Richard H. Weisberg

Loose Professionalism, or Why Lawyers Take the Lead on Torture

Gen’l. Jack D. Ripper: “Were you ever a prisoner of war, Mandrake?”

Group Captain Lionel Mandrake: “Yes . . . the Japanese.”

Ripper: “Did they torture you?”

Mandrake: “Yes, yes, Jack. They did.”

Ripper: “Did you talk?”

Mandrake: “No—but I don’t think they really wanted me to talk. They were just having a bit of fun, that’s all.”

—Stanley Kubrick, Dr. Strangelove

Others in this symposium have amply demonstrated that the practice of torture through the years—apart from the physical and psychic pain visited on the victims—has been fraught with risks to those who inflict it as well. The torturer through history can be characterized as naive (in his hope that confession or disclosure will be accurate) or as cynical (in his indifference to the inaccuracy that usually follows from the practice), or as self-absorbed (in his need for the torture victim to utter formulas that support the torturer’s worldview) or as sadomasochistic (in his literal brutality, often tempered by the phrase “this hurts me more than it hurts you”). None of these descriptions reflects well on the torturer or the society condoning the practice. Against these risks, periodically, apologists for the practice invoke special emergency conditions (whether spiritual or geopolitical), as though the world had never before seen such conditions. Where the premodern
torturer perceived some unique threat to the soul, the modern torturer sees it to the nation-state, and his or her postmodern apologist manages to forget history in an unwise and ironic rush to cloak the torturer’s brutality in the language of utilitarianism.

I want to discuss the professional consequences—specifically to the world of lawyers and law professors—of this rush to rationalization. Using especially the historical example of Vichy, I will associate with that unfortunately analogous “emergency challenge” to (French) legal professionalism the current tendency among some otherwise right-thinking (American) lawyers to justify what had previously been considered an unthinkable practice. Then and there it was racism; now and here it is torture. I will call the phenomenon of legal discourse that slips dangerously toward the known-to-be-wrong as “loose professionalism.” I find it especially in the spearheading contribution to this symposium of Sanford Levinson—which cites allied remarks of Alan Dershowitz and Richard Posner on the subject—as well as in other essays included here.

Two points at least bear clarification early: first, I am not suggesting that the legal community can or should completely avoid discussions of torture; no—I am suggesting on the all-too-infrequent historical model of early protest against aberrational practices that lawyers so inclined should speak out directly and forcefully against the practice. (Hence Professor Levinson misunderstood me at an earlier stage in this debate when he suggested that people with my perspective on torture did not want to have “this conversation in public” but instead opted “to avert our eyes to what is actually going on.” There should be such a “conversation” about torture, including, as its preferably most powerful intervention an emphatic no to the practice!) Second, I am not suggesting that those who, instead, begin to rationalize torture necessarily favor the practice; what I am saying is that the lessons of history are clear in demonstrating that such rationalizations not only help the practice to thrive but often provide (as in Vichy-created racism) the main reasons for its baleful success.

In mid-October 1940, with Nazi occupiers in Paris and a new French regime down in Vichy legislating aggressively against Jews, Professor Jacques Maury leveled a frontal protest against racism. A specialist in public law from the University of Toulouse, Maury could not believe that statute writers from his own country had jumped the gun on German demands and
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new French lawyer Jacques in public law statute writ-
lemands and exceeded even the Nuremberg model of "racial" definition and persecution. As I reported in a book-length study of the French legal profession under Vichy, many lawyers at the time privately found Vichy's premature violation of France's egalitarian traditions to be grotesque. They, like Maury, believed at the beginning that the French system simply would not deign to recognize or enforce racist practices. Maybe the occupiers would eventually impose anti-Semitism on the indigenous population, but the Nazis surely had not yet made that difficult political decision by October 1940, when Vichy on its own promulgated the first of what would become almost two hundred home-grown laws against the Jews. So Professor Maury published openly what most of his colleagues believed: it was unacceptable for a government acting in the name of France to violate "our long-held rule safeguarding equality in their rights as well as their responsibilities to all French people."

A "conversation" had begun about racism. If government ministers under Marshal Petain wished to define and punish people on the basis of their "racial" or "religious" heritage, the rest of the legal community's willingness to do so remained quite unclear. Jacques Maury voiced his unwillingness, and he did so loudly and clearly. His professional assumption was that the strange un-French law would die aborning. No one yet had introduced into the conversation a discourse of rationalization, obfuscation, or utilitarianism. Instead, among the first prominent words from a lawyer was Maury's unambiguous rejection of the practice. Maury—no "Ivan Karamazov [saying, as Levinson has understood Dostoevski's character] "let justice be done though the heavens fall!"—on the contrary was speaking a pragmatic professional language of French legal tradition.

Rising considerably more than an American lawyer might today protesting the practice of torture, Jacques Maury published his professional opinion of the new law's validity in the Parisian equivalent of the Yale Law Journal; it was a frontal attack on racism. He did not assume, as the rationalizers of torture seem to do today, that since the practice exists we are required to micromanage it by bringing our exquisitely refined lawyer-like skills to justify at least some part of it.

Tragically, Maury's protest went no further than the two articles he published in the fall of 1940. If Maury had been punished for his indictment of the new practice, either by the Nazis or the Vichy regime itself, there might have been reason for his colleagues to reject his mode of frontal protest. But he was not punished for his words at all. Three years later, his academic ca-
reer thriving, we find him instead still writing about these laws, which had been developed along the lines of an accepting discourse instead of the conversation of protest he had vainly opened as the Occupation was just beginning. Documents show that, in the absence of any help at the beginning from his confreres at the bar or in academia, Maury himself dropped the discourse of principled protest and instead (like those others) worked within the laws and made them live.

By 1942 and 1943—with the deportations from France proceeding apace and according to Vichy legal definitions—Jacques Maury’s strict professionalism had been transmogrified. Like the rest of his colleagues at the bench and bar (and in academia), Maury instead wrote and talked about the ambiguities surrounding the status of the Jew in Vichy. Like everyone else, he had become a loose professional. Direct protest against the very idea of such laws had disappeared.

What happened between the publication of his protest in late October and the loose professionalism of the high-deportation period? The transmogrification had, as it turns out, little to do either with external German pressure or with indigenous anti-Semitism itself. It did not happen, as it turns out, that Maury’s legal colleagues accepted this bizarre change in their laws and traditions because they were afraid of the Nazis. Fewer still wished to pander to the Germans so that France could politically fit into Hitler’s “new Europe.” Ample documentation proves that French lawyers quickly perceived that the Nazis were willingly permitting French laws and judicial structures to proceed virtually unchanged; that Maury himself went unpunished—that the Vichy laws deliberately distanced themselves from (and often exceeded) Nazi racial models—further indicated that the Germans had prudently decided to let Vichy go its own way, even abiding broad-scale debate by the French as to the direction and philosophy behind such laws.

Anti-Semitism existed, of course, among lawyers as among the wider population. At the bar, there was a special resentment of the recent influx of “foreign Jews.” But there was an even deeper resentment that Vichy legislation worked to disbar and sometimes imprison respected Jewish colleagues whose families had been in the country since Napoleon or before and whose brothers and fathers had died fighting for France during the twentieth century. There was no love of this legislation.

Analogous to the rationalizers of torture today, most Vichy-era lawyers would say wistfully: “Nobody in France likes official discrimination on the
basis of race and religion. But . . .” Everything that really counted in the
discourse that followed Maury’s late-1940 strict professionalism began with
that word but.

Confronted with a clear choice between opposing the practice and
working within it, the French legal community took up the new laws as they
would a rich and potentially fine new wine. Like today’s micromanagers of
torture, they found the “middle ground,” the loopholes, the ambiguities,
and in so doing they made the new and unusual vintage into a highly palat-
able professional brew. As many veterans of Vichy whom I interviewed
twenty or so years ago told me, had French lawyers (like those in Italy) or
the population as a whole (like that in Denmark) rejected the racist laws,
history would have told a different and probably far more benign wartime
story than the one France has to live with today.

Whatever their personal feelings and their finer professional instincts—
to be detected in archival records of private musings by French lawyers
across the spectrum (even in the Vichy ruling circle itself)—the entire rele-
vant legal community spent four years collectively reversing their country’s
150-year-long egalitarian traditions. And they did this not only under no
significant German pressure but sometimes in the face of the occupier’s an-
noyance that the Vichy approach went too far, implicated too many groups,
and involved a case-by-case legalistic scrutiny that was foreign to Nazi ju-
risprudence and precedent.

Although the practice of torture violates all of our traditions, lawyers of
impeccable credentials are starting to “pull a Vichy” on their community.2
Lacking the will to mount a Maury-style protest, they seek to cabin torture
within a spectrum of acceptable and unacceptable procedures and defini-
tions. In this sense they exceed the unfortunate example of Vichy in three
ways: first, if they instead chose to enter the debate at the level of direct
protest, they would encounter none of the personal and professional risks
run by Maury in the fall of 1940. Maury’s finer instincts moved him at first
to protest despite many conceivable risks to his own well-being; today’s
apologists, who are under no external threat, traduce such instincts. Sec-
ond, unlike the Vichy lawyers, who knew that racial laws were an actual un-
avoidable fact, apologists for torture today cannot be absolutely sure that
an American variation on the practice actually exists in any widespread
way. Thus what looks—sadly enough—like an apologetics for torture ac-
tually also stands as a potential goad to decision-makers to adopt or ex-
pand a practice that may currently be no more than a blip on the radar

LOOSE PROFESSIONALISM

303
screen. In Vichy, the legal community’s eventual looseness managed to enhance, grotesquely, the racial laws’ chances of succeeding; today, loose professionalism may in fact create the practice. Third, today’s loose professionals have World War II and its lessons fully behind them; Maury and his colleagues—like the Church in Europe, which also spoke a discourse of apology or accommodation when even Hitler might have stopped his most extreme practices if there had been unambiguous protest early—wrote that unfortunate history. Today’s professional communities need to learn it.

The complex discourse of loose professionalism is on the move, but the Vichy example should give us pause. We should not confuse conversational complexity (even among lawyers) either with intelligence, appropriateness, or even sophistication. These virtues, and perhaps especially the last of the three, implicitly justify the arguments made on behalf of some forms of torture. No one, after all, wants to seem wide-eyed when facing—for example—the “ticking bomb” hypothetical. So even if one admits the severe costs of breaking the taboo against torture, surely it would be unwise to forgo the benefits of saving thousands of lives by torturing the one who knows where the bomb is.

But—as David Cole and I, among others, have pointed out—the hypothetical itself lacks the virtues of intelligence, appropriateness, and especially sophistication. Here, as in The Brothers Karamazov—pace Sandy Levinson—it is the complex rationalizers who wind up being more naive than those who speak strictly, directly, and simply against injustice. “You can’t know whether a person knows where the bomb is,” explains Cole in a recent piece in the Nation; “or even if they’re telling the truth. Because of this, you end up sanctioning torture in general.”

Let us continue to be alert to what governments may be doing. And, if there is evidence that our government practices torture, let us avoid loose professionalism by entering the debate with a firm protest against the practice. Let us not lead, in the name of some skewed idea of Realpolitik, with our collective, liberal chins.

Notes

2. Ironically, some of these actually try to embellish their arguments by citing unspecified examples of the use of torture by the French Resistance during this same
Vichy period. While there are some isolated reported cases of harsh methods used by the embattled Maquis, history has dealt appropriately and in documented detail with the Nazis' actual torture of members of the Resistance, most notably perhaps Jean Moulin. References to the French Resistance to justify torture are historically suspect and professionally perverse.

3. May and June 2004 brought to public attention several memoranda and other internal documents of the Bush Administration that offer copious rationalizations by Administration lawyers tending to soften the taboo against torture. They raise serious questions not only about the merits of their legal analyses, but also about what is the "professional responsibility" of lawyers who believe themselves under pressure to justify what is in fact moral evil.