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## on torture

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# Acquiescence: Torture, Lawyers, and Moral Failure

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## Preface

I am a lawyer. But I have not come to discuss prosecuting individuals for torture. As political power is transferred in the coming weeks,<sup>1</sup> I anticipate increasing demands for these prosecutions.<sup>2</sup> But I want us to pause, and remember that, regardless of any successful prosecutions, torture will not disappear.<sup>3</sup> History, I am sad to say, bares this out.<sup>4</sup> I also want us to

pause, and ponder if, by focusing on torture, we risk taking our focus off other violence, such as bombings and shootings that, while not being torture, destroy life and health – and in greater numbers and in more places and with greater efficiency.<sup>5</sup>

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<sup>1</sup> Lara Jakes Jordan, *Obama Aadvicers: No Charges Likely Against Workers Who Authorized Harsh Interrogation Methods*, ASSOCIATED PRESS (November 17, 2008).

<sup>2</sup> See, e.g., National Lawyers Guild Press Release, JOHN YOO, DAVID ADDINGTON STONEWALL CONGRESS; NATIONAL LAWYERS GUILD URGES SPECIAL PROSECUTOR, CONGRESSIONAL WAR CRIMES COMMISSION (Thursday, June 26, 2008).

<sup>3</sup> For an insightful discussion of the use of trials, see Rebecca Wittmann, *Torture on Trial: Prosecuting Sadists and the Obfuscation of Systematic Crime*, ON TORTURE (Thomas C. Hilde, ed., Johns Hopkins University Press, 2008) 8-18 (hereinafter, “ON TORTURE”). Wittmann argues that the trials of war criminals allow the system that produces the violence of war to continue unexamined.

<sup>4</sup> Torture, of course, is not new. For an historical overview of the prohibition against torture, see Carlos Castresana, *Torture As A Greater Evil*, ON TORTURE 133. The jurisprudence of torture extends from, at least, medieval Roman Catholic canon law, while, in recent

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decades, torture has been practiced “from Burma to El Salvador, Chile to Vietnam, Iraq to Algeria, Saudi Arabia to Sierra Leone, Rwanda to Romania, Israel to Guantanamo, Argentina to the Phillipines.” What is “new,” as Hilde explains is the “overt legalization of torture by a state that traditionally purports to be the opposite of tyranny.” Thomas C. Hilde, *Introduction*, ON TORTURE 4-5. Prosecuting those who allegedly “legalized” torture, and those who tortured pursuant to the alleged legalization, may do very little to eliminate torture from the future. The purpose of the international laws against torture is not, however, primarily for deterrence or prosecution, but rather, primarily, for the reinforcement of existing norms. See, e.g., David Luban, *Beyond Moral Minimalism*, ETHICS AND INTERNATIONAL AFFAIRS, Vol. 20, No. 3., pp. 354-355 (2006).<sup>5</sup> In contrast to the moral “outrage” rightly expressed (albeit not for long) in response to the publicity of the now-infamous Abu Ghraib photographs, there was no corresponding disgust and revulsion at the United States launching long-range high-altitude bombers from Florida to reduce to rubble homes, buildings, and lives in Afghanistan. Alphonso Lingis, *The Torturers and Their Public*, ON TORTURE 108. In contrast to the hundreds of detainees brought to Guantanamo Bay, millions have been left homeless and hundreds of thousands have died as a result of the United States invasion of Iraq.

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I have not come to discuss the law, but rather lawyers. What I want to understand is, how could lawyers get it so wrong? How is it that lawyers, the officers of the American court system, could come to believe that torture is permissible, especially when the texts of the legal prohibitions are so clearly against it.<sup>6</sup> It is too easy to dismiss the so-called “torture lawyers” as political hacks.<sup>7</sup> We will gain no ground in reducing the chances of future torture if we gain no ground in understanding how lawyers who believe

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See, e.g., Morton Abramowitz, *The Shortchanging of Iraqi Refugees*, LOS ANGELES TIMES (June 23, 2008); Gilbert Burnham, Riyadh Lafta, Shannon Doocy, and Les Roberts, *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, THE LANCET (October 11, 2006). We tend to condemn only the extreme instances of violence as “abnormal” while allowing the government to justify as “normal” all other instances of violence. Rebecca Wittmann, suggests this mean that “the decision to support war is always, ultimately, a decision to support war crimes.” Rebecca Wittmann, *Torture on Trial: Prosecuting Sadists and the Obfuscation of Systematic Crime*, ON TORTURE. 15-16. On a reminder of the impact of violence outside the conception of “torture,” see Adi Ophir, *There Are No Tortures in Gaza*, ON TORTURE 27.

<sup>6</sup> For example, Article 4 of the UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN DEGRADING TREATMENT OR PUNISHMENT, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85, provides that “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.” In order to meet this obligation, 18 U.S.C. Section 2340 criminalizes torture under United States law. For a technical discussion of defining “torture” under international and United States law, see Gail H. Miller, *DEFINING TORTURE* (Floersheimer Center for Constitutional Democracy 2005). For a discussion of the legal prohibitions of torture beyond those contained in written agreements, see, e.g., Robert K. Goldman, *Trivializing Torture: The Office Of Legal Counsel’s 2002 Opinion Letter And International Law Against Torture*, HUMAN RIGHTS BRIEF 12 No. 1 (2004) 1-4

<sup>7</sup> See, e.g., Scott Horton, *Yoo Two*, HARPER’S MAGAZINE (April 3, 2008).

themselves good men and women could convince themselves that torture is, at least sometimes, warranted.

### Context

Although my direct focus is not so much John Yoo and Jay Bybee<sup>8</sup> and Bagram<sup>9</sup> and Guantanamo,<sup>10</sup>

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<sup>8</sup> On August 1, 2002, then Assistant Attorney General Jay S. Bybee signed for President Bush’s guidance a (now infamous) Office of Legal Counsel memorandum of law concluding that torture was not illegal—at least not always, if the President ordered it. For a discussion of this and related memoranda, see Scott Horton, *Yoo Two*, HARPER’S MAGAZINE (April 3, 2008); see also *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at

<http://levin.senate.gov/newsroom/release.cfm?id=299242>.

Both Yoo and Bybee are now being investigated by the Office of Professional Responsibility at the Department of Justice for violating their professional duties in the preparation of this memorandum. See, e.g., Stephen Gillers, *The Torture Memo*, THE NATION (April 9, 2008). Perhaps government lawyers should bear the risks in a way that private practice lawyers do not. Michael Hatfield, *Legitimacy, Identity, Violence and the Law*, ON TORTURE 158; Christopher Kutz, *The Lawyers Know Sin: Complicity in Torture*, THE TORTURE DEBATE IN AMERICA 245 (Karen J. Greenberg, ed., Cambridge University Press, 2005) (hereinafter, “THE TORTURE DEBATE”). See also Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture* 10 LEWIS & CLARK LAW REV. 511, 526 (2006). For a critical analysis of this memorandum and other memoranda related to it, David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 162-207 (Cambridge University Press, 2007).

<sup>9</sup> Bagram Airfield, Afghanistan was one of the most infamous sites of United States torture justified as “aggressive interrogation techniques.”. See, e.g., *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at <http://levin.senate.gov/newsroom/release.cfm?id=299242>.

<sup>10</sup> Guantanamo Bay, Cuba appears to have been the initial site for United States torture justified as “aggressive interrogation techniques.”. See, e.g., *United States Senate Armed Services Committee Hearing: The*

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this is the context in which we are living at the moment. It now seems undeniable that demand for abuse descended from the top political offices to the bottom interrogation cells, and that lawyers were involved from the beginning.<sup>11</sup> Their written memoranda, it seems, were not intended as good faith efforts to constrain any behavior, but rather as shields to defend against future prosecution.<sup>12</sup>

The overwhelming consensus of the American bar is that torture, even when called “coercive interrogation,” is illegal -- and, it also seems to me, there is a strong consensus that it should remain so.<sup>13</sup> But, before I proceed, I must point out that

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*Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at

<http://levin.senate.gov/newsroom/release.cfm?id=299242>.

<sup>11</sup> See *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at

<http://levin.senate.gov/newsroom/release.cfm?id=299242>.

<sup>12</sup> According to the *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques*, these memoranda were intended to “create a shield to make it difficult or impossible to hold anyone accountable for” torture.

*United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at

<http://levin.senate.gov/newsroom/release.cfm?id=299242>.

Among others, Stephen Gillers had made this point, *Torture: The Road to Abu Ghraib and Beyond*, THE TORTURE DEBATE 31, as has Noah Feldman, *Ugly Americans*, THE TORTURE DEBATE 273. Richard F. Bilder and Detlev F. Vagts note that Donald Rumsfeld invoked the “advice of counsel” defense in a televised interview, see Richard F. Bilder and Detlev F. Vagts, *Speaking Law to Power: Torture and Lawyers*, THE TORTURE DEBATE 55 (fn. 32).

<sup>13</sup> For a detailed criticism of the infamous August 1, 2002 Office of Legal Counsel memorandum, see, *See, e.g.,* W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 Cornell L. Rev. 67 (2005). Calling it a legal analysis of which no one “could be proud,” on page 68, Wendel cites several sources for arguing not only for ethical lapses but blatant incompetence in the preparation of the memo, such as, “[I]n my professional

arguments defending torture have been made by law professors, some of whom occupy chairs in the most influential schools of the legal academy.<sup>14</sup>

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opinion, the August 1, 2002 OLC Memorandum is perhaps the most clearly erroneous legal opinion I have ever read,” Harold Hongju Koh, Dean, Yale Law School cited in the Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States Before the S. Comm. on the Judiciary, 109th Cong. 158 (2005), available at <http://www.access.gpo.gov/congress/senate/senate14ch109.html>; Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, Wash. Post, June 20, 2004, at B3 (criticizing “stunning legal contortions” in the memos); Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. Times, June 25, 2004, at A14 (quoting Cass Sunstein's opinion that the legal analysis in the memos was “very low level, . . . very weak, embarrassingly weak, just short of reckless”); Ruth Wedgewood & R. James Woolsey, *Opinion, Law and Torture*, Wall St. J., June 28, 2004, at A10 (concluding that the memos “bend and twist to avoid any legal restrictions” on torture and ignore or misapply governing law). For an exceptionally strong reaction by an international law scholar and former military lawyer, see Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811, 811 (2005) (“Not since the Nazi era have so many lawyers been so clearly involved in international crimes concerning the treatment and interrogation of persons detained during war.”).

<sup>14</sup> See, e.g., Harvard University's Felix Frankfurter Professor of Law Alan Dershowitz interviewed by CNN Anchor Wolf Blitzer (March 4, 2003), *Dershowitz: Torture Could Be Justified* available at <http://edition.cnn.com/2003/LAW/03/03/cnna.Dershowitz/>; the Wall Street Journal opinion article co-authored by the University of Chicago's Kirkland and Ellis Professor of Law Eric Posner and Harvard University's John H. Watson, Jr. Professor of Law Adrian Vermeule, *A 'Torture' Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22; and the University of Texas's W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair Professor of Government Sanford V. Levinson's “Precommitment” And “Postcommitment:” *The Ban on Torture In the Wake of September 11*, 81 TEX. L. REV. 2013 (2003). The weight of the legal academy is

And I must point out, what is unfortunately undeniable, that pro-torture arguments have been made by individuals who succeeded academically and professionally and politically to the point in their career at which they were advising the President, directly or indirectly, as the case may be.<sup>15</sup>

Giving legal advice about torture should not have been a hard professional ethics case. It is an easy case. If the law had permitted torture while morality prohibited it, that would have been the hard professional ethics case. Here, however, the professional ethics is easy: morality and the law coincide. The intentional infliction of severe pain on a detainee is prohibited – morally and legally.<sup>16</sup> There is no tension between the moral and legal characterization of torture.<sup>17</sup>

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squarely on the other side, however. See, e.g., *supra*, footnote 13.

<sup>15</sup> After the August 1, 2002 Office of Legal Counsel memorandum was written, Jay Bybee was appointed by the President to the U.S. Court of Appeals for the Ninth Circuit (the Senate confirmed him to this lifetime appointment within two months, though the memorandum was apparently unknown to members of the Senate at the time). John Yoo returned to his position as a member of the faculty at Boalt Hall School of Law, University of California, Berkeley.

<sup>16</sup> Article 4 of the UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN DEGRADING TREATMENT OR PUNISHMENT prohibits torture, while Article 1 defines as “an 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.”

<sup>17</sup> The pro-torture lawyers, especially those who wrote the various government memoranda authorizing

## The Question

The question is, how could a lawyer get this so wrong? It is, as if, suddenly, government lawyers began to argue that slavery were legal, as the lesser of some other evil, so long as we call it “permanent employment” rather than “slavery.” If we can’t trust legal prohibitions on torture and slavery, even when called “coercive interrogation” and “permanent employment,” we must doubt the health of the rule of law.

I do not think the problem is one of the law. It seems clear to most of us that the law prohibits torture. There are few good faith ambiguities on this topic.<sup>18</sup> The problem, I believe, is that lawyers who justify torture as legal, beforehand have concluded, that it is morally necessary to do so.

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torture, did not have the moral clarity and fortitude to object to torture when the law expressly forbade it. In other words, they gave in to temptation when the conditions were greatest to be protected from it. Perhaps they “do not think of themselves as evil, but rather as guardians of the common good, dedicated patriots who get their hands soiled and endure perhaps some sleepless nights in order to deliver the blind ignorant majority from violence and anxiety.” Ariel Dorfman, *Are There Times When We Have To Accept Torture?*, ON TORTURE 110.

<sup>18</sup> For a technical discussion of defining “torture” under international and United States law, see Gail H. Miller, *DEFINING TORTURE* (Floersheimer Center for Constitutional Democracy 2005). For a discussion of the legal prohibitions of torture beyond those contained in written agreements, see, e.g., Robert K. Goldman, *Trivializing Torture: The Office Of Legal Counsel’s 2002 Opinion Letter And International Law Against Torture*, HUMAN RIGHTS BRIEF 12 No. 1 (2004) 1-4. What we are being asked to “throw away,” is the “wisdom, national and international, that has taken us thousands of years of tribulation and shame to achieve.” This hard-won wisdom as how to face the horror of torture has “led almost every nation to sign treaties over the past decades declaring these abominations as crimes against humanity.” As Ariel Dorman asks, “are we so morally sick, so deaf and dumb and blind, that we do not understand this?” Ariel Dorfman, *Are We Really So Fearful?*, ON TORTURE 113-114.

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Their sincere conviction of the moral appropriateness of torture is all that I can fathom has driven their legal analysis to the same conclusion. Thus, if we are to understand how it is lawyers could get the legal analysis so wrong, we have to invoke their moral analysis.<sup>19</sup> For, surely, only a strong moral conviction that torture ought to be used could account for disregarding such a clear, exception-free, international law.<sup>20</sup>

### An Answer

In other words, I believe some lawyers have become confused on the legality of torture because they have become confused on its morality. And I believe I know the cause of their moral confusion.

I suggest to you that lawyers are professionalized to be worse at moral reasoning than non-lawyers. This is not self-loathing lawyer-bashing. I think there is a deep problem here.<sup>21</sup> Lawyers, after all,

are connected to the power of the state in a unique way. Our reasoning directs state power – who is imprisoned, who is set free, who loses custody of the kids, who has to pay taxes. To suggest that we, officers of the court, are systematically worse at moral reasoning than our fellow citizens is to suggest a deep problem. I do not do so casually.

The act of being professionalized as an American lawyer involves a radical de-sensitizing. Law students are taught to over-ride their moral intuition.<sup>22</sup> It is essential to the professional model, as we currently have it, that the lawyer is no moral endorser of the client's objective.<sup>23</sup> If the client has the legal right to foreclose on the orphanage, the lawyer is not personally responsible if he helps the client do it. This disconnect is, even, praised. It is considered a professional ideal for a Jewish lawyer to represent an anti-Semite or a black lawyer to represent a Klansman.<sup>24</sup> Lawyers are professionalized to

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<sup>19</sup> While believing their moral analysis is wrong, it is clear to me that supporters of torture are engaged in a moral analysis. They have concluded that torture is morally required “in the name of salvation, some superior goal, some promise of paradise.” Ariel Dorfman, *Are There Times When We Have To Accept Torture?*, ON TORTURE 110. For Jay Bybee and John Yoo, for example, a separate issue is whether their moral conclusions were formed prior to their engagement in the memoranda-production, or as a result of their engagement. See David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 279-283 (2003).

<sup>20</sup> Article 4 of the UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN DEGRADING TREATMENT OR PUNISHMENT prohibits torture, while Article 2 provides that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability or any other public emergency, may be invoked as a justification of torture” and “an order from a superior officer or a public authority may not be invoked as a justification of torture.”

<sup>21</sup> In its proper historical context, we see this is not a new problem. We should place the failings of the “torture lawyers” in the context of failings of the

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American lawyers who supported of the Alien and Sedition Act, the suspending of habeas corpus during the Civil War, stripping the rights of dissent during World War I, and the internment of Japanese Americans during World War II. Burt Neuborne provides this context in the panel discussion recorded in *Torture: The Road to Abu Ghraib and Beyond*, THE TORTURE DEBATE 14.

<sup>22</sup> Others, of course, have also noted that law schools teach students not to think through the moral consequences of their actions, and to obsess with “precedent” without any understanding of the moral choices lawyers make, see Joshua Dratel, *The Curious Debate*, THE TORTURE DEBATE 111-117.

<sup>23</sup> American Bar Association Model Rules of Professional Conduct 1.2(c): “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views or activities.” A favorite example of application is a lawyer who personally opposes smoking and the marketing of cigarettes but works for a tobacco company.

<sup>24</sup> See, e.g., Aryeh Neier, *DEFENDING MY ENEMY: AMERICAN NAZIS, THE SKOKIE CASE, AND THE RISKS OF FREEDOM* (E.P. Dutton 1979); Thomas B. Metzloff, *The Constitution and*

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suspend their personal identity while wholeheartedly investing the remainder of their being into their client's objective.<sup>25</sup> Lawyers are professionalized, in other words, to acquiesce in their client's moral conclusions rather than to insist on their own.<sup>26</sup>

Of course, this is usually thought to be justified by an appeal to the legal system itself.<sup>27</sup> Each side has a lawyer, and each lawyer is devoted to a side. The job of the lawyer is to zealously represent his client's objectives, not his own, even if he abhors his client. I don't want to argue the merits of this division of responsibility in our legal system. I want to highlight, however, that the lawyer is professionalized to acquiesce morally -- on this level too. She replaces her personal moral instincts with the faith that the legal system accomplishes

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*the Klan: Understanding the Burning Cross in Virginia v. Barry Black*, CIVIL RIGHTS STORIES 347 (Foundation Press 2008).

<sup>25</sup> I believe this answers Burt Neuborne's question, "what is it in law schools causing law students to believe they just need to find some case, some argument?" *Torture: The Road to Abu Ghraib and Beyond*, THE TORTURE DEBATE 14. This process begins in law school, of course, but it intensifies over the years in which the lawyer is engaged in the practice of law. As David Luban points out lawyers' jobs are belief-altering situations. Lawyers put themselves in 2,400 hours a year of a job that alters their belief. Before long, they find themselves believing that a special professional morality, distinct from the morality of the extra-professional life, justifies what they do -- and this belief becomes a fixed part of their moral personality. They effortlessly negotiate the transition from one form of life to the other, with no sense of tension or contradiction. David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 301 (2003).

<sup>26</sup> This understanding of the profession is termed "neutral partisanship" by David Luban. For Luban's analysis of neutral partisanship, see David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 20ff (Cambridge University Press, 2007).

<sup>27</sup> For a discussion of whether or not the adversary system justifies as much as is often claimed for it, see David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 21ff (Cambridge University Press, 2007).

greater moral goods by her accepting a truncated personal moral role. Perhaps it does; perhaps it doesn't. What is impressive to me is that lawyers are professionalized into believing that they are at no personal moral risk -- even while violating their personal sense of right and wrong. Lawyers are professionalized into believing in the moral good of moral deference.

I want to bring this back now to the pro-torture argument. When you look at the argument, you realize how important deference is to the argument.<sup>28</sup> It is essential to the argument's success that you defer to intelligence experts who assure you that torture works to get good information. It is essential to defer to the good faith and skills of the torturers who know how to torture effectively rather than sadistically. It is essential to defer to the apparatus that detains and selects those to be tortured, so that only those who are most likely to have the information ever get tortured. In other words, in order to justify torture, you have to trust the moral clarity and practical abilities of all those in charge of the torture. We have to say that our personal squeamishness must give place to these experts who know the real truth. They are the only ones who can really say what works and what doesn't, what is really right and wrong. Our only moral job is to support them. It is our moral job to be adult enough, sober enough, serious enough, strong

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<sup>28</sup> I have in mind, specifically, the deference required to accept the "ticking-time bomb" rationale. For an analysis of this rationale, see David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, 91 *Va. L. Rev.* 1425 (2007) and Thomas C. Hilde, *Information and the Torture Imagination*, *ON TORTURE* 197. For a critical history of the recent usage of this narrative, see Stephanie Athey, *The Terrorist We Torture: The Tale of Abdul Hakim Murad*, *ON TORTURE* 87.

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enough, man enough, to defer to their moral clarity and authority.<sup>29</sup>

This moral acquiescence is an intentional diffusion of moral responsibility.<sup>30</sup> It is an intentional suppression of personal moral sensitivity in favor of the moral conclusions of someone else. Perhaps the “someone else” is an expert, or our client, or a system. We humans are, on the whole, much better followers than leaders. And, thus, acquiescence fits us.<sup>31</sup> We want to believe that someone else knows better. We want to believe that we needn’t take the risks or trouble of following our own conscience. Lawyers are trained to be the most helpful followers of all.<sup>32</sup> The lawyer is trained to silence himself.<sup>33</sup>

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<sup>29</sup> For a discussion of the “manliness” of torture, see Daris Rejali, *Torture Makes the Man*, ON TORTURE 165-183. We have “the worry that we have become sissies and our enemies know it,” 168.

<sup>30</sup> The intentionality distinguishes this situation from the more commonly understood “diffusion of responsibility,” which is, as David Luban explains, “the well-known fact that groups of people are less likely to respond helpfully in emergency situations than individuals.” David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 283 (2003).

<sup>31</sup> It is notable that the military lawyers, who did, by-and-large, consistently object to torture are trained to provide moral analysis as well as legal analysis. Michael (Dan) Mori, *Torture: The Road to Abu Ghraib and Beyond*, THE TORTURE DEBATE 27.

<sup>32</sup> This reflects the observation by Tzvetan Todorov that “in any human collectivity, there is a convinced, resolute minority who act, and a passive, indecisive majority who prefer to follow, and that the minority almost always prevails. Tzvetan Todorov, *Torture in the Algerian War*, ON TORTURE 23.

<sup>33</sup> I have intentionally used the masculine in this and most instances throughout this essay. While I have not done an empirical analysis, there does not appear to be many women lawyers who have publicly championed torture. That is not to say that there have been no women defenders of aggressive interrogation, see, e.g., Heather MacDonald, *How To Interrogate Terrorists*, THE TORTURE DEBATE 84. (Note that MacDonald’s claims that

Doing something we suspect to be wrong because someone else indicates it is not, is the perennial evil. It recurs throughout human history. It opens the bible as the first sin. It is the greatest mechanism for destruction. It is in all state-sanctioned uses of violence. It is in the lynch mob. It was in Nazi Germany. It was in the subjects of Milgrim’s study who continued to administer the electric shocks to the screaming patient, simply because they were told to do so by the instructor.<sup>34</sup> The subjects administered those shocks, over their own moral repulsion, out of some sort of faith, some sort of trust, that the guy in the lab coat, the system that put the guy in the lab coat in charge, had a greater moral clarity in this situation than they could.

This suspending of personal moral judgment is inherent in lawyering. The lawyer acquiesces in the client’s objectives, defers to the client’s morality, taking care only for the client’s legality. The lawyer defers to the legal system, trusting that its calculation of moral responsibility is more reliable than his own. The lawyer is trained to silence himself.

We cannot expect to cure lawyers of this evil, since we do not know how to cure anyone else. And we don’t. We know that education won’t do it. The German intellectual heritage did not prevent

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interrogators never tortured and that the “Bybee memo” was not causally connected to torture have both been refuted. See, e.g., *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at <http://levin.senate.gov/newsroom/release.cfm?id=299242>.) Nevertheless, we cannot conclude that torture is an exclusively male occupation. Barbara Ehrenreich, *Feminism’s Assumptions Upended*, ON TORTURE 184.

<sup>34</sup> For an analysis of Stanley Milgrim’s famous experiments in the context of professional legal ethics, see David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 239-266 (Cambridge University Press, 2007).

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Nazism. Enlightened French culture did not protect Algerians.<sup>35</sup>

This is a deep criticism. It strikes at the deepest of our modern values. It rejects education as the key to a better future. It rejects books and essays and classrooms and discussion groups as the way to escape the darkness. If we cannot educate ourselves into a better future, we are at our collective wit's end as how to get there.

But I do not want to over-state this case. It is essential not to over-state the case, or else there is despair. While most of Milgrim's subjects shocked screaming patients because they were told to do so, a great many of them did not.<sup>36</sup> While most German lawyers, who were asked, handed in tidy legal opinions to support their Nazi client's objectives, some did not.<sup>37</sup> While some US government lawyers claimed torture was legal, some did not.<sup>38</sup> There is always a light shining, but often, unfortunately, only through a minority. We cannot over-state the case, or else we will ignore this bit of light, weak though it may be, and to do that, would leave us lost in despair. We must always remember these beacons of light.

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<sup>35</sup> Not even the memory of having been tortured is sufficient inoculation. For a discussion of the potentially "favorable" and "unfavorable" factors, see Tzvetan Todorov, *Torture in the Algerian War*, ON TORTURE 18-26.

<sup>36</sup> David Luban rightly emphasizes that about 1/3 of the subjects did not continue. David Luban, *LEGAL ETHICS AND HUMAN DIGNITY* 240-241 (Cambridge University Press, 2007).

<sup>37</sup> In contrast to the more political lawyers, some German lawyers (mostly in the Abwehr) consistently argued for the application of the Geneva and Hague conventions to those captured by the German Army during World War II. Most of these lawyers, ultimately, became the victims of the Gestapo. See Scott Horton, *Through A Mirror Darkly: Applying the Geneva Conventions to a "New Kind of Warfare,"* THE TORTURE DEBATE 136.

<sup>38</sup> See, *infra*, footnote 40.

Unfortunately, it is probably a lost cause to look for the conditions favorable to producing more beacons.<sup>39</sup> After all, we cannot realistically hope to socially engineer lawyers willing to be shot by Nazis rather than simply sign legal memos requested by Nazis.

We may have a hint of something, though, in those US government lawyers who, by and large, did consistently object to torture: the Judge Advocate General lawyers.<sup>40</sup> I doubt it was their superior

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<sup>39</sup> See Tzvetan Todorov, *Torture in the Algerian War*, ON TORTURE 18-26.

<sup>40</sup> The role of these lawyers has been documented by the United States Senate Armed Services Committee. See *United States Senate Armed Services Committee Hearing: The Origins of Aggressive Interrogation Techniques* (June 17, 2008) available at <http://levin.senate.gov/newsroom/release.cfm?id=299242>. Many of their activities are documented in 151 CONG. REC. S8772-S8803 (daily ed. July 25, 2005). The popular press also has described the role of these military lawyers, see, e.g., Hajjar, *An Army of Lawyers*, THE NATION (December 26, 2005), including the coverage of the award to five of these lawyers of the American Civil Liberties Union Medals of Liberty. In July, 2005 Senator Lindsey Graham, himself a reservist Air Force Judge Advocate General (JAG) corps, summarized the legal advice of the JAG lawyers in contrast to the Department of Justice civilian lawyers' advice: "[Y]ou have to understand what the law actually says. The DOJ's interpretation of the torture statute *from a lawyer's point of view* was absurd. And the JAGs were telling the policymakers: If you go down this road, you are going to get your own people in trouble. You are on a slippery slope. You are going to lose the moral high ground . . . . And they were absolutely right. (emphasis added)." 151 Cong. Rec. S8794 (daily ed. July 25, 2005). In the American system, the military is placed under civilian control in order to effectively police the military. However, it was, it turns out, the military lawyers, rather than the civilian leaders, who resisted these abuses. Burt Neuborn, Anthony Lewis, and Dana Priest, *Torture: The Road to Abu Ghraib and Beyond*, THE TORTURE DEBATE 16-18. These lawyers' responses represent the good that can be achieved when the bar functions "as an important counterweight to arbitrary authority." *LEGAL ETHICS AND HUMAN DIGNITY* 5 (Cambridge University Press, 2007). The issue, then, becomes what steps ought we

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education. I believe it was their fear. Their fear of violating the categorical imperative, the golden rule, was in their gut, not their head. They feared that Americans torturing would lead to Americans being tortured. This was not abstract. It was an incarnated fear. It was a deep realization that powerless men with children and wives and memories of sunshine and ease would be maimed and mutilated. It was their fear that they could be among them. It was their fear that they could dearly pay for endorsing torture. If not themselves personally, then those with whom they personally identified: fellow soldiers.

This, then, perhaps is our insight into the cure for immorality: deeply worrying that we will become the victim of our own actions, our own moral decisions.<sup>41</sup> To put it in an old but clear language, it is the deep worry that we will go to hell if we take the wrong turn. The military lawyers, it seems, could more easily imagine what that hell would look like and how it is they would get there.<sup>42</sup> That imagination allowed them to connect the risks of their moral reasoning with the reality of

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take to make these results more likely in more situations.

<sup>41</sup> As Stephanie Athey notes, those who support state violence always believe they will be protected by the state rather than subjected to its violence. Stephanie Athey, *The Terrorist We Torture: The Tale of Abdul Hakim Murad*, ON TORTURE 87. This psychologically protects the supporters from concern that they will be victimized by their own moral decision – being tortured by the state whose torture of others they support. It is an instance of blaming the victim, perhaps, in which torture supporters believe there is something about the victim that would make torturing him at least somewhat justifiable on the basis of some distinction between themselves and the victim. For a discussion of “blaming the victim” in the legal ethics context, see David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 291 (2003).

<sup>42</sup> These lawyers did not have an obscured awareness of the implications for “one’s other, one’s equal, and oneself.” It was not a “game.” Pilar Calverio, *Torture’s New Methods and Meanings*, ON TORTURE 124.

human pain in a way that made them realize the risk was their personal own – not someone else’s. It could be neither delegated nor avoided.

### Implications

Lawyers, I am afraid, have been convinced that we do not risk hell when deferring to our client’s lead.<sup>43</sup> If we cannot raise a fear of hell among ourselves as lawyers, perhaps, at the very least, we could stop telling one another that overcoming our own squeamishness is the great call of the law. If we would not foreclose on the orphanage, we should not help someone else to do it; if we would not drown a man to make him talk, then we should not help someone else to do it.

It should not be controversial to claim that the rule of law is better protected by those responsive to conscience than it is by those who intentionally disregard conscience for pay and promotions. But it is. It is wholly inconsistent with the principles and practices of the contemporary American bar. Perhaps one long-term project needs to be pulling-away the comfortable insulation lawyers feel in deferring to the American Bar Association’s assurances of what is moral.<sup>44</sup> To keep with the religious language, I submit that God has delegated nothing to the American Bar Association. What human morality requires of each us is not a bar committee’s decision. Lawyers need to struggle with how comfortable they are with a *dis-*

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<sup>43</sup> Perhaps clients are taking their cues as to the morality of their actions from their lawyers’ silence, while the lawyers are taking their cues from the clients. This might be described as “pluralistic ignorance,” in which the lawyers and the clients are each reinforcing wrong beliefs. David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 284 (2003). Or, more colloquially, we might say “none of us is as stupid as all of us,” equating stupidity and morality.

<sup>44</sup> David Luban has made a considerable contribution toward this end with his *LEGAL ETHICS AND HUMAN DIGNITY* (Cambridge University Press, 2007).

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integrated moral personality, how many moral anomalies they feel are justified by their well-paying professionalism.

I speculate that many fewer lawyers in the future would sign-off on torture if their professional education did not begin by separating their skills for intellectual agility and their skills for moral resolution. In our law schools, we do not train leaders, we train facilitators. I cannot pretend to be shocked by the results. Lawyers serving those who believe torture is justified will, I submit, 9 times out of 10, twist their own minds into agreement.<sup>45</sup> Unfortunately, and incorrectly, they likely believe this is their moral obligation.

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<sup>45</sup> For a discussion of why lawyers' beliefs tend to fall in line with their clients, see David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, especially 281-284 and 301-304 (2003).