inmates.¹⁵⁰

Alice Ristroph extends this analysis by suggesting that “sexual coercion is intrinsic to the experience of imprisonment” in a way that goes beyond the paradigm of violent rape or assault.¹⁵¹ She explains:

Each inmate will probably experience prison as a partly sexual punishment, even if he is neither raped nor rapist. He will receive extensive sexual harassment, and will likely engage in sexual harassment toward others. He will lose all privacy rights, including any semblance of sexual privacy, as his body is monitored, restrained, and regulated. And he will hold a place in a prison hierarchy based on his assignment to a sexual category.¹⁵²

As a result, “sex and sexual identities structure the prison experience in profound ways.”¹⁵³ Ristroph goes on to note that most responses to prison rape simply seek to build more prisons in which inmates can be better controlled—that is, to “build more, and better, panopticons.”¹⁵⁴ These efforts will reduce violent prison rape, but they also “can be understood as further efforts to police the sexual, and to police through the sexual; they are clearly not aimed at obtaining for prisoners greater autonomy.”¹⁵⁵

The most stark example of the better panopticon that these and related efforts are producing is the rise of the “supermax” prison, which is an extreme form of solitary confinement designed to “separate the most predatory and dangerous prisoners from the rest.”¹⁵⁶ In *Wilkinson v. Austin*, which addressed Ohio’s

149. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 570 (2006).

150. David Kaiser, Letter to the Editors, *A Letter on Rape in Prisons*, N.Y. REV. BOOKS, May 10, 2007, at 22 (footnote omitted).

151. See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 140 (2006).

152. *Id.* at 150.

153. *Id.* at 160.

154. See *id.* at 176.

155. *Id.* at 181.

156. *Wilkinson v. Austin*, 545 U.S. 209, 214 (2005).

supermax prison, the Supreme Court noted some of the common characteristics of supermax confinement: inmates must remain in small single-inmate cells (for example seven feet by fourteen feet) for twenty-three hours every day; a light is on inside the cell at all times; inmates take all of their meals alone; the cell door is designed to prevent them from communicating with each other; and they receive one hour per day in an “indoor recreation cell.”¹⁵⁷

In Wisconsin, supermax inmates are allowed no possessions except one religious text, one box of legal documents, and twenty-five personal letters.¹⁵⁸ Inmates who violated the rules were placed in a Behavior Modification Program.¹⁵⁹ During the first stage of the program, the inmate was naked in the cell with no possessions for three days, was fed only with a composite food called nutri-loaf, and had no bedding (and so slept on a concrete slab).¹⁶⁰ If those three days went well, the inmate proceeded to the next stage for at least seven days, which meant he was allowed to wear a one-piece smock without underwear, eat regular meals, “receive hygiene items two times per day and . . . showers on regular shower days,” but still had to go without bedding. Bad behavior during this period resulted in starting the program over from the beginning.¹⁶¹

Supermax prisons exist in at least thirty states, as well as within the federal prison system, with more than 20,000 people confined in them as of 2000.¹⁶² Although these facilities were designed to house the “worst of the worst,” prisoners have been transferred to them for relatively minor infractions, and some commentators suggest that once a supermax is built, officials will manipulate the transfer policy in order to keep it full.¹⁶³ As Craig Haney points out, these prisons have clear “potential to inflict psychological pain and emotional damage” with symptoms such as “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” as well as “suicidal thoughts and behavior.”¹⁶⁴ Indeed, he asserts that “there is not a single published study of solitary or supermax-like confinement in which involuntary confinement lasting for longer than 10 days, where participants were unable to terminate their isolation at will . . . failed to result in negative psychological effects.”¹⁶⁵

157. *Id.*

158. *Scarver v. Litscher*, 434 F.3d 972, 974 (7th Cir. 2006).

159. *Gillis v. Litscher*, 468 F.3d 488, 490 (7th Cir. 2006).

160. *Id.*

161. *Id.* at 490. For additional information on Wisconsin supermax conditions, including procedures for new inmates, see *Scarver*, 434 F.3d at 974. For conditions at the Illinois supermax, see *Westefer v. Snyder*, 422 F.3d 570, 589 (7th Cir. 2005).

162. David C. Fathi, *The Common Law of Supermax Litigation*, 24 PACE L. REV. 675, 676 (2004); Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 499 (2004).

163. Wynn & Szatrowski, *supra* note 162, at 506.

164. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. 124, 130–32 (2003).

165. *Id.* at 130–32 (2003); see, e.g., Wynn & Szatrowski, *supra* note 162, at 509–17 (discussing the high incidence of mental health problems among prisoners in New York lockdown systems).

The supermax is perhaps the logical conclusion of what Garland describes as the new norm of incarceration: the idea of managing a population that is waste or surplus by warehousing it in prison.¹⁶⁶ Members of this population can be subjected to near-complete control over their movements and possessions, and they are subject to near-continuous surveillance.¹⁶⁷ Further, law helps make such places possible by defining the “basic” or “fundamental” human needs that officials must recognize and accommodate.¹⁶⁸ So long as these needs are met, officials have wide discretion to craft a range of permissible policies and practices that take deprivation, discomfort, and trauma as a norm.¹⁶⁹ Indeed, the supermax inmate is almost a parody of the autonomous liberal political subject, for these inmates perform a mockery of—or take to its logical conclusion—the ideal of the individual abstracted from any social context and placed in a hyper-legal relationship with sovereign authority.¹⁷⁰ The supermax prison and its inmates are also clear precedents for the post-September 11 detention facilities at Guantánamo Bay.

3. Immigration

I close this section with a brief discussion of immigration law and practice because it demonstrates the existence of a parallel (and irregular) process that supports the use of novel or irregular processes for people detained in the war on terror. The Supreme Court repeatedly has declared that “ordinary” standards of due process do not apply to the decisions about who may enter the country and who shall be expelled. For aliens seeking entry, the Court has said that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”¹⁷¹ More recently, the Court has affirmed that “Congress may make rules as to aliens [including permanent resident aliens] that would be unacceptable if applied to citizens.”¹⁷² Although permanent residents may not be removed without some kind of hearing, the hearing does not come with the procedural protections that one would find in a criminal case (because removal is not a criminal proceeding), or even in most civil cases.¹⁷³

166. See GARLAND, *supra* note 132, at 14; James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 Hous. L. Rev. 1003, 1004, 1007–08 (1997).

167. For discussion of this dynamic, see Joan Dayan, *Held in the Body of the States: Prisons and the Law*, in HISTORY, MEMORY, AND THE LAW 196–97, 200 (Austin Sarat & Thomas R. Kearns eds., 1999).

168. *Id.* at 198.

169. *Id.*

170. Cf. STEPHEN HOLMES, *THE ANATOMY OF ANTILIBERALISM* 230 (1993) (stating that liberal rights are attached to “the individual viewed in abstraction from political, economic, familial, and religious roles, as well as from race and gender”).

171. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210–12 (1953).

172. *Demore v. Kim*, 538 U.S. 510, 522 (2003) (endorsing the doctrine of irregular due process for detainees and tracing its lineage).

173. See *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596–98 (1953).

Despite the fact that immigration cases are not criminal, they nonetheless have criminal overtones. Many people facing removal proceedings have committed a crime.¹⁷⁴ More significant is the general tendency to think of the illegal or undocumented immigrant as a criminal—that is, increasingly to criminalize the effort to cross the border without proper permission and documentation. The number of people prosecuted for the misdemeanor of entering the United States illegally or the felony of reentry after removal has risen sharply in recent years, and the vast majority of those convicted for these crimes are sent to prison for significant terms.¹⁷⁵ Of course, a legal immigrant who commits a crime is also likely to be removed—so that a change in immigration status is functionally one of the penalties handed out by the criminal justice system.¹⁷⁶

The irregular procedures of immigration are tightly linked to the widespread use of detention as a means of managing the “removable” portion of the alien population. Thus, immigration also raises the topic of detention camps. My discussion of the post-World War II abuse of German prisoners noted the use of the Nazi death camps to hold prisoners. But of course World War II also saw the creation of domestic concentration camps for Japanese-Americans—famously, if indirectly—upheld by the Supreme Court.¹⁷⁷ Before Japanese internment camps, U.S. officials had already experimented with detention camps for Chinese immigrants beginning at the end of the nineteenth century, such as the facility on Angel Island for those seeking to enter the country. “Between 1910 and 1940, about 50,000 Chinese were confined—often for months and years at a time—in Angel Island’s bleak wooden barracks, where inspectors would conduct grueling interrogations.”¹⁷⁸ On the east coast, Ellis Island functioned primarily as a detention center in its last years of operation.¹⁷⁹

This history makes it unsurprising that detention camps (not “prisons”), with

174. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SPECIAL REPORT: IMMIGRATION OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM, 2000, at 2 (2002).

175. *Id.* at 1–3, 6. Those found guilty of illegal entry received an average prison sentence of more than twenty months, while those convicted of illegal reentry received an average prison sentence of thirty-six months. *Id.* at 5–6.

176. For discussion of the increasing merger of criminal and immigration law, see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 372, 408 (2006).

177. See *Ex parte Endo*, 323 U.S. 283, 300–03 (1944); *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 98–99 (1943).

178. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990, at 15 (1993). According to Erika Lee:

[T]he barracks’ windows were enclosed with iron bars, and the only time that detainees were allowed outside of their dormitory was during mealtimes All Chinese male applicants were housed in one large room, where bunk beds were arranged in double or triple rows. A small recreation yard was adjacent to the barracks, but no educational or recreational programs were provided.

ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943, at 217 (2003).

179. MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 6 (2004); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 217 (1953) (Jackson, J., dissenting) (noting that petitioner was held for two years on Ellis Island).

inmates described as detainees (not “prisoners”) are an integral part of contemporary U.S. immigration law and policy. That became clear in late 1991 and early 1992, when thousands of people fled a military coup in Haiti. Federal officials followed an existing policy of intercepting these refugees at sea and screening them for “a credible showing of political refugee status,”¹⁸⁰ which resulted in immediate repatriation for the vast majority. Yet officials quickly became overwhelmed by the volume of people, and they set up camps at Guantánamo Bay Naval Base, where more than 12,000 people were detained while awaiting further proceedings and likely repatriation.¹⁸¹ In 1994, Guantánamo again became a detention center, this time for tens of thousands of Cuban and Haitian refugees, many of whom remained for more than a year.¹⁸² Both times, the reason for using Guantánamo was not simply geographic convenience. Equally, or even more, important was the fact that the camps were thoroughly under U.S. control but were not actually inside the United States, with the result that the refugees had little chance of receiving the rights that attach to people who make it onto U.S. soil. Instead, they were subject to detention and military control with little concern for due process.¹⁸³

Importantly, however, detention is not something that happens only in emergency situations; it is part of the typical or normal immigration process. In 2002, for example, the average daily immigration-related detention population was 20,000, and the total number of people in immigration detention in a given year is roughly 200,000.¹⁸⁴ Approximately 3,000 people who had been found removable were being held in indefinite detention in 2001,¹⁸⁵ when the Supreme Court ruled that an alien can only be detained until “there is no significant likelihood of removal in the reasonably foreseeable future.”¹⁸⁶ As a result of that decision, the number of people in indefinite detention has fallen, but long-term and sometimes indefinite detention continues for people who are

180. *Sales v. Haitian Ctrs. Council*, 509 U.S. 155, 161 (1993).

181. *See id.* at 163, 166 (upholding the repatriation program against international law and federal statutory challenges).

182. Mireya Navarro, *For Guantánamo Refugees, Hope Fades as Time Passes*, N.Y. TIMES, Dec. 10, 1994, at A1; Mireya Navarro, *Resources Strained at Guantánamo Bay*, N.Y. TIMES, Sept. 4, 1994, at A1.

183. *See* Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139, 140–41 (1995). *Compare* Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (holding that the naval base at Guantánamo Bay is not U.S. territory), *with* Haitian Ctrs. Council v. McNary, 969 F.2d 1326 (2d Cir. 1992) (holding that some constitutional rights apply to Haitians held at Guantánamo because the base is under exclusive U.S. control), *vacated as moot*, 509 U.S. 918 (1993).

184. THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 697 (5th ed. 2003). If anything, the average daily number has increased; Dow gives a 2004 figure of 23,000. Dow, *supra* note 179, at 9. For discussion of detention of asylum seekers, *see* ALEINIKOFF ET AL., *supra*, at 991; STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 1106 (4th ed. 2005).

185. LEGOMSKY, *supra* note 184, at 203.

186. *Zadvydas v. Davis*, 533 U.S. 678, 680 (2001); *see also* *Clark v. Martinez*, 543 U.S. 371, 377–80 (2005) (holding that the Court's ruling in *Zadvydas* also applies to aliens deemed inadmissible to the United States).

classified as “specifically dangerous.”¹⁸⁷

Conditions in immigration detention centers vary widely, but in general they are often similar to prisons, and the detainees—a term that often includes minors or entire families—are often treated as badly as, or worse than, criminals.¹⁸⁸ On some occasions, guards at these centers used physical abuse to maintain order. In the 1990s, for example, guards at the Krome Detention Center in Miami used forced standing as well as “slapping, beating, pointless exercises, and humiliation”¹⁸⁹—abuses that also were part of the routine at Abu Ghraib and Guantánamo.

Rational, well-intentioned policymakers easily could conclude that detention is appropriate for people who have been found removable and appear to be flight risks, particularly if they have serious criminal records. Indeed, the problem with the camp as a tool of modern statecraft is precisely that it is so often a reasonable option. My point here is simply to stress, first, that along with more traditional prisons—including the supermax—camps are a recurring tool for any modern state that seeks to manage and control diverse populations, including populations that it determines are undesirable. Second, places such as the current detention facilities at Guantánamo Bay are not aberrant, and there should be no surprise that prolonged detention of people whose status is amorphous easily leads to neglect or abuse.

II. U.S. LAW AND THE INTERNATIONAL LAW OF TORTURE

This Part considers the interaction between U.S. law and the international law of torture. I will begin with an overview of the relationship between U.S. and international law before turning to ratification of the U.N. Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights (ICCPR). The last section addresses the ways in which the United States has implemented the international law ban on torture through statutory incorporation.

A. IS INTERNATIONAL LAW “PART OF OUR LAW”?

The Supremacy Clause of the U.S. Constitution declares, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

187. See LEGOMSKY, *supra* note 184, at 205–06; see also *Demore v. Kim*, 538 U.S. 510, 529–31 (2003) (refusing to put limits on detention of permanent resident aliens while removal proceedings are pending, where eighty-five percent of such people were detained an average of forty-seven days and fifteen percent were detained an average of four months).

188. See Press Release, ACLU, Landmark Settlement Announced in Federal Lawsuit Challenging Conditions at Immigrant Detention Center in Texas (Aug. 27, 2007), available at <http://www.aclu.org/immigrants/detention/hutto.html>; see also Margaret Talbot, *The Lost Children: What Do Tougher Detention Policies Mean for Illegal Immigrant Families?*, *NEW YORKER*, Mar. 3, 2008, at 58. For earlier litigation over conditions in which juveniles are held pending removal decisions, see *Reno v. Flores*, 507 U.S. 292 (1993).

189. REJALI, *supra* note 55, at 321.

United States, shall be the Supreme Law of the Land.”¹⁹⁰ With respect to customary international law, the Supreme Court declared in 1900 that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹⁹¹

These statements create the impression that international law operates on the same footing as U.S. domestic law. Yet the fact that a treaty is “law” under the Supremacy Clause does not mean that it automatically becomes law within the United States. Treaties create binding obligations as a matter of international law, but courts have held that at least some treaties cannot operate as domestic law without implementing legislation.¹⁹² Some treaties, in short, are self-executing, while others require execution by Congress.¹⁹³ Courts and commentators divide on whether there should be a presumption in favor of or against self-execution, and even the precise meaning of the term is controversial.¹⁹⁴ Finally, Congress can abrogate a treaty—even a self-executing treaty—at any time under the “last in time rule”: when a statute and treaty conflict, the more recent of the two controls.¹⁹⁵ In practice, though, courts seem more willing to hold that a statute trumps a treaty than the other way around.¹⁹⁶

In addition, a treaty cannot become law of any kind in the United States until the Senate gives its advice and consent, the President ratifies it, and the ratification is deposited or exchanged.¹⁹⁷ Beginning with its consent to the Jay Treaty in 1795, the Senate has sporadically insisted on its ability to modify the text of a treaty or to give its advice and consent subject to reservations, understanding, and declarations that seek to alter, clarify, or in some way fix the meaning and application of the treaty—including through declarations that the treaty is not self-executing.¹⁹⁸ More recently, the Executive Branch has included

190. U.S. CONST. art. VI, cl. 2 (emphasis added).

191. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

192. *Medellín v. Texas*, 128 S. Ct. 1346, 1357 (2008).

193. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 371 (2d ed. 2006).

194. See *Medellín*, 128 S. Ct. at 1366 (appearing to lean toward a presumption against self-execution). For criticism of *Medellín* and an argument for a presumption in favor of self-execution, see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); see also Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 699 (1995) (discussing the presumption in favor of self-execution). For a short overview of the self-execution issue, see BRADLEY & GOLDSMITH, *supra* note 193, at 371–80. For a historical analysis, see John T. Parry, *Congress, the Supremacy Clause, and the Implementation of Treaties*, 32 FORDHAM INT’L L.J. (forthcoming 2009).

195. See *Breard v. Greene*, 523 U.S. 371, 376 (1998); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888). For the link between the last in time rule and the self-execution issue, see Parry, *supra* note 194.

196. For rare instances of a treaty trumping or modifying the application of a statute, see *Cook v. United States*, 288 U.S. 102, 119–20 (1933); *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

197. See BRADLEY & GOLDSMITH, *supra* note 193, at 369.

198. Reservations attached to ratification of a treaty are “specific qualifications or stipulations that modify U.S. obligations without necessarily changing treaty language.” Understandings are “interpre-

proposed conditions when it transmits human rights treaties to the Senate, and the Senate has usually adopted these or similar conditions.¹⁹⁹ This process has been controversial domestically and internationally, primarily because these conditions tend to minimize or prevent the incorporation of international human rights norms into U.S. law.²⁰⁰ Nonetheless, the Supreme Court appears to have accepted them.²⁰¹

The picture is equally complicated for customary international law. Immediately after it declared that customary international law is “part of our law,” the Supreme Court indicated that it would not apply if it conflicted with a “controlling executive or legislative act.”²⁰² Put differently, Congress can override customary international law, just as it can trump treaties under the last in time rule. Notably, though, the Supreme Court has held repeatedly that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”²⁰³ As for the Executive Branch, nearly every court to confront the question has held that the President can violate customary international law, and the President may also have authority to violate treaties.²⁰⁴ In addition, federal courts often defer to executive action that has foreign affairs overtones, as well as to Executive Branch interpretations of treaties.²⁰⁵

tive statements that clarify or elaborate, rather than change, the provisions of an agreement and that are deemed to be consistent with the obligations imposed by the agreement.” Declarations are “statements of purpose, policy, or position related to matters raised by the treaty in question but not altering or limiting any of its provisions.” CONG. RESEARCH SERV., LIBRARY OF CONG., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE—A STUDY PREPARED FOR THE COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 125–26 (Comm. Print 2001).

199. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 341 (1995).

200. For criticism of reservations, understandings, and declarations, see U.N. Human Rights Comm. [UNHRC], *General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant*, ¶¶ 8, 14, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994); Henkin, *supra* note 199. For a defense, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

201. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

202. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

203. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) (articulating a similar principle).

204. For discussion of presidential and judicial authority over customary international law, see MICHAEL D. RAMSAY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 362–76 (2007); Julian Ku, Ali v. Rumsfeld: *Challenging the President’s Authority to Interpret Customary International Law*, 37 CASE W. RES. J. INT’L L. 371 (2006). On the President’s ability to violate treaties, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(3) (1987) (declaring President may disregard a treaty “when acting within his constitutional authority”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 214 (2d ed. 1996) (“[T]he President has authority under the Constitution to denounce or otherwise terminate a treaty . . .”).

205. The extent of deference fluctuates. *Compare Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (“[T]he meaning given [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight.”), *with Hamdan v. Rumsfeld*, 548 U.S. 557,

The result is that customary international law fills some gaps in U.S. law and sometimes operates as a background principle against which statutes are interpreted. Yet it rarely has direct and independent legal effect in federal courts. There is an important exception to this summary, however. The Alien Tort Statute provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁰⁶ Although the statute refers to treaties, that provision has little force because most of the treaties that would be relevant—such as the ICCPR and Convention Against Torture—have been declared not self-executing.²⁰⁷ But, the Supreme Court has held that this statute also gives federal courts jurisdiction over federal common law causes of action drawn from customary international law, so long as the customary international law rule is clearly and definitely established.²⁰⁸

The impact of the Alien Tort Statute in practice is that aliens may draw on the customary international law of human rights, which is itself informed by international human rights treaties, to bring damages claims in U.S. federal court. Many of these claims involve torture, and the modern expansion of Alien Tort Statute litigation began with a case involving torture.²⁰⁹ It remains to be seen whether or to what extent these cases will serve as the basis for analyzing torture claims against U.S. officials.²¹⁰

B. U.S. RATIFICATION OF THE CONVENTION AGAINST TORTURE AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. A False Start

Article 7 of the International Covenant on Civil and Political Rights (“ICCPR”) declares, “No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”²¹¹ The U.N. General Assembly adopted the ICCPR in 1966, but the United States did not sign the document until 1977. In early 1978, the Carter Administration sent the ICCPR to the Senate for its advice and

613 (2006) (giving no deference to the President’s interpretation of the Geneva Conventions); see also David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007) (analyzing and comparing treaty interpretation in *Hamdan* with interpretation cases in the eighteenth and nineteenth centuries).

206. 28 U.S.C. § 1350 (2000).

207. See *infra* notes 260, 281. For more on why treaties rarely support claims under the Alien Tort Statute, see BRADLEY & GOLDSMITH, *supra* note 193, at 519.

208. *Sosa*, 542 U.S. at 724–25, 732–33.

209. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980).

210. For discussion of the history of Alien Tort Statute litigation, including the “third wave” of claims against U.S. officials, see Julian Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105 (2005).

211. International Covenant on Civil and Political Rights art. 7, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171, available at http://www.unhchr/html/menu3/b/a_ccpr.htm. Article 4 of the ICCPR confirms that no derogation is permitted from this ban.

consent, along with three other human rights treaties.²¹² In its message to the Senate, the Administration—speaking through Deputy Secretary of State Warren Christopher (later Secretary of State in the Clinton Administration)—included a large number of reservations, understandings, and declarations “designed to harmonize the treaties with existing provisions of domestic law.”²¹³ Some of the reservations, understandings, and declarations proposed by the Carter Administration may have been creatures of political necessity and not substantive positions that the Administration would have otherwise embraced. Even so, the fact remains that the political landscape in the United States made it impossible to obtain the Senate’s advice and consent without these adjustments to the treaty text. One of the most important recommendations was for a declaration “that the treaties are not self-executing.”²¹⁴ Christopher stated the rationale for this provision succinctly: without such a declaration, “the terms of the Convention might be considered as directly enforceable law on a par with Congressional statutes.”²¹⁵

In late 1979, the Senate Foreign Relations Committee held four days of hearings on the treaties. The primary theme of the testimony by Administration officials was that none of the treaties—including the ICCPR—would have any impact on domestic constitutional or statutory law. As the Legal Adviser to the Department of State, Roberts Owen, explained, “we already largely have met the minimum standards reflected in these documents . . . [and] the administration has recommended a number of reservations to make clear that, in order to bring about certain domestic law changes in accordance with the treaties, resort must be had to domestic legislation.”²¹⁶ Similarly, Jack Goldklang, from the Justice Department’s Office of Legal Counsel, insisted that “we should not view these treaties as an opportunity for making new domestic law in the United States”²¹⁷ and emphasized instead that the proposed reservations “would make the treaties consistent with our domestic law.”²¹⁸ Both officials also stressed the need for a declaration that the treaties would not be self-executing and therefore “will not be a source of additional litigation in our own courts.”²¹⁹ Finally, in

212. President’s Message to Congress Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. PRES. DOC. 395–96 (Feb. 23, 1978). The other treaties were the International Covenant on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social, and Cultural Rights, and the American Convention on Human Rights.

213. Warren Christopher, Letter of Submittal to the President of the United States, *in* Four Treaties Pertaining to Human Rights, S. Exec. Doc. C, D, E, & F, 95th Cong., 2d Sess. (Feb. 23, 1978), at vi.

214. *Id.*

215. *Id.* at viii.

216. *International Human Rights Treaties: Hearings Before the S. Comm. on Foreign Relations*, 96th Cong. 26 (1979) (statement of Roberts B. Owen); *see also id.* at 315 (Feb. 6, 1980) (letter from Owen to Senator Jacob Javits) (making clear that a non-self-executing treaty cannot provide “a rule of decision in a particular case” and “may not be enforced directly by the courts, but rather requires implementing legislation”).

217. *Id.* at 39 (statement of Jack Goldklang).

218. *Id.* at 36.

219. *Id.* at 29–30, 40 (statements of Roberts B. Owen and Jack Goldklang).

response to a question from Senator Pell about whether the ICCPR would “affect in any way American domestic law,” Goldklang declared that it would not “[b]ecause of the declaration that the treaty is non-self-executing, because of the reservations.”²²⁰

After the hearings, the Senate took no further action because a variety of events—such as the invasion of Afghanistan by the Soviet Union and the hostage crisis in Iran—took center stage and undermined the possibility of broad support for the treaties.²²¹ A decade later, with the ICCPR still not ratified, the Senate took up the Convention Against Torture.

2. The Convention Against Torture

Like the ICCPR, the Convention Against Torture bans torture and provides that “[n]o exceptional circumstances” can allow any derogation from that ban.²²² Unlike the ICCPR, it also defines “torture.”²²³ The Convention also departs from the ICCPR in its treatment of “other cruel, inhuman, or degrading treatment or punishment”:

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

220. *Id.* at 42 (response of Jack Goldklang to question from Senator Claiborne Pell); *see also id.* at 315.

221. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. 102-23, at 2 (1992) [hereinafter ICCPR REPORT]. In the meantime, a House Committee held hearings about torture. *See The Phenomenon of Torture: Hearings and Markup Before the H. Comm. on Foreign Affairs and its Subcomms. on Human Rights and Int'l Orgs.*, 98th Cong. (1984). The hearings resulted in a joint resolution that called on the Administration “to continue to involve the United States Government in the formulation of international standards and effective implementing mechanisms, particularly the draft Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.” Joint Resolution Regarding the Implementation of the Policy of the United States Government in Opposition to the Practice of Torture by Any Foreign Governments, H.R.J. Res. 605, 98th Cong., 98 Stat. 1721 (1984). Whether those hearings and the resolution had any impact on the eventual ratification of the ICCPR and the signing and ratification of the Convention Against Torture is not clear. For discussion of the resolution, *see* Margaret E. Galey, *Congress, Foreign Policy and Human Rights Ten Years After Helsinki*, 7 HUM. RTS. Q. 334, 363–64 (1985).

222. *See* United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, arts. 2, 4, Dec. 10, 1984, 1465 U.N.T.S. 85, *available at* <http://www.un.org/documents/ga/res/39/a39r046.htm>.

223. “Torture” is

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.

Id. art. 1.

by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.²²⁴

Notice that this provision does not clearly ban cruel, inhuman, or degrading treatment or punishment.²²⁵ Nor does it define the term other than to say that it “do[es] not amount to torture.” More importantly, the text of the Convention appears to allow derogations from the obligation to prevent such treatment.²²⁶

The United States signed the Convention in 1988, and President Reagan submitted it to the Senate for its advice and consent. An accompanying memorandum analyzed the document and proposed several reservations, understandings, and declarations to address perceived shortcomings. The first proposed declaration was that “Articles 1 through 16 of the Convention are not self-executing,” which meant that those provisions “would not of themselves become effective as domestic law” without implementing legislation. Further implementation would be left “to the domestic legislative and judicial processes.”²²⁷

One of the dominant themes in the Reagan Administration’s message was the idea that “torture” should be a very narrow category. Thus, the memorandum contended that the Convention “seeks to define ‘torture’ in a relatively limited fashion,” such that “torture is at the extreme end of cruel, inhuman and degrading treatment or punishment.”²²⁸ Similarly,

[S]uch rough treatment as generally falls into the category of “police brutality,” while deplorable, does not amount to torture. The term “torture,” in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating,

224. *Id.* art. 16.

225. Compare *Medellín v. Texas*, 128 S. Ct. 1346, 1358–59 (2008) (the phrase “undertakes to comply” does not impart an obligation), with U.N. Comm. Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 3, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (“The obligations to prevent torture and other cruel, inhuman or degrading treatment . . . are indivisible, interdependent, and interrelated . . . Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable . . .”).

226. See John T. Parry, “*Just for Fun*”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT’L SEC. L. & POL’Y 253, 265–66 (2005).

227. Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 100-20, at 2 (1988) [hereinafter Message from the President]. For a discussion by a U.S. Department of State official on the ratification of the various reservations, understandings, and declarations, see David P. Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449 (1991); see also Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 117–20 (2007). For discussions of ratification of the Convention and ICCPR, with a focus on the question of self-execution, see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 678–80 (2006); David Sloss, *The Domestication of International Human Rights: Non-Self Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 157–69 (1999). For a defense of non-self-execution declarations, see Bradley & Goldsmith, *supra* note 200, at 446–49.

228. Message from the President, *supra* note 227, at 3.

application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain.²²⁹

The Administration also noted that “mental pain and suffering . . . is a relatively more subjective phenomenon than physical suffering” so that the touchstone for when mental pain is severe enough to constitute torture ought to turn on “more objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain and suffering.”²³⁰

The Administration also revealed that part of its strategy during the negotiation of the Convention had been to “propos[e] that the Convention focus on torture rather than on other relatively less abhorrent practices.”²³¹ According to the memorandum, “the attempt to establish the same obligations for torture as for lesser forms of ill-treatment would result either in defining obligations concerning [cruel, inhuman, or degrading treatment] that were overly stringent or in defining obligations concerning torture that were overly weak.”²³² In keeping with this analysis—albeit creating some tension with the claim that the Convention itself reflects a narrow definition of torture—the Administration proposed the following understanding: “in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.”²³³

Even as it sought to confine the definition of torture, the Administration also highlighted Article 2’s “no exceptional circumstances” clause as “necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.”²³⁴ Having made that point, however, the Administration then proposed an understanding that “relevant common law defenses, including but not limited to self-defense and defense of others,” would remain available, under the rationale that such acts are simply outside the scope of torture because “specific intent to cause excruciating and agonizing pain and suffering” is lacking.²³⁵ Left unclear, perhaps deliberately, was whether this understanding would have made room for other common law defenses—such as necessity—that might have been in greater tension with the non-derogable ban on torture.

With respect to the regulation of cruel, inhuman, and degrading treatment in Article 16, the Administration observed that the Convention “embodies an undertaking to take measures to prevent CIDT rather than a prohibition of

229. *Id.* at 4.

230. *Id.* at 3.

231. *Id.* at v.

232. *Id.* at 15.

233. *Id.* at 4–5.

234. *Id.* at 5.

235. *Id.* at 6.

CIDT.”²³⁶ Even so, the Administration expressed concern that “Article 16 is arguably broader than existing U.S. law” and proposed an understanding that “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.”²³⁷

Finally, the Administration also proposed an understanding to the Convention’s prohibition in Article 3 against extraditing a person to a country “where substantial grounds exist for believing that he would be in danger of being subjected to torture.”²³⁸ The goal of the understanding was to conform the Convention to existing U.S. immigration law, which prevents a person from being deported to a country where it is more likely than not that he or she would be persecuted. Accordingly, the proposed understanding declared that “[t]he United States understands the phrase, ‘where there are substantial grounds for believing that he would be in danger of being subjected to torture,’ as used in Article 3 of the Convention, to mean ‘if it is more likely than not that he would be tortured.’”²³⁹ Amnesty International later contended that this understanding—which was ultimately adopted by the Senate—was “unwarranted.”²⁴⁰ “The treaty,” Amnesty explained, “is concerned with possibilities, not probabilities,” and “[s]ubstantial grounds would certainly exist in a case where a person faced a 45 percent (or even a 30 percent) chance of being tortured on his return, yet the proposed understanding would exclude that person from the treaty’s protection unjustifiably.”²⁴¹

By the time the Senate’s Foreign Relations Committee took up the Convention, President Reagan had been succeeded by the first President Bush, and the Administration negotiated with the Senate about scaling back the reservations, understandings, and declarations that the Reagan Administration had proposed. For example, in the words of State Department Legal Advisor Abraham Sofaer at a January 1990 hearing on the Convention, “we have deleted the former understanding on common law defenses, which was widely misunderstood”²⁴²—a phrase which in political language sometimes means “all too well understood.”

Administration officials also were forced to drop the proposed understanding

236. *Id.* at 15.

237. *Id.* at 15–16.

238. *Id.* at 6.

239. *Id.*

240. *Convention Against Torture: Hearing Before the S. Comm. on Foreign Relations*, 101st Cong. 58 (1990) (statement of Winston Nagan, Chairman of the Bd. of Dirs., Amnesty Int’l USA) [hereinafter *Convention Against Torture Hearing*].

241. *Id.*

242. *Convention Against Torture Hearing*, *supra* note 240, at 11 (statement of Abraham D. Sofaer, Legal Advisor, U.S. Dep’t of State). Sofaer also discussed the negotiations over the RUDs. *Id.* at 8–9; see also Letter from Janet G. Mullins, Assistant Sec’y, Legislative Affairs, U.S. Dep’t of State, to Sen. Larry Pressler (Apr. 4, 1990), *reprinted in* S. EXEC. REP. NO. 101-30, at 40 (1990) (explaining that the common law defenses understanding “was no longer necessary and potentially counterproductive”).

that torture is limited to “extremely cruel and inhuman” acts that are “specifically intended to inflict excruciating and agonizing physical or mental pain.” Nonetheless, they persisted in their efforts to contain the definition of torture by continuing to insist on a “specific intent” understanding. In addition, even as they backed away from adjectives such as “excruciating and agonizing,” Deputy Assistant Attorney General Mark Richard took care to declare at the 1990 hearing that:

Torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct.

As applied to physical torture, there appears to be some degree of consensus that the concept involves conduct the mere mention of which sends chills down one’s spine: the needle under the fingernail, the application of electric shock to the genital area, the piercing of eyeballs, etc. Techniques which inflict such excruciating and agonizing physical pain are recognized as the essence of torture. Hence, the Convention chose the word “severe” to indicate the high level of the pain required to support a finding of torture.²⁴³

To the extent Richard’s examples were intended to provide a core idea of conduct that would constitute torture, the status of things such as “systematic beating”—identified by the Reagan Administration as an example of torture but notably missing from Richard’s list—would arguably remain an open question. The emphasis in this list appears to be on types of violence that were unusual in some way (piercing eyeballs) and that did not have the “everyday” quality of something like beating, so that unusual versions of everyday violence (systematic beatings, for example) occupied an unmentioned and ambiguous category.

That said, the “greatest problem” with the Convention for the Bush Administration was the concept of mental harm. Richard argued at the hearing that mental harm is a subjective concept and that “mental suffering is often transitory, causing no lasting harm.”²⁴⁴ He went so far as to claim that the idea of mental suffering described in the Convention was so vague that it would not “meet Constitutional due process requirements”—a reference to the “void for vagueness” doctrine.²⁴⁵

Richard was correct that the “severe mental suffering” standard in the Convention is ambiguous. Still, the assertion that the Convention as drafted might violate domestic due process standards is surprising. First, the ambiguities of the Convention tend to operate in favor of government interests, so that the Administration’s goal in raising this point was not immediately apparent. Second, due process doctrine is not well-suited to capturing Executive Branch

243. *Convention Against Torture Hearing*, *supra* note 240, at 16 (statement of Mark Richard, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice). For criticism of the earlier proposal, see *id.* at 8–9 (Sofaer statement).

244. *Id.* at 17 (Richard statement).

245. *Id.*

concerns about the meaning of treaty provisions intended to restrict the government rather than to serve as the specific basis for criminal prosecutions of individuals. This is particularly true in light of the Administration's insistence that the Convention not be self-executing. Due process concerns are more appropriate for criminal statutes designed to implement the Convention.²⁴⁶ Third, to the extent it is relevant, the constitutional standard for vagueness is high. The test for assessing a statute is often stated as whether "men of common intelligence must necessarily guess at its meaning and differ as to its application" in a way that goes beyond the ordinary ambiguities of legislation.²⁴⁷ The underlying issues are whether a particular statute provides a sufficient amount of "fair warning" and includes adequate standards to avoid "arbitrary and discriminatory enforcement."²⁴⁸ Also relevant to courts is whether the conduct being regulated "is particularly evil."²⁴⁹ As a result, defendants seeking to avoid application of a criminal statute on vagueness grounds carry a heavy burden, especially outside the First Amendment context.

Whether or not Administration officials really believed the due process argument, they used it to support a new proposed understanding that would narrow the kinds of mental suffering that qualified as torture:

"The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."²⁵⁰

The point of this understanding was to shift the focus from "subjective" suffering to objective conduct, and in particular to "conduct calculated to generate severe and prolonged mental suffering of the type which can properly be viewed as rising to the level of torture."²⁵¹ Richard also stressed that the

246. To the extent due process applies in this context, U.S. constitutional doctrine holds that a treaty cannot override individual constitutional rights, so that a criminal defendant's due process right to a reasonably clear criminal prohibition could not be defeated simply because the allegedly vague prohibition derived from a treaty. *See* *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid v. Covert*, 354 U.S. 1, 16–17 (1957).

247. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

248. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

249. WAYNE R. LAFAVE, *CRIMINAL LAW* 105 (4th ed. 2003).

250. *Convention Against Torture Hearing*, *supra* note 240, at 10 (Sofaer statement).

251. *Id.* at 17.

kinds of conduct included in the understanding were “intentional acts . . . designed to damage and destroy the human personality,” as opposed to “the normal legal compulsions which are properly a part of the criminal justice system—interrogation, incarceration, prosecution, compelled testimony against a friend, etc.—notwithstanding the fact that they may have the incidental effect of producing mental strain.”²⁵²

By making this proposal, the Administration deployed the vagueness argument in a win-win manner. The proposed understanding would significantly narrow the reach of the Convention and expand or at least maintain the available space for legal state violence. If the proposal were defeated, the Administration’s stated concerns about the possibly fatal vagueness of the Convention would still remain available to counter expansive views of the Convention’s prohibitions.

In short, the Reagan and Bush Administrations sought to construct a sharp dichotomy between horrific acts that amount to torture and other forms of conduct. Torture would become a category with few gray areas, because it would encompass only the worst of the worst—conduct that everyone assumed was not only already illegal but also almost never practiced in the United States. In the process, more debatable categories of conduct would be shunted aside and apparently relegated en masse to the lesser category of cruel, inhuman, or degrading treatment. At the same time, both Administrations also sought to limit the scope of the cruel, inhuman, and degrading treatment category—which they reasonably viewed as ambiguous. The result of their efforts was to take some of the conduct that arguably would fall within the Convention and place it outside, at least under the United States’ understanding of its obligations. Put differently, the Executive Branch sought to raise the bar for establishing that either torture or cruel, inhuman, and degrading treatment had taken place.

These efforts did not go unnoticed. The transcript of the hearing includes several appendices of statements prepared by interested parties. Amnesty International, for example, complained that “[t]he purpose of most of these reservations, understandings, and declarations is to assure that the Convention will have little or no impact in the United States, because U.S. law is regularly asserted as the source of reservations or interpretations of the treaty.”²⁵³ For its part, Human Rights Watch specifically noted that the mental suffering understanding “does not cover many types of psychological torture used around the world.”²⁵⁴ To the contrary:

The range of acts that constitute torture is limited only by the imaginations of those who seek to perpetrate them. In recent years governments that practice

252. *Id.*

253. *Id.* at 55 (statement of Amnesty Int’l USA).

254. *Id.* at 94 (statement of Human Rights Watch).

torture increasingly have sought to devise methods that cause intense pain but leave no marks. The era of psychological torture appears to be ahead of us.²⁵⁵

These comments were intended less as a complaint about U.S. practice and more as a lament for the United States' failure to create a good example by signing on to the Convention without reservation.

Several months after the hearing, the Foreign Relations Committee published a report recommending that the full Senate give its advice and consent to ratification of the Convention and the several reservations, understandings, and declarations that had been negotiated among the Administration, various senators, and other parties.²⁵⁶ Once again, the narrowness of "torture" was an important theme. Thus, the report declared, "For an act to be 'torture,' it must be an extreme form of cruel and inhuman treatment, cause severe pain and suffering, and be intended to cause severe pain and suffering."²⁵⁷

On October 27, 1990, the full Senate concurred with the Committee's recommendations, with minor amendments, after a short debate.²⁵⁸ Because the Senate conditioned its advice and consent on the proviso that the President could not ratify the Convention until all necessary implementing legislation was passed, the United States did not formally ratify it until October 21, 1994, after passage of legislation that imposed additional criminal penalties on torture.²⁵⁹

Although the debate was uneventful, the final package of reservations, understandings, and declarations is significant. Perhaps most important is the Senate's declaration that the Convention is "not self-executing." Because of that declaration, the Convention does not create any legal causes of action in the United States for individual claimants and may not create any domestic legal rights at all without congressional implementation.²⁶⁰ Also worth stressing again is that the end product of the negotiations narrowed the Convention's definition of torture in two ways, at least for U.S. consumption. First, the Senate stated its understanding that "in order to constitute torture, an act must be specifically

255. *Id.*

256. S. EXEC. REP. NO. 101-30, at 4 (1990).

257. *Id.* at 6; *see also id.* at 7-8, 10.

258. The only issue during debate was the approval of several amendments to the advice and consent resolution proposed by Senator Jesse Helms and relating to the primacy of U.S. law over international law and to the importance of federalism in the application and enforcement of treaty obligations. *See* 136 CONG. REC. 36, 194-96 (1990).

259. *See id.* at 36,199; *Ratifications of Human Rights Treaties and Related Issues*, INT'L HUM. RTS. L. UPDATE (Aspen Inst.), Fall 1994, at § III(a); Office of the United Nations High Commissioner for Human Rights, <http://www2.ohchr.org/english/bodies/ratification/9.htm> (last visited Jan. 17, 2009).

260. The Senate Report declared that "the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law," and that the non-self-execution declaration would clarify "that further implementation of the Convention will be through implementing legislation." S. EXEC. REP. NO. 101-30, at 10 (1990). Federal courts repeatedly have held that the Convention is not self-executing. *See, e.g.,* *Cornejo-Barreto v. Seifert*, 379 F.3d 1075, 1086-87 (9th Cir. 2004) (reaching this conclusion and citing other cases that have reached the same conclusion), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc).

intended to inflict severe physical or mental pain or suffering.”²⁶¹ Although the meaning of this understanding is not completely clear, the Senate apparently meant the phrase “specifically intended” to describe an action taken with a mental state or level of intention more precise than simple knowledge that a particular act would cause severe pain. Rather, to constitute torture, an action would have to be taken with the express purpose of causing pain. Requiring proof of purpose would thus insulate some forms of state violence by restricting the category of violent or harmful conduct that qualifies as torture.

Second, the Senate adopted the understanding on the definition of mental harm and thereby narrowed the kinds of mental harm that count as torture.²⁶² As I suggested above, the goal of this second understanding is presumably to provide that, as a matter of law, only certain practices can result in mental suffering that is serious enough to constitute torture. No other practice, however severe the harm it causes, will qualify. I find it difficult to interpret these two changes as anything other than a conscious effort to leave more room for coercive practices by freeing state actors from concern about international law, perhaps especially during operations outside U.S. territory.²⁶³

The Senate also agreed to a reservation—originally proposed as an understanding by the Reagan Administration—that sought to provide greater certainty about the kinds of conduct that fall within the category of “cruel, inhuman or degrading treatment or punishment.” As with the understandings about “torture,” this reservation addresses uncertainty by limiting the Convention’s potential scope:

[T]he United States considers itself bound by the obligation . . . to prevent “cruel, inhuman or degrading treatment or punishment,” only insofar as the term . . . means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.²⁶⁴

261. 136 CONG. REC. 36, 198. “Specific intent” is a common law term for a high level of mens rea, as opposed to the more ordinary “general intent.” The Model Penal Code instead distinguishes between purpose and knowledge. See MODEL PENAL CODE § 2.02 & cmt. at 21 (1962). Several federal courts have adopted this interpretation of “specifically intended” in the torture context. For discussion and criticism, see Renee C. Redman, *Defining “Torture”: The Collateral Effect on Immigration Law of the Attorney General’s Narrow Interpretation of “Specifically Intended” When Applied to United States Interrogators*, 62 N.Y.U. ANN. SURV. AM. L. 465–95 (2007).

262. 136 CONG. REC. 36, 198.

263. Some additional support for this conclusion comes from the Reagan Administration’s effort to obtain an understanding on the “lawful sanctions” exception in Article 1’s definition of torture: “The United States understands that ‘sanctions’ includes not only judicially-imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law.” The goal was “to guard against illegitimate claims that such law enforcement actions constitute torture.” Message from the President, *supra* note 227, at 4–5. The Bush Administration withdrew the proposed understanding after it was criticized for potentially “legitimiz[ing] officially-sanctioned torture.” *Convention Against Torture Hearing*, *supra* note 240, at 10 (Sofaer statement).

264. 136 CONG. REC. 36, 198.

In other words, “cruel, inhuman or degrading conduct” is unconstitutional conduct, and it follows that torture is unconstitutional as well. Significantly, the second Bush Administration would later argue that this reservation limited the reach of Article 16 to actions in U.S. territory—as opposed to any territory under U.S. jurisdiction.²⁶⁵ Yet nothing in the hearings, report, or debate indicates any effort to achieve that result, and one official from the first Bush Administration has explicitly denied any intent to do so.²⁶⁶

One sometimes encounters the suggestion that the linkage of cruel, inhuman, or degrading treatment with conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments grew out of a concern that the Convention could support attacks on the use of the death penalty in the United States. Yet the record of ratification does not support this claim. The original letter of transmittal from the Reagan Administration does not mention the death penalty in its discussions of Articles 1 and 16. When the Bush Administration revisited these issues, it did not address its death penalty concerns through the cruel, inhuman, and degrading treatment reservation. Instead, it proposed a separate understanding, ultimately adopted as part of the final package: “international law does not prohibit the death penalty, and . . . this Convention [does not] restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.”²⁶⁷ Although the doctrinal reference is to the same three constitutional amendments, the fact that the final package of reservations, understandings, and

265. U.S. Written Response to Questions Asked by the U.N. Comm. Against Torture, Response to Question #44 (Apr. 28, 2006), available at <http://www.state.gov/drl/rls/68554.htm>; Letter from William E. Moschella, Assistant Attorney Gen., to Sen. Patrick Leahy (Apr. 4, 2005).

266. See Abraham Sofaer, *No Exceptions*, WALL ST. J., Nov. 26, 2005, at A11. At the time the Convention was negotiated, U.S. negotiators apparently took the position that it would not apply to “armed conflicts” and thus would not overlap with the Geneva Conventions. See U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Summary Prepared by the Secretary-General in Accordance with the Commission Resolution 18 (XXXIV)*, ¶ 55, U.N. Doc. E/CN.4/1314 (Dec. 19, 1978) [hereinafter Secretary-General’s Summary]; U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 5, U.N. Doc. E/CN.4/1984/72 (Mar. 9, 1984). This understanding, in turn, would mean that the Convention would not apply to some overseas activities. Although this may have been the position of U.S. negotiators, the Convention itself does not draw this distinction. See Convention Against Torture, *supra* note 222, art. 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.”); see also Secretary-General’s Summary, *supra*. Commentators also tend to disagree strongly with claims that the Convention (or human rights law generally) does not apply in times of war. See, e.g., AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 74 (1999); ANNA-LENA SVENSSON-McCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION 214, 376–77 (1998); Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1367–70 (2007).

267. 136 CONG. REC. 36,198; see also *Convention Against Torture Hearing*, *supra* note 240, at 10–11 (Sofaer statement). For the Reagan Administration’s discussions of Articles 1 and 16, see Message from the President, *supra* note 227, at 3–4, 15–16. See also Stewart, *supra* note 227, at 461–62 (discussing the death penalty issue and making no link between it and the CID reservation).

declarations has a separate death penalty provision strongly suggests that the reservation about cruel, inhuman, or degrading treatment was not intended to preserve the death penalty. Rather, in combination with the non-self-execution declaration, the purpose was to preserve space for coercive interrogation.

3. The International Covenant on Civil and Political Rights

After the Senate agreed to the Convention, the Bush Administration asked the Senate to reopen its consideration of the International Covenant on Civil and Political Rights ("ICCPR"). The Administration also proposed a revised group of reservations, understandings, and declarations. It explained that "a few provisions of the Covenant articulate legal rules which differ from U.S. law and which, upon careful consideration, the Administration declines to accept in preference to existing law."²⁶⁸ It also stated that because "existing U.S. law generally complies with the Covenant[,] . . . implementing legislation is not contemplated."²⁶⁹ The reservations were, "in many respects, similar to those proposed by the Carter Administration" and included the familiar declaration that the Convention was not self-executing.²⁷⁰

The Administration also included a statement that Article 7's ban on cruel, inhuman, or degrading treatment or punishment "means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States."²⁷¹ The primary reason for this reservation was to make "clear in the record that we interpret our obligations under Article 7 of the Covenant consistently with those we have undertaken in the Torture Convention."²⁷² The Administration noted that decisions of the European Court of Human Rights and the U.N.'s Human Rights Committee indicated that "prolonged judicial proceedings involving cases of

268. *International Covenant on Civil and Political Rights: Hearing Before the S. Comm. on Foreign Relations*, 102d Cong. 9 (1991) [hereinafter *ICCPR Hearing*].

269. *Id.* at 14.

270. ICCPR REPORT, *supra* note 221, at 2. The Administration stated this declaration would "clarify that the Covenant will not create a private cause of action in U.S. courts." *ICCPR Hearing*, *supra* note 268, at 14. It later explained,

[W]ith very few exceptions the law or practice of the United States . . . is already fully in accord with the requirements of the Covenant. In those few instances when U.S. law differs in its particulars from the Covenant . . . , the Administration has proposed an appropriate reservation or understanding In such instances, Congress remains free, of course, to adopt legislation conforming U.S. law to the requirement of the Covenant.

Id. at 80. The Senate Report subsequently stated that in "areas in which U.S. law differs from the international standard . . . it may be appropriate and necessary to question whether changes in U.S. law should be made to bring the United States into full compliance at the international level." But the Report makes clear the ICCPR would not accomplish that result by itself: "changes in U.S. law in these areas will occur through the normal legislative process." ICCPR REPORT, *supra* note 221, at 4. For discussion of some of the various statements about self-execution and the ICCPR during the advice and consent process, see Sloss, *supra* note 227, at 165–67.

271. *ICCPR Hearing*, *supra* note 268, at 8.

272. ICCPR REPORT, *supra* note 221, at 12.

capital punishment,” as well as “corporal punishment and solitary confinement,” could violate Article 7, and it indicated that the proposed reservation would prevent such interpretations of the ICCPR from applying domestically.²⁷³

Human rights groups objected to the reservation on Article 7. Carol Nagenast, the Chair of the Board of Amnesty International USA, testified that “[t]here is no convincing reason why a constitutional ceiling should be placed on the meaning of ‘cruel, inhuman and degrading.’”²⁷⁴ Rather, she argued that, “[t]o the extent that the standard of ‘cruel and unusual punishment’ [in the Eighth Amendment] differs from the ‘cruel, inhuman and degrading treatment or punishment’ standard of the Covenant, U.S. citizens should be entitled to the greatest protection whether it be provided by national or international law.”²⁷⁵ A separate Amnesty International statement insisted that “[t]he interpretation of the phrase ‘cruel, inhuman or degrading treatment or punishment’ is much broader than the interpretation of the phrase ‘cruel and unusual punishment’” and that the protections of Article 7 also went beyond those of the due process and equal protection clauses.²⁷⁶ As Amnesty aptly put it, by adopting the reservation, “the United States will be asserting that it does not intend that Article 7 have any impact at all.”²⁷⁷ The statements of other groups sounded similar themes.

Despite these concerns, the Foreign Relations Committee unanimously recommended adoption of the reservation for the reasons stated by the Bush Administration. The Committee’s only independent statement on the issue was that any changes in U.S. law should occur “through the normal legislative process.”²⁷⁸ On April 2, 1992, the full Senate gave its advice and consent to the ICCPR with no debate.²⁷⁹ As with the Convention Against Torture, nothing in the hearings or reports suggests that anyone in the Administration or Senate raised questions about the phrase “within its territory and subject to its jurisdiction” in Article 2 of the ICCPR. That phrase has similarly become controversial because of its import for the extraterritorial obligations, if any, that the ICCPR imposes on signatories.²⁸⁰

273. *ICCPR Hearing*, *supra* note 268, at 10. For concern over claims that the “death row phenomenon” of confinement on death row while appeals play out could support cruel, inhuman, or degrading treatment claims, see *id.* at 10 (Administration explanation); *id.* at 112 (prepared statement of the International Human Rights Law Group); *cf.* *Soering v. United Kingdom*, 11 Eur. Ct. H.R. (ser. A) at 439, 468 (1989). Once again, the Administration proposed and the Senate approved a separate reservation on capital punishment. See 138 CONG. REC. 8068 (1992).

274. *ICCPR Hearing*, *supra* note 268, at 41 (statement of Carol Nagenast, Chair of the Bd., Amnesty Int’l USA).

275. *Id.*

276. *Id.* at 96–97 (statement of Amnesty Int’l USA).

277. *Id.*

278. ICCPR REPORT, *supra* note 221, at 4.

279. 138 CONG. REC. 8068 (1992).

280. When the issue came up soon thereafter, Clinton Administration officials argued that Article 2 “restricted the scope of the Covenant to persons under United States jurisdiction and within United States territory.” U.N. Human Rights Comm., *Summary Record of the 1405th Meeting: United States of*

In sum, the United States ratified both documents with the declaration that they are not self-executing and the reservation or understanding that they are coextensive with pre-existing constitutional rights.²⁸¹ That is to say, neither document creates any rights; they only ban conduct that is already unconstitutional, and they do not expand existing restrictions on executive authority to wield state violence.

C. STATUTORY INCORPORATION OF INTERNATIONAL LAW ON TORTURE

Although the ICCPR and Convention Against Torture play no direct role in domestic law, the Senate's advice and consent has domestic ramifications that go beyond the simple refusal to take those documents at face value. For example, Congress enacted three statutes to implement the Convention. The first provides a civil cause of action in the United States against people who torture under the auspices of a foreign government.²⁸² The second criminalizes torture committed outside the United States by U.S. nationals or by persons later found in the United States.²⁸³ The third is a declaration of policy contained

America, ¶ 20, U.N. Doc. CCPR/C/SR.1405 (Mar. 31, 1995). The Human Rights Committee disagreed. See U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 284, U.N. Doc. CCPR/C/79/Add.50 (Oct. 3, 1995). The second Bush Administration took the same position as the Clinton Administration. See U.S. DEP'T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 130 (2005), available at <http://www.state.gov/g/drl/rls/55504.htm>; see also *id.*, annex 1; Matthew Waxman, Head of U.S. Delegation, Principal Deputy Dir. of Policy Planning, U.S. Dep't of State, Opening Statement on the Report Concerning the International Covenant on Civil and Political Rights (July 17, 2006), <http://www.state.gov/g/drl/rls/70392.htm>. For discussion of this issue, compare Dominic McGoldrick, *Extraterritorial Application of the International Covenant on Civil and Political Rights*, in EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES 41 (Fons Coomans & Menno T. Kamminga eds., 2003) and Satterthwaite, *supra* note 266, at 1358–65, with Michael Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 122–27, 130–31, 136–38 (2005).

281. Federal courts have taken the non-self-execution declaration seriously for the ICCPR, just as they have with the Convention Against Torture. See Satterthwaite, *supra* note 266, at 1365 n.184 (citing cases). David Sloss advances a provocative history and interpretation of the non-self-execution declarations that suggests they do not prevent courts from applying the Convention and ICCPR “directly to provide a judicial remedy in some, but not all, cases that raise meritorious treaty-based human rights claims.” Sloss, *supra* note 227, at 135; see also *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 n.22 (3d Cir. 2003) (suggesting, but not holding, that the non-self-executing declaration only prevents the Convention from creating a cause of action but may not prevent it from being directly enforceable in habeas proceedings). I do not agree with Sloss's reading of the history and thus cannot join his argument that the non-self-execution declarations were intended to have the limited effect he claims for them.

282. Torture Victim Protection Act of 1991 (“TVPA”), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2000)). For discussion of the TVPA as an implementation of the Convention, see H.R. REP. NO. 102-367, at 3–5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85–88.

283. 18 U.S.C. § 2340 (2000). For discussion of this statute as an implementation of the Convention, see S. REP. NO. 103-107, at 58–59 (1993), *reprinted in* 1994 U.S.C.C.A.N. 302, 366. The statute “applies only to acts of torture committed outside the United States” because torture within the United States is “covered by existing applicable federal and state statutes.” *Id.* at 59, 302, 366; see also 18 U.S.C. § 2340B (2000) (declaring state and local laws not preempted).

in the Foreign Affairs Reform and Restructuring Act (“FARRA”):

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.²⁸⁴

All three statutes define “mental suffering” in ways that are essentially identical to the Senate’s understanding of that term as limited to specific circumstances.²⁸⁵ Thus, the specific statutory remedies adopted to implement the Convention mirror the more restrictive view espoused during the ratification process rather than the more expansive view that the text of the Convention or the ICCPR would support. Nor do these statutes mention or provide any remedy for the infliction of cruel, inhuman, or degrading treatment or punishment. The distinction between that category and torture is therefore critical to the availability of criminal penalties, damages, and relief from extradition or removal.

The case of FARRA is particularly interesting. Regulations adopted by the State and Homeland Security Departments to implement FARRA track the Senate’s understandings and the positions of the Reagan and Bush Administrations. First, extradition and removal are prohibited only if it is “more likely than not” that torture will take place.²⁸⁶ Second, the regulations stress that “[t]orture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment.”²⁸⁷ The clear implication is that the United States may deport or extradite people to countries in which they are likely to face cruel, inhuman, or degrading treatment that would be unconstitutional here (because according to the Senate, cruel, inhuman, or degrading treatment is unconstitutional by definition). Although per-

284. Foreign Affairs Reform and Restructuring Act (“FARRA”), Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (1998). The Act also directed federal agencies to craft regulations to implement this policy and states that these regulations will “implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.” *Id.* § 2242(b).

285. 18 U.S.C. § 2340(1)–(2); TVPA, 28 U.S.C. § 1350 note; FARRA, Pub. L. No. 105-277, § 2242(f)(2) (declaring that the definition of torture is the same as the Convention, “subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention”). For a discussion of the Senate’s understanding of “mental suffering,” see *supra* notes 250, 262 and accompanying text.

286. 8 C.F.R. § 208.16(c)(2) (2008); 22 C.F.R. § 95.1(c) (2008). The immigration regulations also allow the Administration to take “diplomatic assurances” into account. See 8 C.F.R. § 208.18(c) (2008).

287. 8 C.F.R. § 208.18(a)(2) (2008); 22 C.F.R. § 95.1(b)(7) (2008). The immigration regulation adds the phrase “that do not amount to torture” at the end of the phrase quoted in the text. Note as well that both sets of regulations limit the reach of the “lawful sanctions” exception to torture by declaring that the exception does not apply to sanctions that “defeat the object and purpose of the Convention Against Torture to prohibit torture.” 8 C.F.R. § 208.18(a)(3); 22 C.F.R. § 95.1(b)(6).

haps startling, this result is arguably consistent with the Convention, as well as with U.S. practice. Just as the Convention does not rule out an exceptional circumstances justification for cruel, inhuman, or degrading treatment falling short of torture, neither does it rule out extradition of a person to a country where he will face such treatment.²⁸⁸

Immigration courts hear roughly 30,000 cases every year in which aliens raise claims under the Convention Against Torture, and they grant relief in only two to four percent of those cases.²⁸⁹ Federal courts have been more welcoming to claims under the Convention, and they frequently reverse or vacate the decisions of the immigration courts.²⁹⁰ Still, the sheer number of cases being decided by immigration courts makes it impossible for federal courts to engage in meaningful review of decisions that reject torture claims. Federal court review also reflects both the ambiguities of the Torture Convention and the restrictions created by the U.S. ratification process. In a recent case, for example, the Ninth Circuit determined that “it is not clear” that beatings of demonstrators by police “would rise to the level of torture,” and it denied

288. See Convention Against Torture, *supra* note 222, art. 3. In its first *General Comment*, the Committee Against Torture has highlighted the ban on rendition to face torture but said nothing about rendition to face cruel, inhuman, or degrading treatment. U.N. Comm. Against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22*, ¶¶ 1, 3–5, U.N. Doc. A/53/44 (Nov. 21, 1997). Its second *General Comment* fudges this issue but does not reverse the earlier comment:

[I]f a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment . . . the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State’s obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1.

U.N. Comm. Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 19, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). Still,

[I]nsofar as it might be possible to derive from other international . . . legal instruments a prohibition against extradition . . . where the extradited or expelled person might be exposed to cruel, inhuman or degrading treatment or punishment falling short of torture, the fact that article 3 of the present *Convention* only deals with torture should not be interpreted as limiting the prohibition against extradition . . . which follows from such other instruments.

J. HERMAN BURGERS & HANS DANIELIUS, *The United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 150 (1988).

289. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2006 STATISTICAL YEAR BOOK, M1 (2007); see also EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2005 STATISTICAL YEAR BOOK, M1 (2006); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2004 STATISTICAL YEAR BOOK, M1 (2005); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK, M1 (2004); EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, FY 2002 STATISTICAL YEAR BOOK, M1 (2003).

290. See, e.g., *Mouwad v. Gonzales*, 485 F.3d 405 (8th Cir. 2007); *Kay v. Ashcroft*, 387 F.3d 664 (7th Cir. 2004); *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004); *Al-Saher v. INS*, 286 F.3d 1143 (9th Cir. 2001).

relief.²⁹¹ Several courts have also denied relief on the ground that the treatment the alien would face in the receiving country—such as atrocious prison conditions—amounts only to cruel, inhuman, or degrading treatment and does not rise to the level of torture.²⁹² Holdings like these are probably inevitable, because expansive definitions of torture in the context of police or prison violence would risk calling into question the legitimacy of those actions in the United States.

D. MINIMIZING INTERNATIONAL LAW

The United States has recognized international law standards on torture and cruel, inhuman, or degrading treatment, but it has avoided their full implications and in some instances has consciously watered them down. The picture is murkier with respect to the Geneva Conventions, which the United States signed and ratified before the current vogue for reservations, understandings, and declarations. As the Supreme Court's recent decision in *Hamdan v. Rumsfeld*²⁹³ indicates, the conventions can be a source of law, but it remains unclear whether they are self-executing and whether they will be interpreted to confer individual rights in U.S. courts.²⁹⁴ Worth noting as well is the War Crimes Act, which in its original form criminalized violations of the obligations imposed by international agreements such as the Geneva Conventions.²⁹⁵ The 2006 Military Commissions Act amended the War Crimes Act to include torture and cruel or inhuman treatment as specific crimes but also provided definitions that sharply circumscribe the kinds of conduct subject to prosecution.²⁹⁶

The bottom line is that international law is relevant to the U.S. law of torture, but its impact is unclear. Far clearer is that international law is simply not a very important source of U.S. legal doctrine with respect to torture and other forms of state violence, even if it does provide a source for legal arguments and political advocacy. Further, this minor role and lack of clarity is plainly both deliberate and durable. The result is that the minimization of international law—particularly of international law rules intended to control state violence—emerges as a key part of the U.S. legal order and thus of the ways in which the

291. *Ahmed v. Keisler*, 504 F.3d 1183, 1201 (9th Cir. 2007). The court did hold that police beatings sufficed to create a probability of persecution, *see id.* at 1200, although the dissenting judge disagreed, *see id.* at 1201–03 (Rawlinson, J., dissenting).

292. *See Auguste v. Ridge*, 395 F.3d 123, 128, 154 (3d Cir. 2005) (upholding petitioner's removal to Haiti despite the fact that conditions in the prison to which he would be sent would probably be "miserable and inhuman" and "brutal and deplorable" because there was no evidence that Haitian officials have a "specific intent" to use prison conditions as a means of inflicting severe pain or suffering); *see also Redman*, *supra* note 261, at 465–95.

293. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

294. *See id.* at 627–28. For discussion of the question whether the Geneva Conventions are self-executing, see Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 124–28 (2004).

295. 18 U.S.C. § 2441 (2001).

296. Military Commissions Act, § 6(b), Pub. L. No. 109-366, 120 Stat. 2600 (2006).

U.S. legal system reflects rule of law values.

CONCLUSION

My discussion so far undermines claims that opposition to torture is a necessary and significant part of U.S. law and legal practice. In this concluding Part, I take a further step and suggest some of the ways in which the formation of policy, legal arguments, and official actions that make up the prosecution of the war on terror draw from the episodes I have described in this Article.²⁹⁷ The excesses of the war on terror, in other words, may be deplorable, and many of them are certainly illegal, but they are not aberrations.

Consider first the infamous “torture memo” of August 2002, issued by the Office of Legal Counsel (“OLC”).²⁹⁸ Many commentators have stressed the ways in which that memorandum goes beyond the ordinary parameters of reasonable legal argument in many of its conclusions.²⁹⁹ Few have been willing to recognize that aspects of the memorandum—such as its focus on specific intent, its insistence on a narrow definition of torture, and its stress on the distinction between torture and cruel, inhuman, or degrading treatment—draw on the compromises written into the Convention Against Torture, stressed by the Reagan and Bush Administrations during ratification and memorialized in the Senate’s resolution of advice and consent. That is, the goal of retaining legal discretion to use coercion, which was so central to ratification of the Convention and the ICCPR, finally bore fruit. The memo also reflects the government-favoring uncertainties of constitutional law’s “shocks the conscience” and “reasonableness” tests, as well as the emergency-sensitive doctrine of necessity.³⁰⁰

At the end of 2004, OLC issued a new interrogation memorandum that repudiated much of the torture memo’s analysis and concluded interrogators

297. Cf. REJALI, *supra* note 55, at 315 (“[M]ost techniques that appeared at Abu Ghraib had appeared first in American prisons and plantations, British ships and bases, and French prisons and penal camps in the colonies.”).

298. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, Regarding the Standards of Conduct for Interrogation Under 18 U.S.C. § 2340–2340A (Aug. 1, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

299. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW & JUDGMENT INSIDE THE BUSH ADMINISTRATION* 143–50 (2007); José Alvarez, *Torturing the Law*, 37 *CASE W. RES. J. INT’L L.* 175, 176–77 (2006); Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 *J. NAT’L SEC. L. & POL.* 455, 458 (2005); Koh, *supra* note 10, at 647; Seth F. Kreimer, “*Torture Lite*,” “*Full Bodied*” *Torture, and the Insulation of Legal Conscience*, 1 *J. NAT’L SEC. L. & POL’Y* 187 (2005); Luban, *supra* note 11, at 1425; Waldron, *supra* note 8, *passim*.

300. Similarly, the debate over the application—or not—of the Geneva Conventions to the invasion of Afghanistan reflects the stance toward international law that emerged in the ratification of the Convention Against Torture and ICCPR: these documents have minimal influence and are perhaps merely optional; certainly they have little domestic meaning. For the various documents, see *THE TORTURE PAPERS*, *supra* note 298, at 38–135.

cannot engage in conduct that is “extreme and outrageous.”³⁰¹ Exactly how this new analysis would generate different results was left unclear, however, and the memorandum included a footnote that “reassure[d] the C.I.A . . . that the Justice Department was not declaring the agency’s previous actions illegal.”³⁰² Two months later, OLC issued an additional memorandum—followed by another in May—that “provided explicit authorization to barrage terror suspects with a combination of painful physical and psychological tactics, including head-slapping, simulated drowning and frigid temperatures.”³⁰³ In short, the improved legal analysis continued to follow the understandings reached during ratification of the Convention—that coercion will be permitted by domestic law even if it is questionable under international law.

Similarly, the policy of extraordinary rendition—in which people are seized in one country by or with the assistance of U.S. officials and sent to another country to be coercively interrogated—follows a history of outsourcing torture to local, non-U.S. officials in Vietnam and Latin America.³⁰⁴ It also has roots in the Clinton Administration, although there is some disagreement about whether Clinton officials used it to facilitate coercive interrogation.³⁰⁵ As with the torture memo, the legal debate on rendition draws on the differences between torture and lesser forms of abuse. It also reflects the U.S. understanding of constrained application of Article 3 of the Convention Against Torture. More generally, the rendition debate takes place against the background of U.S. policy on the limited geographic scope of the Convention Against Torture and the ICCPR, as well as of constitutional rights.

Interrogation and detention operations at Abu Ghraib prison drew on these precedents in at least two ways. First, many of the military police who served as guards had worked in prisons. As General Taguba concluded in his report on Abu Ghraib, “without adequate training for a civilian internee detention mission, Brigade personnel relied heavily on individuals within the Brigade who had civilian corrections experience, including many who worked as prison guards or corrections officials in their civilian jobs.”³⁰⁶ Some of the abuse that guards inflicted on prisoners—including the explicitly sexual forms of abuse—derives from the everyday violence, and sexualized violence, of U.S. prison

301. Memorandum from Daniel Levin to James B. Comey, Deputy Attorney Gen., Regarding Legal Standards Applicable Under 18 U.S.C. §§ 2340–2340A (Dec. 30, 2004), in *THE TORTURE DEBATE IN AMERICA* 361, 368 (Karen J. Greenberg ed., 2006).

302. Scott Shane et al., *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1; see Memorandum from David Levin, *supra* note 301, at 362 n.8.

303. Shane et al., *supra* note 302. Both memoranda remain classified.

304. For discussions of extraordinary rendition in the war on terror, see John T. Parry, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELB. J. INT’L L. 516 (2005); Satterthwaite, *supra* note 266, at 1350.

305. McCoy, *supra* note 39, at 109; Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 45, 45; Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23.

306. Dep’t of the Army, The Taguba Report (Mar. 2004), in *THE TORTURE PAPERS*, *supra* note 298, at 433.

culture. At a higher level, military officials contracted with private prison consultants, who were often “former state directors of corrections” from states whose prisons have been involved in litigation over patterns of violence and abuse.³⁰⁷ For example, the former director of the Texas prison system during part of the period that it was in litigation—and who during his superintendence of that system and prisons in New Mexico and Utah allegedly presided over policies that included strip searching, rapid and violent reactions to rule infractions, and the use of restraint chairs—was one of several state prison officials hired in 2003 to oversee the creation of prisons in occupied Iraq.³⁰⁸

Second, many of the interrogations at Abu Ghraib and other places were less obviously violent or abusive because they were conducted according to the now-superseded *Army Field Manual 34-52*, which sets out rules for interrogations.³⁰⁹ These rules draw from the kinds of psychological research that informed the *Kubark* manual as well as materials on police interrogation. The *Field Manual* methods, which include such things as controlling a suspect’s level of fear, elevating or deflating his pride or ego, and using threats and deception, are literally “textbook,” but they nonetheless cause mental suffering.³¹⁰ In most cases, the suffering is temporary, but in other cases the effects are more severe or longer-lasting.³¹¹ Whether this is torture or merely cruel, inhuman, or degrading treatment is not clear, but once again it is the kind of treatment that U.S. law protects through constitutional doctrine and the minimization of international law. The new *Field Manual*, adopted in September 2006, continues to allow a significant amount of coercion even as it seeks to put

307. Michelle Brown, “Setting the Conditions” for Abu Ghraib: *The Prison Nation Abroad*, 57 AM. Q. 973, 984 (2005); see also REJALI, *supra* note 55, at 315; Neil A. Lewis, *F.B.I. Saw Inmates Treated Harshly at Abu Ghraib*, N.Y. TIMES, Oct. 26, 2004, at A11 (“One agent reported seeing inmates stripped naked and put in isolation cells. The report said this seemed similar to what the agent had seen in prison strip-searches in the United States.”).

308. See Devlin Barrett, *Senator Criticizes Hiring of 4 Iraq Prison Officials*, HOUS. CHRON., June 3, 2004, at A6; Kim Cobb, *Ex-Head of TDCJ Set Up Iraq Jail: “Checkered” Career Raises Questions*, HOUS. CHRON., May 16, 2004, at A1; C.C. Simmons, *Prisoner Abuse: From Texas to Baghdad: Former Texas Prison Chief Played Key [R]ole at Abu Ghraib*, THE TOUCHSTONE, Sept./Oct. 2004, <http://www.rtis.com/touchstone/oct2004/06.html>. Note that the former Texas director did not run Abu Ghraib; he was part of a team of advisors sent to help reconstruct “the judicial, prosecutorial and law enforcement sectors” in Iraq. See Press Release, Dep’t of Justice, Department of Justice Sends 25 Advisors to Iraq in Support of Provisional Authority Effort to Reconstruct Criminal System (May 20, 2003), available at http://www.usdoj.gov/opa/pr/2003/May/03_ag_267.htm.

309. DEP’T OF THE ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION 3-13 to 3-20 (1992).

310. Interrogators at Abu Ghraib had official permission to use methods that went beyond the *Field Manual*. See Memorandum from Lt. Gen. Ricardo S. Sanchez Regarding CJTF-7 Interrogation and Counter-Realisation Policy (Sept. 14, 2003), in ADMINISTRATION OF TORTURE: A DOCUMENTARY RECORD FROM WASHINGTON TO ABU GHRAIB AND BEYOND A-232 (Jameel Jaffer & Amrit Singh eds., 2007); Memorandum from Lt. Gen. Ricardo S. Sanchez Regarding CJTF-7 Interrogation and Counter-Resistance Policy (Oct. 12, 2003), in ADMINISTRATION OF TORTURE, *supra* at A-238 to A-239. My point is that even strict adherence to the *Field Manual* leaves room for coercion.

311. For an account of using these methods to obtain information, see CHRIS MACKEY & GREG MILLER, THE INTERROGATORS: INSIDE THE SECRET WAR AGAINST AL QAEDA (2004).

clearer limits on that coercion.³¹² And, as I already suggested, the definitions of torture and cruel, inhuman, or degrading treatment in the Military Commissions Act amendments to the War Crimes Act further limit the kinds of conduct deemed to violate U.S. criminal law, with the result that greater room exists for coercion.³¹³

As a final example, consider the detention camp at Guantánamo Bay. The use of Guantánamo for refugees in the 1990s was an obvious precedent for using it to hold prisoners of the war on terror. Equally important is that the OLC opinion on the use of Guantánamo explicitly relied on the results of the litigation over the rights of those refugees and concluded, based on those cases, that federal courts likely would not exercise habeas jurisdiction over petitions filed by people detained there.³¹⁴ Thus, although Bush Administration officials may have chosen Guantánamo because they thought it would be lawless space, that decision was based on the fact that it really was a lawless space during the Clinton and first Bush Administrations.

Daily life at Guantánamo also draws on ordinary U.S. law and practice. First, as at Abu Ghraib, interrogations at Guantánamo draw on standard forms of military and police violence and on *Kubark*-style forms of psychological coercion.³¹⁵ Second, officials at Guantánamo developed a set of Standard Operating Procedures to govern other aspects of the camp. The overall message of the procedures is one of complete control and domination. Prisoners arrive masked, with earmuffs and restraints. Once at the camp, they are showered, subjected to

312. See DEP'T OF THE ARMY, FIELD MANUAL NO. 2.22-3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (2006). The document repeatedly cites the Geneva Conventions, stresses the importance of treating prisoners humanely, and emphasizes the responsibility of commanders. *Id.* at 5-6, 5-13 to 5-14, 5-17 to 5-18, 5-20. It specifically prohibits cruel, inhuman, or degrading treatment and provides a non-exclusive list of prohibited interrogation methods: "forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner"; "placing hoods or sacks over the head of a detainee; using duct tape over the eyes"; "applying beatings, electric shock, burns, or other forms of physical pain"; "waterboarding"; "using military working dogs"; "inducing hypothermia or heat injury"; "conducting mock executions"; and "depriving the detainee of necessary food, water, or medical care." *Id.* at 5-21. Finally, the new manual lists eighteen permissible methods for all interrogations, as well as a "restricted interrogation technique called separation." The approved methods are the seventeen from the 1992 *Field Manual*, plus the "false flag" method, in which interrogators "convince the detainee that individuals from a country other than the United States are interrogating him, and trick the detainee into cooperating with U.S. forces." *Id.* at 8-6 to 8-18, App. M. Separation is a form of isolation that is meant to be less severe than sensory deprivation. The new *Field Manual* is thus an interesting combination of exhortations to comply with the Geneva Conventions and new methods that allow more psychological coercion and thus make compliance with the Conventions more difficult.

313. See *supra* note 296 and accompanying text.

314. See Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'ys Gen., to William J. Haynes, II, Gen. Counsel, Dep't of Defense, Regarding Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba (Dec. 28, 2001), in THE TORTURE PAPERS, *supra* note 298, at 29. The Supreme Court, of course, ultimately reached the opposite conclusion. See *Rasul v. Bush*, 542 U.S. 466 (2004).

315. Official interrogation procedures at Guantánamo also went well beyond what the *Field Manual* allowed. See Memorandum from Donald Rumsfeld, Sec'y of Defense, to the Commander, US Southern Command, Regarding Counter-Resistance Techniques in the War on Terrorism (April 16, 2003), in THE TORTURE PAPERS, *supra* note 298, at 360.

a medical examination and a body cavity search, fingerprinted, forced to give blood and DNA samples, and placed into new restraints.³¹⁶ The message of control continues with the two-phase Behavior Management Plan for new arrivals—which includes isolation and deprivation of nearly all possessions—as well as the ongoing standards of conduct, a classification process based on cooperation, and a carefully calibrated disciplinary system.³¹⁷ These voluminous procedures emulate the rigorous controls of the supermax prison. And that should not be a surprise. If these methods are permissible for the worst of the worst at home, it follows that they are good enough for the suspected terrorists and war criminals confined at Guantánamo. As if to underscore the point, some members of Congress have argued that transfer of Guantánamo prisoners to the United States presents few risks because they can easily and safely be held at supermax or other maximum security facilities.³¹⁸

All of this suggests a final observation about U.S. legal and political discourse. Before September 11, ideas of the rule of law, legitimate government conduct, and sovereign power—not to mention notions of decency—had already evolved to make room for the kinds of practices that are routine in police work and in maximum security and supermax prisons. That is to say, the facilities, rules, and practices that exploded into public view at Abu Ghraib and Guantánamo are not so very different from those that have operated and continue to operate on a much larger scale within the United States. Seen in this way, the conclusion beckons that the appropriate descriptive narrative for torture and abuse in the war on terror is less one of disjuncture and more one of continuity with the rule of law as a domestic practice.

316. DEP'T OF DEFENSE, HEADQUARTERS: JOINT TASK FORCE - GUANTÁNAMO, CAMP DELTA STANDARD OPERATING PROCEDURES 3.3, 4.2–4.3 (2003).

317. *Id.* at 4.3, 6.7–6.8 & chs. 8–9.

318. See Mark Mazzetti & Scott Shane, *Where Will Detainees from Guantánamo Go?*, N.Y. TIMES, Jan. 24, 2009, at A13 (quoting Sen. Diane Feinstein, Sen. Carl Levin, and Rep. John Murtha).