1. 'Jurists, Bad Christians': Torture and the Rule of Law*

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> Detainee began to cry. Visibly shaken. Very emotional. Detainee cried. Disturbed. Detainee began to cry. Detainee bit the IV tube completely in two. Started moaning. Uncomfortable. Moaning. Began crying hard spontaneously. Crying and praying. Very agitated. Yelled. Agitated and violent. Detainee spat. Detainee proclaimed his innocence. Whining. Dizzy. Forgetting things. Angry. Upset. Yelled for Allah. […] Urinated on himself. Began to cry. Asked God for forgiveness. Cried. Cried. Became violent. Began to cry. Broke down and cried. Began to pray and openly cried. Cried out to Allah several times. Trembled uncontrollably.[1]

I.

The September 11 attacks of 2001 marked a watershed in political and legal philosophy: What developed in the wake of these attacks has shifted the basic premises of discussion onto entirely different grounds, in what can be described in certain important respects as a reversal of the earlier paradigm, or even as a throwback, depending on how one chooses to look at the change.[2] In fact it used to be, in the 1990s, that philosophers of law could work on the idea of a cosmopolitan order, could work on ways to extend constitutional principles to the sphere of international relations, could even conceive (not ingenuously) of institutionalizing the Kantian project for a perpetual peace.[3] But that has quickly vanished, the discussion now fo-

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1 Internal log detailing the interrogation at Guantanamo of a man identified as Detainee 063, quoted by P. Sands in his article 'The Green Light', *Vanity Fair*, May 2008.

2 See the bleak and dreary assessment presented in E. Denninger, 'Recht, Gewalt und Moral – ihr Verhältnis in nachwestfälischer Zeit: Ein Bericht', *Kritische Justiz* 38 (2005): 359ff.

3 Significant in this regard, because emblematic of a certain outlook or *Stimmung* that had a noticeable hold on the community until a few years ago, is Jürgen Habermas's fine essay 'Kants Idee des ewigen Friedens – Aus dem historischen Abstand von 200 Jahren', now in J.

cussing on the merits of preventive war, on the eclipse of international law in the mould of Westphalia, and on 'benevolent hegemony' – and the idea has even been floated of empire and imperialism, literally so stated.[4] We thus have, among others, essayists and scholars like Michael Ignatieff and Michael Walzer, once styled as 'liberal,' who are making the case for a 'light' form of 'Empire,'[5] and Thomas Nagel reminds us that if we are to achieve justice on a global scale we will have to take a Hobbesian path, by going through the (equally global) injustice of rule by the strongest, with a de facto monopoly of force exercised on an international stage.[6]

The paradigm reversal goes even deeper, however. Before 9/11, we were still working from within a conception of law that minimized law's coercive side and to a certain extent extruded force and violence from the archetypal context in which law is experienced. When confronted with a choice between 'facts' and 'norms,' between 'facticity' and 'validity,' jurists and theorists generally seemed to favour norms and validity, embedding these in the language of rights, principles, reasons, and arguments. Law was thus conceptualized as being fundamentally grounded in argumentation, discourse, and persuasion rather than in coercion: Essential to law was its laying a claim to justice, not its being a fait accompli. In a word, a 'milder,' kinder law was being forged.[7]

But in a dramatic turn now, the idea of force and violence as essential, foundational elements of law has swung back into action.[8] This resurgence can primarily be observed in international law – with John Bolton, for example, former U.S. ambassador to the United Nations, arguing that this law does not 'really'[9] exist – and the

Habermas, *Die Einbeziehung des Anderen* (Frankfurt, Suhrkamp, 1996), 192ff. Similar, too, is G. Teubner, 'Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorien', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 63 (2003): 1ff. Evidence that the upbeat 'mood' was not to last, however, came as early as in J. Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?', in *Der gespaltene Westen* (Frankfurt, Suhrkamp, 2004) 113ff.

4 For a discussion, see M. La Torre, 'Global Citizenship? Political Rights under Imperial Conditions', *Ratio Juris* 18 (2005): 236ff.

5 Compare the words of the British historian and essayist Tony Judt: 'In today's America, neoconservatives generate brutish policies for which liberals provide the ethical fig-leaf' (T. Judt, 'Bush's Useful Idiots', *London Review of Books*, vol. 28, no. 18, 21 September 2006, <http://www.lrb.co.uk/v28/n18/judt01_.html>)

6 T. Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33 (2005): 113ff.

7 The appropriate reference here can only be G. Zagrebelsky, *Il diritto mite* (Turin, Einaudi, 1992). Cf. M. La Torre, *Constitutionalism and Legal Reasoning* (Dordrecht, Springer, 2007).

8 Perhaps the pithiest *policy* encapsulation of this new embrace should be credited to Cofer Black, the head of the CIA Counterterrorist Center who in testimony to Congress in late 2002 made the now-famous remark, 'There was a before-9/11, and there was an after-9/11: After 9/11 the gloves came off'.

9 See J. R. Bolton, 'Is There Really Law in International Affairs?', *Transnational Law & Contemporary Problems* 10 (Spring 2000). More or less in the same vein, though more sophisticated and 'law and economics' re-styled, is the argument presented by J. L. Goldsmith and E. A. Posner, *The Limits of International Law* (Oxford, Oxford University Press, 2005).

same is happening in the sphere of international relations, now being depicted as Mars contra Venus, as a Hobbesian world in which the Kantian (and European) ideal of peace cannot flourish except under the shield of American might and power.[10] This new paradigm has crept into domestic law too, however: Here the Bush administration and its *Kronjuristen* have pushed onto a nation the idea of an unbridled executive power, legitimized to eschew the general laws, and even the constitution in certain respects, not to mention international treatises, their force being regarded as mostly symbolic: 'I'm the decider,' says President Bush, 'and I decide what is best,'[11] which in political theory and jurisprudence translates to the proposition that protection of the law is the president's business. This formula, worthy of Carl Schmitt, captures the new doctrine of executive exceptionalism as set out by the administration's top theorist, John Yoo. It is doubtless significant, and an indication of the new zeitgeist, that this young constitutional theorist now teaches law where the great Hans Kelsen once taught, at the University of California, Berkeley.

Kelsen emphatically and rigorously upheld the primacy of international law over national law and spoke of peace through law; Yoo, in stark contrast, is saying there is no obvious reason why the United States should make it a policy objective to curb violence and contain war around the world, and the same goes for the U.S. constitution: 'It is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force.'[12]

Change the language slightly, and there reemerges the old doctrine of the president (chief executive) as *Hüter der Verfassung* – as keeper of the constitution. The underlying argument here is once more of a 'realist' cast and roughly Schmittian in origin: Legal reasoning is in large part political or policy-oriented, and therefore, says the argument, it cannot be entrusted exclusively to 'nonpolitical,' and hence 'politically unaccountable,' bodies such as courts of law: 'When courts resolve genuine ambiguities, they cannot appeal to any 'brooding omnipresence in the sky'; often they must rely on policy judgments of their own. Those judgments should be made by the executive, not the judiciary.'[13] This turns on its head the basic principle of constitutional justice as expressed by the U.S. Supreme Court in its finding that it

10 It is Robert Kagan who has famously described Americans and Europeans as coming from two different planets: Mars and Venus, the one Hobbesian (and powerful) and the other Kantian (and weak). This power equation is seen as essential to the transatlantic relationship, and its solution – i.e., peace through power – is outlined in his very much quoted 'Power and Weakness', *Policy Review,* June/July 2002.

11 From a speech delivered 18 April 2006. Cf. R. Cohen, '"The Decider" Has Rules, All of Them Are Big, "Yo"', *Herald Tribune*, 22–23 July 2006.

12 J. Yoo, *The Powers of War and Peace* (Chicago, University of Chicago Press, 2005), ix. See also J. Yoo, *War by Other Means* (New York, Atlantic Press, 2006).

13 C. R. Sunstein, 'Beyond Marbury: The Executive's Power to Say What the Law Is', *Yale Law Journal* 115 (2006): 2580 ff.

is 'emphatically the province and the duty of the judicial department to say what the law is,'[14] which is the main holding in *Marbury* v. *Madison*, the foundation on which rests the federal system of judicial review in the United Sates.

They say that if you want peace you should be prepared for war. This adage has been newly conceptualized as a primary government function, and as a justification for government action, by bringing war into analogy with law and arguing that just as a lawless state could not ordinarily exist, so a warless one could not, either: 'War, like law, sustains the State by giving it the means to carry out its purposes of protection, preservation, and defense.'[15] The notion of a just war sets international law into motion – it does so as the reaction consequent upon a violation of such law. But reaction (a response) morphs into aggression (an initiative), and so comes to also embrace the preventive use of force, which comes into play even in situations in which there is no imminent threat to national security (a point made by the White House in its annual *National Security Strategy* report of 2002). In fact the concept of collective security is effaced from international law, displaced by the concept of national interest, which becomes paramount and whose interpretation is brought under the exclusive control of the U.S. president in his capacity as commander in chief. The sovereign thus reclaims an unqualified *jus ad bellum*, a privilege no longer subject to any of the rules the international community lives by.

So viewed against this background, law essentially becomes force and violence – as it does in Carl Schmitt's conception – and sovereignty once more projects itself as decision-making power under an *Ausnahmezustand*, the dreaded state of emergency in which the tenuous fibre and connections by which the law is held together wear away under the ultimately overriding standard of friend and enemy. In fact, in this fibre, which is thinning out by attrition under the force of this revived framework, we find some old foundations of law, first among which habeas corpus: It is now a presidential prerogative to decide who has the right to petition for this writ; the president may qualify anyone as an 'unlawful enemy combatant,' a category hitherto unknown, and anyone so qualified is thereby denied any right or guarantee under any system of law, whether domestic, international, or humanitarian, and so becomes fair game (*Freiwild*), and can therefore be taken away to a secret black-site location, can be locked up in a prison camp off-limits to judicial oversight, can be detained indefinitely and without charges.

This doctrine has in large part been formalized in the Military Commissions Act of 2006, signed into law by President Bush on 17 October 2006, which also acts to undercut the significance of the U.S. Supreme Court's holding in *Hamdan v.. Rumsfeld* [126 S. Ct. 2749 (2006)], where it is argued that a state of war does not amount to a 'blank cheque' for the executive, and that the exercise of exceptional executive powers requires the approval of Congress. Yet the Military Commissions Act [under

14 *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1802), p. 177.

15 P. Bobbit, *The Shield of Achilles: War, Peace, and the Course of History* (New York, Anchor Books, 2003), p. 780.

Section 6(a)(3)] vests in the chief executive (in the U.S. president) the authority to interpret Common Article 3 of the Third Geneva Convention, relative to the treatment of prisoners of war, thereby authorizing the president to determine the article's purview. And under Section 948(d)(c) of the same act, the president is further authorized, along with the secretary of defense, to designate any non-U.S. citizen as an unlawful enemy combatant, a status that strips the person so designated of the right to petition for habeas corpus[16]. A 'state of exception' has thus been set up under the war on terror, a state in which force suspends the rule of law, and which produces its own brand of exceptional subjects, the unlawful enemy combatants—exceptional precisely because what applies to them is not law but force. In this sense the *jus ad bellum*, so reinstated without let or hindrance, ends up gutting the *jus in bello* and taking away all its force.[17]

II.

If we look through the *National Defense Strategy of the United States of America*, a report issued in March 2005 by the U.S. Defense Department and the Pentagon, we will find under the heading 'Our Vulnerabilities' the revealing proposition that 'our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.'[18] What is revealing here is the underlying assumption that international institutions and judicial processes stand on the same level with terrorism: All three are tools that 'the weak' use to thwart and derail 'the strong.' There is a definite Nietzschean and capitalistic theme lodged in this idea: Law and rules can fall into the hands of 'the weak,' who can aptly use them to thwart the progress, triumph, and vitality of those on the 'winning' side.

Words are deeds, and their consequences are not long in coming. So it seems that among several other moral and legal aberrations of our time, there is one in particular which has been every legal system's bête noire since the Enlightenment and yet is creeping back upon us, this being the legalization of torture. Thus, even though in the first half of what has been called the 'dumb' century (the 18th century), Ales-

16 Such denial of habeas corpus has now been struck down by the Supreme Court in its *Boumediene* v. *Bush* decision (128 S. Ct. 2229, issued on June 12, 2008), whereby aliens detained in Guantanamo Delta Camp now have an acknowledged right to challenge their detention in U.S. Courts: see R. Dworkin, 'Why It Was A Great Victory', *The New York Review of Books*, August 14, 2008, pp. 18 ff.

17 Cf. D. Luban, "Liberalism, Torture, and the Ticking Bomb," in *The Torture Debate in America*, ed. K. J. Greenberg (Cambridge: Cambridge University Press, 2005), 64–65.

18 D. H. Rumsfeld, *The National Defense Strategy of the United States of America*, (Washington DC, U.S. Department of Defense, 2005), p. 5.

sandro Manzoni could confidently proclaim that torture is 'dead and gone, a thing of the past,'[19] the tide seems to be turning now, with a growing number of jurists and policymakers enthusiastically looking to convince us otherwise. And indeed torture, as an anticipatory and hence inevitably disproportionate use of force, reproduces to some extent the phenomenological mechanics of the preemptive war advocated in President Bush's newfangled national-security doctrine. It can be argued, by analogy, that torture is to criminal law as preemptive war is to international law, in that both make useless and ineffectual any criterion of predictability or proportionality in the lawful use of force. And both find their basis in the idea of an imminent yet uncertain threat, and in the overriding and exclusionary value of national security. The breakup of international law by way of preemptive war thus paves the way for the equivalent breakup of domestic law by way of 'the torment.'

It should not come as a surprise, then, that when White House Counsel Alberto Gonzales (later serving as U.S. attorney general) requested an opinion on the legality of torture under international law, the response, laid out in a leaked August 1, 2002, U.S. Defense Department memo of the Office of Legal Counsel, involved none other than John Yoo – the *Kronjurist* (then acting as deputy assistant attorney general) who has been responsible for theorizing for the United States the legality of preemptive war. The memo, coauthored by Yoo along with Assistant Attorney General Jay S. Bybee,[20] points out in the first place that while the United States does have international obligations under the 1987 'United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (or CAT), these obligations are restricted by an instrument of ratification the United States deposited upon signing the convention in 1988, an instrument exercising which the first Bush administration submitted its own, apparently narrower understanding of torture, which would later become law (with passage of the 1994 Federal Anti-Torture Statute: 18 USC § 2340), and under which nothing counts as torture unless it inflicts 'prolonged mental harm caused by [...] the threat of imminent death.'[21] In the second place, the Bybee memorandum further restricts this definition by finding it to mean that 'physical pain amounting to torture must be equivalent in

19 A. Manzoni, *Storia della colonna infame*, ed. by G. Lesca (Florence, Barbera, 1923), pp. 39-40 (my translation).

20 The full version of the document was signed by Bybee alone, for which reason it has come to be known as the 'Bybee memorandum.'

21 'Memorandum for Alberto R. Gonzales, Counsel to the President, August 1, 2002', now in M. Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York, New York Review Books, 2004), p. 115. The re-legalization of torture practices pursued through this first memorandum is later supported in detail and made more explicit by John Yoo in his 'Memorandum for William J. Haynes II, General Counsel of the Department of Defense', dealing with military interrogation of 'alien unlawful combatants held outside the United States, March 14, 2003. See also – to have a concrete image of what is at stake – Donald H. Rumsfeld, in his capacity as US Secretary of Defense, 'Memorandum for the Commander, US Southern Command', having as its subject 'counter-resistance techniques in the war on terrorism', April 16, 2003.

intensity to the pain accompanying serious physical injury, such as organ failure, or impairment of bodily function, or even death.'[22] Anything below this threshold – including repeated physical violence – does not, according to Yoo and Bybee, qualify as torture.[23]

Through a broad reading of the understanding the United States entered with its accession to CAT, Yoo seems also to be introducing a doctrine of double effect whereby nothing counts as torture unless there is a 'specific intent' to torture. Under this specific-intent standard, in other words, it is legitimate to inflict serious pain and suffering (there is no finding of torture) so long as such suffering is not the immediate and direct intent behind the conduct in question, that is, so long as the suffering is a side effect and not the primary purpose of the infliction.[24] Now, let us assume that the specific aim of any act of duress is to obtain information (rather than to inflict pain): If we couple this assumption with the doctrine of the double effect as found in the memorandum, we get a specific-intent standard under which *any* infliction of pain aimed primarily at extracting information is simply that, plain interrogation, even if it clearly *is* torture by any other account.

Indeed, the only meaning of torture Yoo accepts as valid for the United States is that referred to in 18 USC § 2340A (part of the 1994 Federal Anti-Torture Statute).[25] Yet even under this restriction, the final outcome is that *anything* will pass muster, regardless of whether it counts as torture or not, for in the Bybee memorandum, Yoo's doctrine on presidential powers is brought to bear in such a way that section 2340A of the U.S. Code would prove unconstitutional if it were to be constructed as a limitation on such powers: 'Even if an interrogation method arguably were to violate Section 2340A, the statute would be unconstitutional if it impermissibly encroached on the President's constitutional power to conduct a military campaign. As Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.'[26] Terrorists, it is further commented, are not regular combatants, and this makes the Geneva Conventions obsolete and amenable to exception with respect to this class of subjects.

22 'Memorandum', in Danner, *Torture and Truth*, p. 115.

23 Under Bybee's (and of course Yoo's) standard, then, many cruel practices now widely regarded as torture no longer count as such, on which point see H. H. Koh, 'Can the President Be Torturer in Chief?', *Indiana Law Journal* 81 (2006): 1150.

24 'Memorandum', in Danner, *Torture and Truth*, p. 142.

25 The actual definition is stated in 18 USC § 2340, which quotes almost verbatim the understanding the first Bush administration submitted as a reservation to CAT. As defined in Section 2340, torture is 'an act [...] specifically intended to inflict severe physical or mental pain or suffering', which in turn 'means [among other things] the prolonged mental harm caused by [...] the threat of imminent death.'

26 'Memorandum', in Danner, *Torture and Truth*, p. 142.

When asked whether the president could, for example, be prohibited from torturing a child, John Yoo responded with an unqualified no – there is no binding treaty in this regard. The question was asked by Doug Cassel: 'If the president deems that he's got to torture somebody, including by crushing the testicles of the person's child, is there no law that can stop him?' Yoo's response: 'No treaty.' Moreover, according to the now Professor of Law at Berkeley University 'customary international law, whatever its source and content, does not bind the President.'[27] Further, even an act of Congress could not limit the president's exceptional powers in time of war. And the war on terror is a war proper (however unprecedented it may be, precisely on account of its being waged on an enemy whose methods are those of terrorism). This balance of public powers must, according to Yoo, be resolved by tipping the scales in favour of executive power: 'Congress cannot tell the president how to exercise his judgment as commander in chief.'[28]

Any provision of law that might interfere with the president's power to declare a situation extraordinary – such as to warrant the use of interrogation methods prohibited by law – must be held unconstitutional: 'If the president really made this decision, that there are these extraordinary circumstances where the president needs to order interrogation that's in conflict with the congressional regulation, that regulation will be unconstitutional, too.'[29] Bybee then adds to this that officials who may be involved in torture can still avoid criminal or civil liability by claiming that 'they were carrying out the President's Commander-in-Chief powers.'[30] The president's immunity from domestic, constitutional, and international law thus extends to all those who have acted under an order ultimately traceable to the president's authority.

In short, Article 2 of the U.S. Constitution (which makes the president commander in chief of the armed forces) is constructed as meaning that the president may at discretion declare a state of exception as a matter of final decision and may in this case use full executive powers, such as are deemed necessary to handle the emergency so declared: 'The Commander in Chief Clause is a substantive grant of authority to the President conferring all those powers not expressly delegated by the Constitution to the Congress.'[31] This does nothing short of taking the Ninth Amendment constitutional principle of the citizens' unenumerated *rights* and transmogrifying into a doctrine of the 'president's unenumerated *powers*'; that is, by a

27 J. Yoo, 'Memorandum for William J. Haines II, General Counsel, Department of Defense', January 9, 2002, now in K. J. Greenberg and J. L. Dratel (eds.) *The Torture Papers – The Road to Abu Ghraib*, (Cambridge, Cambridge University Press, 2005), p. 39.

28 'The Torture Question', interview with John Yoo, PBS, Frontline series, <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html> (posted 18 October 2005). See also Yoo's comments reported by J. Mayer, 'Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program', *New Yorker*, 14 February 2005.

29 'The Torture Question', interview with John Yoo.

30 'Memorandum', in Danner, *Torture and Truth*, p. 146.

31 J. Yoo, 'Transferring Terrorists', *Notre Dame Law Review* 79 (2004): 1198.

dramatic analogy, just as the *citizens* retain any rights not expressly set forth (enumerated) in the Constitution, so the *president* acquires any and all powers the Constitution does not expressly reserve to the nonexecutive branches and agencies of government (in plain contradiction to the basic idea of the United States government as a government of enumerated powers and limited jurisdiction).

III.

Now, the passing events just briefly outlined serve as background, and I will take them as my occasion to broach the broader question of whether torture is consistent with the rule of law. Which connects, too, with another question, that of whether there is any *moral* justification for torture. But before I proceed, I should say something about the kind of perspective I am bringing to the subject of torture. This is, to begin with, something we should never have been compelled to write about in the first place. As Seth F. Kreimer has expressed the idea, 'there are some articles I never thought I would have to write; this one.'[32]

Alan Dershowitz – an advocate of torture, his preferred method at least since 1989 being that of driving needles under the terror suspect's fingernails[33] – submits that professors, such as he is, are there to bring up any subject of discussion and to question our deepest, most settled, and long-established convictions. As he puts it, 'professors have yet a different responsibility: to provoke debate about issues before they occur and to challenge absolutes.'[34] This may have some logic going for it as a general platitude about the role of academia; less so when we bring the idea to bear on the issues themselves, and torture is one such issue: it cannot be approached as a mere philosophical exercise, just as it is senseless to take a theoretical perspective on, say, violence committed against women and children.[35] So I must express my deepest disagreement with this learned fellow professor, finding instead common ground with Jeremy Waldron, whose words (at the other end of the spectrum) cap-

32 S. F. Kreimer, 'Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror', *University of Pennsylvania Journal of Constitutional Law* 6 (2003): 278.

33 The method, in his own words, is that of 'a sterilized needle inserted under the fingernails to produce unbearable pain without any threat to health or life': A. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT, Yale University Press, 2002), p. 144.

34 A. Dershowitz, 'Tortured Reasoning', in *Torture: A Collection*, ed. by S. Levinson (Oxford, Oxford University Press, 2004), p. 266.

35 Cf. J. Gardner and H. Shute, 'The Wrongness of Rape', in *Oxford Essays in Jurisprudence*, 4th series, ed. by J. Horder (Oxford, Oxford University Press, 2000), p. 194.

ture precisely my attitude to torture: 'It is dispiriting as well as shameful to have to turn our attention to this issue.'[36]

Moral and legal philosophy – understood as reflection on what is right and wrong, on what we should and shouldn't do – lives in a sphere apart from that of theoretical philosophy, such as ontology, epistemology, or the theory of meaning. Theoretical philosophy is fundamentally concerned with what the world *is* and what can be known about the world. This is a sphere in which any question may legitimately be asked, in contrast to moral philosophy, wherein *not* every question can seriously and responsibly be put forward as a subject of discussion. To be sure, there are some frivolous questions that can conceivably be asked even in theoretical philosophy, questions such as what would happen if grass were pink instead of green, but these questions are precisely that: trivial and inconsequential. Not so in moral philosophy, for we are working here within the practical realm, where everything we do, speak, or think carries a consequence. And just as we all know there are certain things we cannot and should not say, so there are things we shouldn't even *think:* We have to be thoughtful about our own thoughts and be able to rein them in accordingly, before they become reality. Contemplating someone's death or suffering and *using* and practicing such power of imagination – even on someone we understand to be our worst enemy – is certain to morally taint and debase us, and to undermine our ability to exercise sound moral judgment and act on it.

In the realm of practical reason and reflection there are questions of legitimate conduct the very *discussion* of which can be consequential in unhelpful ways. True, discussion is in itself valuable, but it can cause us to have second thoughts about our deepest moral convictions (and this is not *always* useful) and it can equally become ambiguous and offensive (which is *never* useful). Thus, we could enter on a philosophical discussion to test the legitimacy of certain items of conduct under hypothetical exceptional situations: Is it okay to rape our own child if we are stranded on a desert island and know we are the only human survivors of a nuclear war? Would it be okay to sell our mother's organs if we were living under reduced circumstances and would otherwise go hungry? Would it be okay to kill our father and thus save ourselves? Would it be okay to round up all the criminals and undesirables of the inner city, deport them to concentration camps, and perhaps implement on them the Final Solution? Of course, we *could* engage in such discussions, but whether we should is an entirely different matter: we could bring subtle philosophical argument to bear on the discussion, but no matter how sophisticated, articulate, or eloquent we might sound, we would surely be judged morally blighted (or even downright evil) and undeserving of any public audience.

There is a relevant connection here with utilitarianism as a moral theory, since one of the biggest faults found with this theory is precisely that everything in it is up for discussion: no topic is off the table; any topic, no matter how offensive to moral

36 J. Waldron, 'Torture and Positive Law: Jurisprudence for the White House', *Columbia Law Review* 105 (2005): 1683.

sensibility or how trivial or counterproductive, can plausibly be taken up and discussed in full earnest.[37] But then, descanting on what is more appropriate – 'enhanced interrogation' by electric shock or by waterboarding (i.e., strapping the victim to a board and simulating drowning, a practice enthusiastically supported by the vice president of the United States, Dick Cheney) – will prove repugnant to anyone except to someone who has vowed a strict allegiance to utilitarianism.

So then, I believe that engaging in any discussion on torture comes close to the scenarios just briefly described: Torture is morally objectionable not only in itself but also as a subject of discussion (a discussion about its pros and cons, even a mock discussion staged for purely academic interest). This is the sort of discussion that Bernard Williams would likely call a 'moral unthinkable,'[38] and that Robert Alexy would describe as 'discursively impossible.' It behooves us, I think, to bring our best judgment to bear on what we decide to say – to use our sense of the morally unthinkable, so as to exercise control on what we say, and to some extent even on what we think. Debating whether torture is morally or legally admissible strikes me as plain despicable, and the reason I am doing it, in seeming contradiction, is that this is a sentiment that needs a public voice. In April of 1811 at the Cádiz Cortes, Lord of Villanueva requested that 'this point not be discussed,' and that, 'without further ado, a vote be taken to abolish the judicial practice of the torment.'[39] And this is precisely the appeal and example that needs to be made public: Any different attitude is cause for suspicion as either inhuman or as likely lead to inhumanity.

So if I am taking up the matter it is because other people more impolitic than I – whether it be politicians, lawmakers, judges, jurists, or philosophers – have unabashedly set themselves at work to open this Pandora's Box. Torture is being not only discussed but also practiced; the imperialist-minded political changes referred to at the outset have put it on the agenda, and it is by this unfortunate historical contingency that discussion about torture has now become a must: This is unbelievably not a what-if discussion about hypotheticals but a necessary and real one with respect to which there is no choice but to be engaged.

IV

If we look at the debate that has unfolded in recent years, and at the different schemes that have been evolved to bring torture back as a legitimate practice under

37 The point is stated in B. Williams, 'A Critique of Utilitarianism', in J. J. C. Smart and B. Williams (eds.) *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973), p. 93.

38 'One might have the idea that the unthinkable was itself a moral category' (ibid., p. 92).

39 Tomás y Valiente, *La tortura en España*, p. 7.

the laws of our states, we can make out in this landscape five main argumentative strategies that have been deployed to this end. In what follows, I briefly illustrate each of these strategies in turn and offer the arguments that I think make each of them invalid.

(i) The first strategy is that which John Yoo and Jay S. Bybee adopted at the U.S. Justice Department under White House Counsel (and later Attorney General) Alberto Gonzales. This is a strategy that has been instrumental in bringing about, among other horrors, the Abu Ghraib prison-abuse scandal and the extensive extraordinary-rendition program, i.e., taking suspects into U.S. custody, by abduction or other method, and delivering them to third-party countries where they can be more easily tortured at secret locations outside the reach of U.S. jurisdiction. The strategy, as was pointed out earlier, consists in asserting the exceptional executive powers of the U.S. president as commander in chief of the armed forces, a capacity in which (as the argument goes) the president has free rein and cannot be held accountable under any national or international law.

This assertion of powers comes into conflict with established constitutional doctrine in the United States,[40] with the doctrine of *jus cogens* in international law[41] (a doctrine upheld in a House of Lords ruling of 17 December 2005), and especially with the basic principles of democratic constitutional government, in which executive power forms the main focus of constitutional limitations. Unbridled executive power not subject to any control, whether in ordinary or extraordinary circumstances, has no place in a government established under the rule of law, much less in a constitutional government, in which the fundamental rights set a limitation on the scope and depth of political action, and in which human dignity delimits an area outside the reach of legislative power, and all the more so of executive power. Thus, there is no doubt as to what the Founding Fathers intended when, in framing the U.S. Constitution in 1787, they vested in Congress the power to declare war: Entry into war – far from being a privilege of the executive, as Yoo would have it – is a matter of such consequence for the nation as a whole and for its future that any decision to that effect must be entrusted to the wisdom and judgment of all of the nation's representatives. So says explicitly the Constitution, and so read the *Federalist Papers:* 'The President is to be the commander-in-chief of the army and navy of the United States. [...] In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would

40 For an authoritative statement of this doctrine, see J. H. Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton, Princeton University Press, 1993) – and it is no coincidence that Yoo takes critical aim at this book throughout his theoretical construction.

41 See M. Jahn, 'Gute Folter – schlechte Folter? Straf-, verfassungs- und völkerrechtliche Anmerkungen zum Begriff "Folter" im Spannungsfeld von Prävention und Repression', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 87 (2004): 33-34, where international law prohibiting torture is argued to enjoy *jus cogens* status.

amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies – all which, by the Constitution under consideration, would appertain to the legislature' (*The Federalist*, no. 69).[42] For James Madison and his fellow Federalists, one of the great advantages of republicanism over the monarchy, and of federalism over sovereign states, was that of making it so that a decision to make war does not fall into the hands of a single person or of a few but is rather entrusted to many, who will have to persuade one another and will thus have to exercise good reason and be thoughtful: The single person or the few are more likely to act in the heat of passion, whereas the many will be able to ponder the decision and put a check on one another through collective decision-making in legislative bodies. Monarchy was felt to be pernicious by the Federalists precisely because it grants the executive branch those powers that Yoo is now claiming for the chief executive.

If the president is not master of war and peace, but is bound in this very delicate matter by the Constitution and by Congress, then his role as supreme commander of the armed forces (under Article 2 of the U.S. Constitution) cannot be refashioned into a role designed for rule by diktat, beyond good and evil, above national and international law, and without regard to basic rights. Hence, not every means will be justified in view of military victory. The president as envisaged by Yoo – a president subject to no judgment other than his or her own, with regard to such fundamental matters as peace and war and the freedom and dignity of citizens and foreigners alike – would bring about a government of men (of a *single* man) rather than one of laws. It is *despotism* that this vision sadly prefigures.

(ii) The second strategy in the effort to ground torture on a moral and legal basis is to cast the practice in a presumptively descriptive light. Torture, in other words, is presented as a matter of fact, a manifold phenomenon that may come in any shape, from a terrorist strike to a serious threat to national security, and it is here to stay, which leaves us with only two alternatives: We can take the hypocritical stance of formally rejecting torture while allowing it go unchecked underground in the secret chambers of executive power, or we can come to terms with its presence in society as a necessary evil, thus legalizing its use as a practice subject to oversight, making it, therefore, a transparent, responsible practice. 'I pose the issue as follows,' writes Alan Dershowitz: 'If torture is in fact being used and/or would in fact be used in an actual ticking-bomb mass terrorism case, would it be normatively better or worse to

42 J. Madison, A. Hamilton, and J. Jay, *The Federalist Papers*, ed. by I. Kramnick (Harmondsworth, Penguin, 1987), p. 398 (italics in original).

have such torture regulated by some kind of warrant, with accountability, record-keeping, standards, and limitations?'[43]

The objection here seems quite obvious. The argument proceeds on the assumption that torture is a de facto practice in fairly wide use – an established government practice. But that is arguably not an assumption that can safely be made universally with respect to every country. Thus, for example, it is doubtful that torture ever became a serious option among Spanish law-enforcement officials in the wake of the Madrid train bombings of 11 March 2004, or among British law enforcement following the London subway bombings of 7 July 2005.

Despite Dershowitz's view of torture as an inevitable social fact, there can still be found countries in the world where government is based on the rule of law and where society is decent. But at any rate, this second justificatory strategy proceeds on an additional and important assumption; that is, in addition to assuming that terror suspects get tortured as a matter of course – i.e., the practice is part and parcel of the business of running a government: it 'comes with the territory' – we also have to assume that this phenomenon, precisely by virtue of its being a 'social' fact, cannot morally be judged inherently loathsome, and so does not draw onto itself such contempt as to rule out the idea of legalizing it. Legalizing a practice entails that the practice itself be judged all in all 'okay'; that is, the practice may not have all it takes to qualify as moral, and may even be immoral to a certain extent, but not intolerably so, and not so much as to unsettle and shock the conscience of those who are called upon to judge it, for if it did reach such an extreme point, it could not even begin to make a case for itself as legitimate enough to be legalized.[44] Yet these are precisely the extremes that torture reaches. We have before us a type of conduct so plainly wrong and intolerable to common moral sentiment that even its possible or likely uptake in society would still not offer a good reason why it should be legalized. In fact, legalization implies a value judgment that does not cast the practice in a completely negative light but rather views it in certain respects positively. If, by contrast, we are *morally* convinced that torture cannot be engaged in, and that this tenet carries the highest moral force, then there is no way that torture can *legally* be found legitimate.

43 A. Dershowitz, 'The Torture Warrant', *New York Law School Review* 48 (2004): 277.

44 It should be pointed out, too, that legalized practices appearing on their face to violate the Constitution (as torture would seem to do if it were to be legalized) come under what the Supreme Court has called a 'more searching judicial inquiry' (*US* v. *Carolene Products Co.* 304 U.S. 144 (1938), 152 n. 4), which has come to be known as 'strict scrutiny' and which forms part of the court's understanding of the due-process principle. Strict scrutiny clearly requires more than just loose acceptance of something as not immoral, and in fact one cannot help but notice its close resemblance to Radbruch's formula, from German legal theory, whereby a law or provision is found invalid (unconstitutional) if it oversteps the threshold of 'extreme injustice.'

(iii) The most powerful and widely used strategy for reintroducing torture in law consists in laying out the loosely utilitarian ticking-bomb scenario of a device that could go off any minute now – a hypothetical scenario, true, but which vividly seizes the imagination.

The case is that in which someone is arrested who is known or suspected to have somewhere planted an explosive device that will soon detonate, killing many innocent people. In a dramatic situation such as this one, the only way to prevent the bomb from exploding, thus saving the lives of many, is to resort to torture, coercing from the person in custody information about where the bomb has been placed.

A hypothetical case like this one was presented by Niklas Luhmann at a conference held in Heidelberg in December 1992,[45] and it has also been used by Winfried Brügger, a German professor of public law who has been defending for over a decade now what he terms a *Rettungsfolter*, or 'lifesaver torture,' with a view to legalizing the practice.[46] Similar, too, is the case Dershowitz invokes in his proposal to make torture subject to a court warrant.[47] The proposal had already been laid out along similar lines by Luhmann, who envisages a scheme under which international judges authorize torture and supervise its execution by way of video cameras that record the entire procedure live, thus enabling the judges to instruct the torturers in real time on how to appropriately gauge the infliction of pain (as by increasing or decreasing the intensity of it or otherwise interrupting the treatment altogether): 'Zulassung von Folter durch international beaufsichtigte Gerichte, Fernsehüberwachung der Szene in Genf oder Luxemburg, telekommunikative Fernsteuerung.'[48] It will be up to the 'torturee,' Luhmann comments, to decide whether to hold out and be a hero or give in and be a traitor. Certainly, he concludes, this falls far short of being a satisfactory solution, but it nonetheless does much better than the alternative, which is to let innocent people die at the hands of terrorists. Dershowitz seems unaware of Luhmann's conference paper, yet proceeds very much à la Luhmann in his oblique defence of torture, by laying insistent emphasis on there being no moral absolutes: Right and wrong is not an all-or-nothing affair but a matter of degree.

45 See N. Luhmann, 'Gibt es in unserer Gesellschaft noch unverzichtbare Normen?', (Heidelberg, C. F. Müller, 1993), p. 1: 'In Ihrem Lande – und das könnte in nich zu ferner Zukunft auch Deutschland sein – gäbe es viele linke und rechte Terroristen, jeden Tag Morde, Brandanschläge, Tötung und Schäden für zahlreiche Unbeteiligte. Sie hätten den Führer einer solchen Gruppe gefangen. Sie könnten, wenn Sie ihn folterten, vermutlich das Leben vieler Menschen retten – zehn, hundert, tausend, wir können den Fall variieren. Würden Sie es tun?'

46 See W. Brügger, 'Würde gegen Würde', in *Verwaltungsblätter* (Baden-Württemberg, 1995), 414ff.; W. Brügger, 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?' *Juristen-Zeitung* 55 (2000): 165–173; and W. Brügger, 'Das andere Auge: Folter als zweitschlechteste Lösung', now in *Rettungsfolter im moderneen Rechtsstaat: Eine Verortung* (Bochum, Kamp, 2005) 107-17.

47 Dershowitz presents the same proposal in Ch. 4 of *Why Terrorism Works*, pp. 131ff.

48 Luhmann, 'Gibt es in unserer Gesellschaft noch unverzichtbare Normen?' p. 27.

The reply here is that just as there is no absolute right and wrong, because these concepts are relative, so there can be no absolute relativity, either; that is, relativity is itself a relative concept subject to restraints: If all moral criteria were subject to infinite gradation, then they could all be thinned out until they became meaningless by attrition and exception, and we would eventually come to a world in which nothing would make sense. No longer would the Latin maxim say *Fiat justitia et pereat mundus* (Let justice be done, though the world perish), but '*Fiat justitia*, and let the world perish in consequence,' since it would no longer be the moral criterion that holds its ground against the exception, but the exception that trumps the criterion in the name of justice or (much to the same effect) in the name of utility. Indeed, this is the same sort of abrasive relativism the utilitarian theory is apt to usher in. The point can be illustrated in narrative by way of Agamemnon, who resolves to sacrifice his daughter in order to bring favourable winds and make it possible for the Achaeans to make sail toward Troy. He does so to please the vast majority of his people, and his behaviour on this occasion is that of a good utilitarian. But, as the story goes, the girl's mother, Clytemnestra, never forgives Agamemnon for that gesture. In fact, if the rationale behind Agamemnon's pliant behaviour were carried to its logical conclusion (i.e., all criteria are always and without exception relative), we could probably, and imperceptibly, bring ourselves to justify anything and everything, or something close to it. Thus, for example, it was this logic that came to bear in justifying the Jewish councils when for some time the Germans, in an unsurpassed cynical test of human behaviour in distress, made these councils responsible for drawing up the lists of people from the ghetto to be deported to extermination camp. Similarly, Carl Schmitt and Karl Larenz, two insightful legal theorists, appealed to the logic of the lesser of two evils to justify ex post facto their adherence to the Nazi movement. Yet we know at least since Auschwitz that evil is bottomless, and so we should likewise know that the lesser of two evils can descend ever so close to unfathomable depths.

Stated otherwise, once we relativize the absolute, rock-solid prohibition against doing what we regard and experience as an outright, intolerable evil, and start making concessions to such evil – balancing different evils against one another to see which is the lesser one, the one toward which we could bend our behaviour – we will soon find that we have made a practice out of such tradeoffs (allowing in a measure of evil as a condition for what seems like a great gain in practicability), and by a natural progression we will thus become inured to the blatant evil that had initially elicited our dismay and outrage: No longer will we be morally inhibited from acquiescing in any evil of any kind, for once we accept torture in one case, there will be no compelling reason not to do so in other cases, too. This is perhaps best known as the slippery-slope thesis, which Steven Lukes succinctly captures in this observation that 'removing the general prohibition would soon dissolve inhibitions.'[49]

To see this thesis borne out, we can look at the dynamics involved in the torture argument presented by Richard Posner, the U.S. federal judge widely known as a

49 S. Lukes, 'Liberal Democratic Torture', *British Journal of Political Science* 36 (2005): 15.

legal theorist and pragmatist, and as a prominent exponent of the law-and-economics school, and recently an advocate of torture on 'moral' grounds. What is significant here is that he starts out by accepting torture in 'exceptional' cases, only to accept it later on in 'less exceptional' ones. His main argument is pragmatic and consequentialist; that is, torture is the lesser evil, with the only other alternative being a far worse evil that torture is *effective* at preventing: 'Many consciences will not be shocked at the use of torture when it will ward off a great evil and no other method would work quickly enough to be effective.'[50] Which means, too, that if we should actually come face to face with a terrifying ticking-bomb scenario, it would be so much as irresponsible on our part to foreclose recourse to a tool so useful as torture: 'In so extreme a case, it seems to me, torture must be allowed,' Posner reflects. But he shortly thereafter softens this statement: 'And perhaps in less extreme cases,'[51] too, it should be allowed.

Another place where we can see the slippery-slope thesis borne out – despite all the attempts made at demonstrating its logical ineptness – is in Dershowitz's extensive rhetorical appeal. The Harvard professor first presents a hypothetical situation in the extreme (the ticking-bomb scenario) and then concedes that the very concept of extreme circumstances is subject to interpretation and can therefore be stretched indefinitely.[52] He therefore concludes that the judge must have full discretion in deciding whether to issue a torture warrant – the judge mustn't be hamstrung by rigidly framed statutory constraints. Indeed, the difference between the ad hoc discretion of law-enforcement and intelligence officials and the judge's discretion under the torture-warrant scheme, Dershowitz argues, lies not in any exceptional-circumstances standard the judge is held to (in fact, no such standard is envisioned under the scheme) but in the judge's accountability: The determination must be made 'openly and with accountability.'[53]

But now the question bears asking: If we are in fact willing to accept a lesser evil (here, torturing another soul) as a way to avert a greater evil (allowing many innocent others to die), why should we not also be willing to take the blame that comes

50 R. A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford, Oxford University Press, 2006), p. 85.

51 R. A. Posner, 'Torture, Terrorism, and Interrogation', in Levinson (ed.) *Torture: A Collection*, 293. Cf. Posner, *Not a Suicide Pact*, Ch. 4. Despite defending an exceptional use of torture on *moral* grounds, Posner rejects the idea of formally legalizing the practice, choosing instead to refashion the torturer's activity as a case of 'civil disobedience', to be judicially assessed on its merits with lenience and perhaps even justified by criminal exemption. This view is interestingly made to rest on the slippery-slope argument: If torture were legal, 'officials would be tempted to test the outer bounds of so extraordinary a grant of authority' (ibid. p. 86); law enforcers, in other words, might be apt to stretch the rule beyond its intended meaning and purpose.

52 See Dershowitz, 'The Torture Warrant', p. 283.

53 Ibid. p. 290.

with that evil (however much it may be a 'lesser' evil)? If we are willing to sacrifice *another*'s integrity and dignity – and reduce that person to a pulp, both physically and emotionally – why should we not also be willing to sacrifice our *own* dignity, and positively assert that what we are doing (if we *are* in fact doing it) is hateful and inexcusable?[54] If what we are doing is evil (albeit 'less' evil), why, then, should we need the community, the state, and the law to support us and lift us from responsibility for the exceptional violence and pain we have inflicted? If the circumstances are so exceptional and terrifying – and no less terrifying is our response (as both Brügger and Dershowitz own up to, albeit in not so many words) – then let those deeds recoil upon ourselves, upon the doers, the torturers: Let the consequences visit us with equal ghastliness; let the law be our judge us and let it punish us accordingly, with all its harshness.[55]

This is a proposition we are unlikely to accept. In fact, as Hannah Arendt points out, 'the weakness of the argument has always been that those who chose the lesser evil forget very quickly that they chose evil.'[56] And as it happens – precisely because we are so prone to forget – what only a moment ago we were claiming as an exceptional circumstance under which our bad behaviour might be justified, we are now claiming as a matter of *right*. This much can be observed in the dynamics of the argumentative strategy by which the German professor Brügger advocates the use of torture as a 'life-saving device': He first introduces an exceptional circumstance justifying torture so understood (as a means by which to save the lives of innocent people) and then converts this circumstance into a foundation for the *right to torture*, a right the state claims for itself under its duty to protect its citizens.[57]

(iv) One argument deployed in Brügger's writings, and especially in the Bybee memorandum, is that of legitimate self-defence: 'If an attack appears increasingly likely, but our intelligence services and armed forces cannot prevent it without the information from the interrogation of a specific individual, then the more likely it will appear that the conduct in question will be seen as necessary.'[58] Bybee concedes that this case does not make a fit with the traditional understanding of self-defence, which becomes available to us only when confronted with an immediate frontal threat that is certain to materialize: 'Self-defence as usually discussed involves using

54 This point has been made with insight and sensitivity by Elaine Scarry, 'Five Errors in the Reasoning of Alan Dershowitz', in Levinson, *Torture*, pp. 281ff. See also E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford, Oxford University Press, 1987), esp. her discussion of torture, pp. 27ff.

55 Cf. H. Brunkhorst, 'Folter vor Recht: Das Elend des repressiven Liberalismus', *Blätter für deutsche und internationale Politik* (2005): 80-81.

56 H. Arendt, 'Personal Responsibility under Dictatorship', in H. Arendt, *Responsibility and Judgment*, ed. by J. Kohn (New York, Schocken Books, 2003), 36.

57 See Brügger, 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?' pp. 165ff.

58 'Memorandum', in Danner, *Torture and Truth*, p. 153.

force against an individual who is about to conduct the attack. In the current circumstances, however, an enemy combatant in detention does not himself present a threat of harm. He is not actually carrying out the attack.'[59] Still, this is someone who, by hypothesis, has had a part in *planning* the attack, and if he or she can disclose relevant information about such an attack, then we do (on Bybee's doctrine) have a case for self-defence. In support of this thesis, Bybee invokes an article by Michael S. Moore, who in the 1980s discussed the Israeli practice of torturing detained Palestinians suspected of terrorism. According to Moore a terrorist can be said to have 'culpably caused the situation where someone might get hurt. If hurting [the terrorist] is the only means to prevent the death or injury of others put at risk by his actions, such torture should be permissible, and on the same basis that self-defense is permissible.'[60] So the terrorist, having been a party to the planning, can be regarded as part of the threat itself, as an accomplice and author – a circumstance that may justify acting in self-defence. The same principle, Bybee further comments, applies equally to *individuals* under threat and to the *nation* as a whole if it should come under the threat of terror.

So the gist of the argument is that we can torture someone in self-defence. But surely there is something deeply amiss here – just speaking these words should be enough to alert us to the discordant note within. Indeed, the person on whom torture is inflicted (the 'torture recipient') is by definition *defenceless*, unable to do anything that may inhibit the torturer's ability to do anything at will: 'In an interrogation torture case, the person being tortured is attacking no one. He has already been physically subdued and imprisoned [...]. In traditional self-defense, the person against whom one uses defensive violence is dangerous; in the torture case, he is helpless.'[61] A person in these incapacitating conditions – having no power of mind or body – cannot plausibly be described as a source of danger, except in a sophism designed to justify the unjustifiable.

Further, there needs to be a direct causal connection between self-defence and the threat it is intended to drive back, and the connection must be such that this will be the likely result. Yet we cannot say as much about torture, in which it is uncertain whether the information being sought will be obtained, or whether any information coercively obtained will be useful, or whether any useful information so obtained will causally and decisively contribute to extinguishing the threat. In addition, self-defensive action needs to be proportional to the threat posed; torture, in contrast, is overkill, by definition disproportionate and abusive: A deep, structural imbalance is built into the torture situation, with the inflicted harm far outweighing the danger

59 Ibid.
60 M. S. Moore, 'Torture and the Balance of Evils', *Israel Law Review* 23 (1989): 323.
61 Luban, 'Liberalism, Torture, and the Ticking Bomb', p. 63; cf. Koh, 'Can the President Be Torturer in Chief?', p. 1163.

against which it is defending. If there does not seem to be an inherently one-sided situation, that is because the danger being repelled is understood as having in it the potential to bring destruction on a great scale – but in torture, *any* harm inflicted is *real* harm, and it meets up against a counter-harm that comes to nothing: It is either inexistent, since the torturee cannot counteract, or it is merely presumptive, based on an *assumption* of baneful things to come, not on any knowledge of them (for, otherwise, there would be no need for the torturous act in the first place). So there is a definite hypocrisy involved in styling torture as self-defence: It is doublespeak whose real purpose is to overlay with a veneer of legitimacy what is actually an aggression, a behaviour that is always offensive and never defensive.

(v.) The last argumentative strategy appeals once more to the ticking-time-bomb scenario: This is an exceptional situation that, precisely on that account, engages in the politician an ethic of responsibility. The focus thus shifts to the politician, in a role much like that which Max Weber describes: that of a decision-maker who takes responsibility for any decisions made. Hence, when an extraordinary circumstance comes up that calls for swift action, the politician rises to the occasion and sets a policy for which he or she will ultimately be held accountable.

In reply to this accountability argument comes the caveat about equality under the law. In other words, accountability as such is all well and good, but not when it amounts to exceptionalism, for in this avatar it must come to grips with the principle that no one is above the law: Even the politician, despite the connections and backroom dealing that bind him (or her) to the occult demons of power, cannot skirt the rules of civilization that hold for everybody without exception. The politician's responsibility as Weber understands it does not exempt the politician from the consequences that come by operation of law within an institutional setting of general rule-making. Responsibility in this sense is none other than the politician's responsibility before the law – a moral commitment to follow the rules that everyone else lives by. There is no apparent reason why the politician should subscribe to a separate standard and responsibility, one that is ultimately lower or laxer than that which the ordinary citizen is held to.

Then, too, it is unclear what is meant by *politician*, what kind of role this word refers to. The responsible politician is generally understood to be a statesman (or stateswoman) in the elitist and Weberian tradition of thought, designating a person of exceptional skill and leadership, someone on whom weighs responsibility for attending to the *res publica*, the public good, but who can equally interpret and satisfy the needs arising under the reason of state. We have here before us what might be described as a process of parallel hypostatization: There is an underlying substance, a preexisting 'stateness' or 'reason'; then out of this essence a constitution and a polity are formed as its concrete expression; and then *in* comes a subject who connects with this 'political essence' and grasps its meaning through a privileged relationship, a bond so special and strong as to lift this person from ordinary moral obligation. There is a quality about this conceit which is at once romantic and authoritarian, for it casts the politician in a heroic light: 'Whoever enters on such an enterprise must

have the makings of a leader,' says Weber. 'But that will not suffice: This leader will also have to emerge as a hero, however much in a subdued, almost muted way.'[62] On this conception, what ultimately drives political activity, the fulcrum around which this activity revolves, is the use of force: 'Those who seek wellness for their own soul and blessing for that others will not do so by going through politics, for the tasks undertaken here fall into an altogether different category, and are such as can only be accomplished through violence.'[63] It seems to flow naturally that a heroic and exceptional figure so conceived – not bound by common morality, a sort of Nietzschean overman for all seasons – should take a relaxed attitude toward torture and not scruple too much about resorting to it: 'Those who get involved in politics, that is, who make use of power and violence, make a pact with diabolical powers,'[64] and if that is the case, then it wouldn't be so much out of character for these persons to also draw the hangman and the torturer into their coterie.

But it is worth asking now: Is this truly and invariably what politics is about? Is this breed of 'heroic' politician, unhindered by scruple with respect to his own soul or that of others, the person to whom we would entrust our future? Is this the kind of figure a democratic polity should rely on in its management of public affairs? The politician's role in democracy should tend to closely resemble that of the *citizen*, and have very little to do with the aristocrat, the Hyperborean statesman conceived in a Weberian mould. Politics in democracy should tend toward a *taming* of force, and anywhere force plays a role in driving the course of the *res publica*, it will signify a failure in the effort to reach mutual understanding and agreement – the mainstay of a democratic order. How could citizens deliberate and make decisions together all the while knowing and accepting that any one of them could turn around and, should the occasion arise, declare a willingness to torture others in the group, reducing them to inert matter, extinguishing these persons as autonomous bearers of rights, and hence as beings endowed with an inalienable dignity?

After all, a constitutional democracy does not have its basis in any preexisting 'stateness' or political essence from which spring forth basic constitutional rights and principles. The *salus populi* and the reason of state – so often adduced as grounds for a constitutional democracy's use of force and violence, even a brutal use – still answer to the content of constitutional rights and principles. There is no dark, inner quintessence concealed within a constitutional democracy, no latent 'state of exception,' no unattended crucible of radical forces brewing beneath the surface, ever ready to break out into violence at the next prepolitical situation of existential danger. The only existence at stake in a democracy is that of the constitution and its

62 M. Weber, 'Politik als Beruf', in *Gesammelte Politische Schriften*, ed. by J. Winckelmann (3rd ed., Tübingen, Mohr, 1973), p. 560 (my translation).
63 Ibid. p. 557 (my translation).
64 Ibid. p. 554 (my translation).

rights.[65] For in a constitutional order, and under the rule of law generally, the state never exists as a pliant argument waiting to be filled in.[66] Here torture – far from being a sort of *arcanum constitutionis*, as some would have us believe – is the final seal attesting to the existential crisis of a political community willing to forsake its own principles and hence its own welfare and survival.[67] The point has been well expressed by Michael Ignatieff: 'For torture, when committed by a state, expresses the state's ultimate view that human beings are expendable. This view is antithetical to the spirit of any constitutional society whose raison d'être is the control of violence and coercion in the name of human dignity and freedom.'[68]

V..

In this concluding section I will defend the thesis that a necessary, conceptual connection holds between torture and illegality. The thesis found an early defender with Christian Thomasius, in his daring essay on torture, 'Dissertatio de tortura ex foris Christianorum proscribenda':[69] Torture victims perceive themselves as victims of *abuse*, and are so perceived by others.

This much seems intuitive. But it is not just that: The immediate evidence and accompanying sense of revulsion can be explained by a discursive reason, too, which is that torture resists universality. Torture defeats any attempt at bringing it under a principle of universal material application: No one who accepts infliction of torture on others will accept it on oneself; this is not a standard that anyone would advocate and at the same time choose to *live by*. And it stands to reason that no one should do so, because torture is experienced by those on the receiving end of it as an act of extreme, *intolerable* violence, as an abuse and an excess – and it *must* be so experienced if it is to qualify as torture, as an *unbearable* torment, as a method for effectively obliterating another's will. Torture could never pass the test of universal acceptability that acts more or less as a final criterion of morality, for it is defined as an excess and an abuse even by those who use and apply it. Nor should it be other-

65 Compare Hauke Brunkhorst on the constitutional order set up under the Federal Republic of Germany: 'A state existing *prior* to the constitution, and capable of obliging its citizens to ensure its own survival should the constitutional order cease to exist, is unknown to the *Grundgesetz* (or basic law of the republic) and is foreign as well to the emergency laws established under its framework' (Brunkhorst, 'Folter vor Recht', p. 78 (my translation, italics in the original)).

66 Cf. C. Möllers, *Staat als Argument* (Munich, Beck, 2001).

67 Cf. H. Brunkhorst, 'Folter, Würde und repressiver Liberalismus', in *Rückkehr der Folter*, ed. by G. Beestermöller and H. Brunkhorst, 88ff.

68 M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, Princeton University Press, 2004), p. 143.

69 For a modern edition of this essay, see C. Thomasius, *Über die Folter*, ed. by R. Liebewirth (Weimar, Hermann Böhlaus Nachfolger, 1960).

wise, since the act is *designed* that way: Its deliberate aim is precisely to be intolerable and excessive; in the words of one expert, Professor Dershowitz, it must consist in the infliction of 'unbearable pain,' and for this reason it is graduated to the occasion – it is made to depend on the varying degree to which the victim can bear pain (the idea being to *break* that limit).

But at the same time, this very characteristic of torture – its being perceived as an intolerable abuse even by those who resort to it – also offers an argument *against* the practice. Indeed, while torture may fail the test of universality as a *standard*, it does not fail in its ability to cross that line and be universal in its *consequences*. In other words, it is not only the torturee's dignity that is being assailed in and through torture, but also that of the torturer (however much in a different and less painful way), who likewise gets transformed into an instrument, an instrument of evil and horror. It is for this reason that torture must not be allowed, because it would transform the whole of society into a 'body torturous,' a body of torturers and torturees. Who among us would ever like to live next to a torturer? But by the same token, who among us would like to live *as* a torturer, with a finger pointed at us, not only by others but also by our own consciences? As Hannah Arendt has put it,[70] what self, what individuality – in the permanent dialogue we each by ourselves carry on with the other, with that interlocutor who at the same time is our own conscience – would bear the company of a torturer within? And that is, too, the main argument used by Michael Ignatieff: 'The problem with torture is not just that it gets out of control, not just that it becomes lawless. What is wrong with torture is that it inflicts irremediable harm on both the torturer and the prisoner. It violates basic commitments to human dignity.'[71]

'In principle,' Michael Davis points out, 'torture is limited only by the tortured's endurance,'[72] which makes this an unreliable and shaky method – a point with a long history on its side, going back at least to Roman jurisprudence. Thus, Ulpian described torture as fragile and dangerous, and by no means a guaranteed way to arrive at the truth: a 'res fragilis et periculosa et quae veritatem fallat.' In effect, torture is overdependent on the degree to which the pain being inflicted can be tolerated: 'Nam plerique patientia sive duritia tormentorum ita tormenta contemnunt; alii fit, ut etiam vario modo fateantur, ut non tantum se, verum etiam alios criminentur' (*De officio proconsulis*, 48, 18, 1, 23). The same point was made by Cesare Beccaria, who in his celebrated book *On Crimes and Punishments* (Chapter 16, 'On Torture')

70 Arendt, 'Personal Responsibility under Dictatorship', pp. 97ff.

71 Ignatieff, *The Lesser Evil*, p. 140.

72 M. Davis, 'The Moral Justifiability of Torture and other Cruel, Inhuman, or Degrading Treatment', *International Journal of Applied Philosophy* 19 (2005): 165.

observed how 'it is confounding all relations to expect that [...] pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture.[73]

Torture therefore *is* abuse and excess – necessarily so, by its own phenomenology. Which goes to show that, unless law is itself conceived as abuse and excess, we cannot at one and the same time be subject to the rule of law and be acting as torturers. As evidence for this proposition, consider how paradoxical it would be to conceptualize and set forth in the law an offence called 'abusive torture,' 'excessive use of torture,' or 'cruel and unusual torture.' It rings odd for a reason, which is that torture carries these attributes by definition: It is *inherently* excessive and abusive; it cannot conceivably make for a use of the public powers congruent with the rules of law, a congruence that Fuller lists as one of the requisites essential to the very concept of law.[74] This holds true quite apart from the obvious fact about torture, namely, that it consists in a punishment inflicted *before* ascertaining whether a crime has been committed, and indeed regardless of whether such a crime is even on the books.

This failure of correspondence had been noted in the early 18th century by Thomasius, who discussed the possibility of the judge overseeing and 'controlling' the torturer at work. Yet this activity frustrates any attempt at objective regulation, for it is governed through and through by a criterion of rational instrumentality. The 'object' of torture – invariably a human being – has to be treated precisely as such, as an object, that is, as a means to something else. Torture can thus be framed in such a way as to make it functional to its *own* end, but it can never be brought under any *different* standard, a normative standard conceived from without. Indeed, the efficacy of torture turns precisely on its ability to drive its own action to excess. As Pietro Verri would write later on in the century, in his *Osservazioni sulla tortura*, in which he took up the work of the Italian jurist and magistrate Giulio Gallo, 'there being no certain norms that can be established in regard to the evidence justifying the use torture, the entire matter is remitted to the judge's discretion.'[75]

Discretion, understood as freedom to judge on one's own, is thus connatural with torture, and woven into its deep fabric. This made plain sense to Alessandro Manzoni, too, who noted certain inconsistencies in Verri's discussion, to be sure, but then observed that the point in question – about discretion falling into the judge's hands when no clear rule is available – had been a long-running theme among jurists. In fact, 'Bartolus himself introduced it as a matter of established opinion: *Doc-*

73 In the original: 'Ma io aggiungo di più, ch'egli è un voler confondere tutti i rapporti, l'esigere [...] che il dolore divenga il crociuolo della verità, quasi che il criterio di essa risieda nei muscoli e nelle fibre di un miserabile' (C. Beccaria, *Dei delitti e delle pene*, ed. by G. D. Pisapia (Milan, Giuffrè, 1973), p. 40).

74 See L. L. Fuller, *The Morality of Law* (New Haven, Yale University Press, 1969 (rev ed.)), pp. 81ff.

75 In the original: 'in materia di tortura e di indizj, non potendosi prescrivere una norma certa, tutto si rimette all'arbitrio del giudice' (P. Verri, *Osservazioni sulla tortura* (Milan, Feltrinelli),p. 83).

tores communiter dicunt quod in hoc non potest dari certa doctrina, sed relinquitur arbitrio judicis [Jurists commonly say that in the matter at hand (whether any evidence is deemed sufficient grounds for torture) there can be no certain doctrine, and that discretion is therefore relinquished to the judge]. And with this they were not meaning to offer any sort of principle, but were rather stating a plain fact, namely, that the law, having no criteria for determining when evidence is grounds for torture, leaves it to the judge to make this determination at discretion.'[76]

The effort in jurisprudence is nonetheless to *contain* the judge's discretion, using to this end various arguments and artifices – yet, as Manzoni concludes, these amount to nothing more than 'ineffectual patches for something that fundamentally could not be cast in any good shape.'[77]

No deontological criteria are at hand that could possibly help us work out in advance the measure or the means of violence to be used in torture. As Klaus Günther has underscored,[78] this indeterminacy begins with the very choice of instruments for the infliction of pain. And then the pain must always be carried to a level *beyond* the threshold of bearability: 'Until the tortured dies,' Michael Davis observes, 'the point at which the torture should stop is a matter of the torturer's judgment (or that of a superior).'[79] We could attempt to set out, as Brügger does,[80] types of cases in which government bodies might be allowed to use torture. But still, in doing so we could not, and should not, make provision for the degree of violence to be used, a measure that we would not be able to control. And as Thomasius observes, the executioner, the torturer, can always use his terrible instruments in such a way as to fool the onlooker, the judge acting as controller: 'Carnifex hic iudici in applicandis instrumentis fucum facere potest.'[81]

If these findings are all accurate, and everything suggests that they are, the rule of law – a rule by which to preestablish the boundaries of admissible behaviour in this or that circumstance, thus precluding abuse and excess in the behaviour so regulated – presents itself as phenomenologically incompatible with the way torturous action is structured. This crucial point is given a compelling statement by Klaus Günther,

76 In the original: 'Bartolo la ripeteva anche lui come sentenza comune: *Doctores communiter dicunt quod in hoc* (quali che siano gl'indizi sufficienti alla tortura) *non potest dari certa doctrina, sed relinquitur arbitrio judicis*. E con questo non intendevan già di proporre un principio, di stabilire una teoria, ma d'enunciar semplicemente un fatto; cioè che la legge, non avendo determinato gl'indizi, gli aveva per ciò stesso lasciati all'arbitrio del giudice' (Manzoni, *Storia della colonna infame*, pp. 56–57).

77 Ibid. p. 62.

78 See K. Günther, 'Darf der Staat foltern, um Menschenleben zu retten?' in *Rückkehr der Folter: Der Rechtsstaat im Zwielicht?* ed. by G. Beestermöller and H. Brunkhorst (Munich, Beck, 2006), 107.

79 Davis, 'The Moral Justifiability of Torture', p. 165.

80 Brügger, 'Das andere Auge', p. 115.

81 Thomasius, *Über die Folter*, title. 2, sec. 5.

among others, who argues that there is no such thing as 'clean' torture: This is an activity that cannot be made consistent with any scheme of law, on account of the increasing aggressiveness and violence this activity is inherently designed to exert.[82] In particular, there is no way to conceptualize a 'proportionate' and 'predictable' form of torture, which must invariably manifest itself as disproportionate and unpredictable: 'Assuming that torture is at all effective, it can be such only insofar and as long as the person under torture cannot anticipate how much it can still be escalated or be made to last.'[83]

Our conclusion, then, can only come down to this: There is no room for torture under the rule of law. In fact, torture would come as a setback in the process of civilization set in motion during the Enlightenment period and the modern age, a process aspiring to carry on in ways that will bring down the rate of violence in social relations and in the law itself. The cruelty of torture makes this an activity squarely antithetical to the *mildness* distinctive to the law as a principle and technique by which to tame and pacify social and interhuman relations. But more significantly perhaps, there is a structural reason why torture has no place under the rule of law. This form of rule acts as a criterion whereby any action, and all the more so the violent action of a government body, must be framed in ways that make it predictable and proportional. And there is no way that a criterion so conceived can accommodate torture, structurally designed as it is to repel any hint of predictability, proportionateness, or restraint.

And there is yet a third reason for the permanent illegality of torture, a reason showing this activity to be illegal in an even more fundamental way. A legal system is based on the assumption of its members being free and equal subjects under the law, and along with this subjectivity comes a dignity recognized for each such member as a person endowed with a free will, or a capacity for autonomous action. Now, torture is so conceived as to deny and violate this dignity and capacity in the most flagrant way possible. As Günther explains, torture must act on the tortured in such a way that their will be broken ('Sein Wille soll gebrochen werden').[84] And as another German scholar has emphasized, 'torture is incompatible with the rule of law precisely because the activity attacks individuals in their capacity to be subjects under the law – in fact the activity inclines toward crossing a *further* limit, beyond which one is broken and destroyed as an autonomous person.'[85] In this respect, torture stands on an equal plane with enslavement, for in either case a subject is transformed by law into *chattel*, into something to be disposed of at will, ad libitum. Tor-

82 Günther, 'Darf der Staat foltern', p. 107. Cf. also K. Günther, 'Folter kennt keine Grenze', *Die Zeit*, 13 March 2008.

83 Günther, 'Darf der Staat foltern', p. 107 (my translation).

84 Ibid. p. 106.

85 J. Ph. Reemtsma, *Folter im Rechtstaat?* (Hamburg, Hamburger Edition, 2005), 125 (my translation, italics added).

ture thus means despotism, slavery, *tyranny*. As Thomasius cautions us, 'quaestio omnibus tyrannis praebet occasione, sub specie iustitiae in subditos saeviendi.'[86]

VI.

I should like now to close my statement against torture with this addendum: 'Juristen, böse Christen!' (Jurists, bad Christians!). It was Martin Luther who gave forth with these words,[87] for it seemed to him that positive law – the justice of men – is inevitably tied up with violence, blood, coercion, even torture: 'Recht ist Gewalt' (Law is violence).[88] To a Christian, law paradigmatically presents itself in the shape of the cross, a tool of affliction and torture, and also a symbol of treatment that is degrading in the extreme and suppressive of dignity: It meant to slaves, but not to freemen, deep torment and punishment by death. Furthermore, the jurists had taken it upon themselves to judge their own kind, thus claiming a power that can rightfully be exercised only by God: 'Judge not, that ye be not judged,' 'He that is without sin among you, let him first cast a stone at her,' Jesus said. The jurists have paid no heed to these words, for they have taken the supreme moment of judgment into their own hands, wasting no time to cast the first stone.

There is also third reason why Luther denounced jurists as bad Christians. This can be described as a conceptual (or 'logical') reason, which is that the law they handle perpetrates its own injustice; it does so by its inability to overcome the *form* of justice, this being the form of *law:* 'Jeder Richter ist ein Feind Christi, weil er die Gerechtigkeit der Werke treibt.'[89] Stated otherwise, a form of justice that cannot be bent toward kindness and charity will convert into patent injustice. Jurists are in this sense bad Christians, an immoral lot, because they confine themselves to judging conduct by the classificatory and systematizing criterion of the formal rule.

Nor were these learned experts of the law much inclined toward the golden rule of reciprocity, 'Do not do to others what you would not have them do to you': This principle the jurists were unwilling to make into a universal law of torture, to take one example. In fact, the *jus commune* they all shared would not allow the hangman to ply on them the terrible trade he plies on others; the Medieval jurists, in other words, took care to exempt themselves from torture, an exemption that also took in (besides doctors of laws) judges, lawyers, physicians, and the nobility and clergy –

86 Thomasius, *Über die Folter*, title 2, sec. 4.
87 M. Luther, *Tischreden*, ed. K. Aland, Reclam (Stuttgart, 1981), 205.
88 Ibid. p. 207.
89 Ibid. p. 205.

all were granted immunity from 'the question' (though, in fairness, immunity was also extended to pregnant women and children).[90]

Now, the jurists who are urging today a return to torture – however much within its restricted use as a 'life-saving' device, or *Rettungsfolter* – must equally reckon themselves as bad Christians by Luther's standards, in the first place because they no longer have any notion of the sufferings endured carrying the cross, but even more so because there is a definite callousness about them, predisposing them to show what appears to be no compassion at all for the soul of a battered body. As we have learned, John Yoo's hand will not shake even at the sight of a tortured child,[91] though it should be mentioned here to Yoo's credit that he seems to endorse, appropriately enough, a universal extension of the criteria he adopts with respect to torture: This much can be gleaned from his comment that it would be legitimate for Al Qaeda militants to torture Donald Rumsfeld should they capture him.[92]

But Yoo, Bybee, Dershowitz, and Brügger, and many others following their lead, also show themselves to be 'bad jurists.' They do so in the first place by failing to honour certain basic duties under their code of professional ethics, such as the duty not to cater to the whims and wishes of those who pay them, even if it is the sovereign pro tempore they are working for. Yoo and Bybee should not make it their calling to devise ways by which to answer any request whatsoever their client may possibly express, regardless of how all-powerful this person may be.[93] More importantly, however, what makes them 'bad jurists' is their denying the law its quality as *form* – their willingness to bypass the rule of law, the sworn enemy of abuse and cruelty. Like the High Priest, they rehearse the motto of expediency whereby one man should die lest an entire people should perish (cf. John 18:14). Legality as we understand it brooks no abuse, but they say this kind of law can be broken when special circumstances arise that justify doing so. And one might think that these circumstances, justifying our rising above the law, should be used to exercise mercy – but no, they are used instead to indulge in lawless cruelty and excess.

And yet, as Blackstone observed in his *Commentaries on the Laws of England*, it is mercy that we can see being invoked as a justification for torture: 'It seems astonishing that this usage, of administering the torture, should be said to arise from a

90 See P. Fiorelli, *La tortura giudiziaria nel diritto comune*, vol. 1 (Milan, Giuffrè, 1953), pp. 276ff., and J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (2nd ed., Chicago, University of Chicago Press, 2006), p. 13.

91 The allusion here is to the PBS interview with John Yoo: see note 26 above. Compare the hypothetical case used by M. Strauss to criticize the ticking-bomb scenario, in 'Torture', *New York Law School Law Review* 48 (2004): 275–276.

92 See Yoo, *War by Other Means,* p. 166. The comment was set down the context of Rumsfeld's former position as U.S. defense secretary and gets its full meaning within that context, but the point comes across clearly regardless.

93 On this point, and on the charge levelled at Yoo and Bybee for breaking the deontological code of lawyers and jurists, see the lucid considerations offered in R. B. Bilder and D. V.. Vagts, 'Speaking Law to Power: Lawyers and Torture', in *The Torture Debate in America*, ed. by K. J. Greenberg (Cambridge, Cambridge University Press, 2006), 151ff.

tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nation' (*Commentaries*, bk. 4, chap. 25). To be sure, mercy and torture do share a trait in this bizarre comparison, for they both break the formal constraints of justice – both debouch into the concrete – but they do so in dramatically different ways: Only torture does it *contra legem*, effecting abuse and assault in the process. So we have mercy, the highest *justice* in the concrete case, against torture, the highest *injustice* in the concrete case: Both break the rule of law, but one engages in cruelty, and outrageously claims a spurious equivalence with the other under the pretext of a parallelism it craftily uses as a shield by which to conceal what is actually a deep antithesis.