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Jonathan H. Marks, "The Logic and Language of Torture"
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Abstract: In his paper "The Logic and Language of Torture," Jonathan H. Marks explores the tragic temptation of torture in the wake of the 11 September 2001 attacks. Emotive responses to terrorism fueled by ticking bomb scenarios and other narrative constructs caused the U.S. to reconsider torture and the boundaries of permissible interrogation tactics in the aftermath of 9/11. While many in the media and the academy debated the necessity of "interrogational torture," the government decided that something more than moral reconstruction was required. For that reason, it embarked on a campaign of legal exceptionalism. While affirming its commitment to the torture ban, the administration engaged lawyers to define torture as narrowly as possible and to disapply prohibitions on cruel, inhuman, and degrading treatment. These measures led inevitably to the abuse of detainees (many of whom had no intelligence value whatsoever) and -- in some cases -- to their deaths. Recognizing the role that emotion and narrative constructs have played in both moral reconstruction and legal exceptionalism is vital if we are to avoid a repetition of these mistakes in the event of another attack.

Jonathan H. MARKS**The Logic and Language of Torture**

The road from terror to torture is, alas, well-traveled. Fuelled by narrative constructs that evoke fear and anger, we embark on exercises in moral reconstruction and legal exceptionalism -- rendering permissible (sometimes even mandating) what would otherwise be prohibited and making inevitable what would otherwise be inconceivable. Oliver Wendell Holmes once observed that "most people reason dramatically, not quantitatively" (Myers 56). A century later behavioral economists told us that, most of all, we fear "dread risks" -- uncontrollable low-probability, high-consequence events, such as mass terror attacks (see Slovic 283). The vivid and devastating collapse of the Twin Towers provided evidence in support of both claims. It gave us a "terrific" vision of the world in which we are constantly under threat from Islamic fundamentalism, rebranded "Islamofascism" (on this, see, e.g., Safire; Pollitt) There is no denying that Al Qaeda poses a real threat to the lives of US-Americans (among others). However, we fear calamitous acts of terrorism in the "homeland" more than we fear a plethora of chronic and pedestrian risks, although the latter have (to date) caused many more fatalities than domestic terrorism. At least 18,000 people under the age of 65 die prematurely every year in the United States for lack of health insurance (Institute of Medicine 5); more than 40,000 US-Americans die in road traffic accidents, the leading cause of death for those between three and thirty-three (see Subramanian), and those unfortunate enough to be both uninsured and involved in a car accident have a 37% greater chance of dying than insured victims. We are, however, inured to these quotidian risks, despite the magnitude of the losses they cause, and we focus instead on our dread risks, both real and imagined. This is why, in the months following the attacks on 11 September 2001, many of us took to the roads to make long journeys instead of flying -- a decision that now seems ill-advised, given the resulting spike in road traffic fatalities (see Gigerenzer).

The impact of basic emotions, such as anger or fear, whether evoked by terrorism or other risks, is felt beyond the sphere of individual behavior (see Marks, "What Counts", "The Power"). They undoubtedly shape our policy preferences -- whether we are inside government (on this, see Tenet) or outside it. This was starkly revealed by a study conducted in the months after 9/11 (see Lerner, Gonzalez, Small, Fischhoff). Half the subjects in the study group were conditioned by audio-visual stimuli to feel anger; the other half were primed to feel fear. The fear-conditioned group favored conciliatory and capacity-building responses, such as strengthening ties with Muslim countries and improving public health infrastructure. The anger-conditioned group, on the other hand, preferred poorly-targeted or untargeted punitive responses, such as the mass deportation of foreigners without valid visas -- a measure that, according to one recent estimate, would cost the United States around \$230 billion over a five year period (see Goyle and Jaeger). As I have argued elsewhere, basic emotions such as fear and anger may multiply and become amplified across groups and populations (see Marks, "What Counts" 574-78). Without doubt, this is a complex process, one mediated by social, political and constitutional structures, as well as culture, history and collective memory (or collective amnesia). But it may help explain the results of a survey conducted in 2004 -- after the photos of detainee abuse at Abu Ghraib were first published -- in which almost one quarter of the US-American respondents agreed that it was "too restrictive" to say that governments should never use torture, but said that it would be unacceptable for a foreign government ever to use torture against an American detainee (see Kull, Ramsay, Subias, Weber, Lewis). More than half of respondents described as "convincing" the view that "given what we learned from the 9/11 attacks, we cannot afford to tie our hands by declaring off limits any method for getting information that could be useful in the war on terrorism" (Kull, Ramsay, Subias, Weber, Lewis 7). The survey respondents were clearly suffering from what Timor Kuran has termed "moral dissonance" (Kuran 233), as they grappled with competing moral imperatives. Torture is bad, and must be stopped. Terrorism is bad, and must be stopped. But

to stop terrorism, we need torture (provided, of course, that we are not the victims). Or so the reasoning goes. This type of analysis is not the sole province of survey respondents. It has taken hold of many in the academy too. The political scientist, Michael Gross, framed the issue in a similar way: "Humanitarian law forbids torture *and* terror. But *if* torture is necessary to prevent terror, something has to give; one cannot unequivocally condemn both" (Gross 235; emphases in the original). Similarly seduced by the torture imperative -- or by the belief that others presented with it will inevitably succumb -- the Harvard legal scholar, Alan Dershowitz, went further in his analysis and proposed a system of "torture warrants" to be issued by a judge *ex ante* (Dershowitz 131-65), designed to give a patina of legitimacy to what would otherwise be considered a flagrant violation of fundamental human rights. Although some in the academy have spoken out firmly against torture (see, e.g., Waldron; Luban), many mused on paper about whether the torture ban is sustainable in light of the threat that Al Qaeda terrorism presents (see McKelvey). Slavoj Žižek has been critical of fellow academics and commentators for writing essays that "introduce [torture] as a legitimate topic of debate," arguing that they are "even more dangerous than an explicit endorsement of torture" which would be "too shocking" (103). He notes that the debate tends to legitimize torture and "changes the background of ideological presuppositions and options much more radically than its outright advocacy" (Žižek 104). Although Sanford Levinson, a liberal constitutional lawyer, noted Žižek's critique of the torture debate, it did not discourage him from agonizing about the legitimacy of torture in several articles and a collection of essays which he also edited (see, e.g., Levinson). So what ineluctable force compels ordinarily well-intentioned academics to rend the fabric of their liberal mantle and turn, reluctantly, to a coarser cloth?

It should come as no surprise that, in a world of vivid images, there is a powerful image that fuels the torture imperative. That image is, of course, the "ticking bomb" (Dershowitz 131). It is most vivid in the mind of the beholder -- who tends to locate it, to maximum effect, in the heart of a city in which one's nearest and dearest live. In dramatic representations, the ticking device is often a digital clock -- as in the History Channel's *The Dark Art of Interrogation*, inspired by Mark Bowden's well-known article of the same title. Sometimes the "device" is an Al Qaeda suicide bomber, primed and waiting for a prearranged time in order to detonate the device (see "Dirty War"). The bombs intended to be the subjects of our fear are sometimes nuclear devices -- in which case, they are truly "The Sum of All Fears." At other times, they are "dirty bombs," munitions that cannot trigger a nuclear explosion, but generate fear by scattering radioactive isotopes over a wide area (see "Dirty War"). The popular Fox television series, *24*, regularly presents its hero, CIA operative Jack Bauer, with torture imperatives fueled by imminent explosions and accompanied by extradiegetic music that predictably derives its urgent beat from a ticking sound. In the first five seasons of the show, there were -- by one count -- 67 torture scenes (Mayer, 68). *24* may be fictional, but it clearly has an impact on the real world. In November 2006, U.S. Army Brigadier General Patrick Finnegan, the dean of the United States Military Academy at West Point, flew to Southern California to meet the creators of the series. He came to voice concern that the show's premise -- that fundamental norms must be violated in the interests of national security -- was having a "toxic effect" (Mayer 72). He called for the show to stop or at least change its approach, arguing that it made U.S.-Americans "generally more comfortable and more accepting" of detainee abuse and that it "promoted unethical and illegal behavior and had adversely affected the training and performance of real American soldiers" (Mayer 72-73). In recent years, Hollywood has rarely warned us of the perils of torture. Some cautionary words were voiced by one character in the *The Siege* (1998) -- a troubled and controversial film that predicts eerily both interagency tensions in the wake of September 11 and the use of nudity as an interrogation tactic. FBI agent Anthony "Hub" Hubbard (played by Denzel Washington) issues a warning to Major General William Devereaux (Bruce Willis) in the presence of CIA operative Elise Kraft (Annette Bening) and a naked detainee who is fearfully muttering Arabic: "if we torture him, General, we do that and everything we have fought, and bled, and died for is over. And they've won. They've already won!"

(the warning proves futile; the FBI agent is escorted out of the room, and the detainee is tortured). When he turns out to have no intelligence value, as Hub also predicted, the detainee is subsequently killed in an off-screen summary execution signaled by a gunshot sound. For the greater part, however, ticking bomb dramas invite us to see -- and feel -- the torture imperative. They ask us to understand and forgive interrogational torture, and to distinguish it from torture in which a legitimizing intelligence objective is lacking.

The success of this enterprise is demonstrated by two recent movie trailers which implicitly acknowledge that it is neither novel nor challenging to extract sympathy with ticking bomb narratives. Recognizing our acclimatization to interrogational torture, they seek to develop a voyeuristic appetite for cruelty that is unmitigated in its gratuity. In *Hostel* (2005), the trailer promises "a place where all your darkest sickest fantasies are possible, where you can experience anything you desire, where you can torture, punish or kill for a price." The words flash on the screen in short segments, interspersed with images of a man tied to a chair, a display table of dirty surgical instruments, a human toe wedged between the menacing blades of a pair of pliers, and a hand wielding a revving drill. As if our appetites for the pain of others were inexhaustible, the trailer for *Saw III* features images of whirring saws and the voice of a woman pleading ("Please don't do this"). It ends with a gravelly voiceover: "Suffering. You haven't seen anything yet." These trailers exploit the theatricality on which much real torture depends (on this, see McCoy 76-83) and undoubtedly call for sociological and psychological analysis in their own right. However, I leave this analysis for others; instead, I explore how the ticking bomb has captured the public imagination and inspired a torture-tolerant culture despite two inconvenient truths: that ticking time bomb scenarios are more fictive than real and, even if such a scenario could and did arise, torture would not be the "magic bullet." Since my primary purpose here is to describe the emotive force of ticking bomb scenarios and the means by which we have responded to them, I will not set out an exhaustive argument in support of these two claims—an exercise others have already conducted, in my view, persuasively (see, e.g.; Luban; Buffachi, and Arrigo). However, some powerful evidence in support should be briefly noted.

First, a group of interrogators meeting at Georgetown University in late 2006 acknowledged that in their collective one hundred years of interrogation experience, none of them had ever encountered a true ticking-bomb scenario (see Cordes). Even if such a scenario were to occur (and I will say a little more about the improbability of this below), torture is -- for good reason -- *not* the response recommended by the experts. If interrogators had a real terrorist conspirator in their custody, he would probably be aware of the limited time until the detonation of the bomb, and he would have at least two options for frustrating his captors. He could either hold out and endure the torture until the explosion occurs, or he could deliberately give false information that would lead the interrogators and their associates astray. If, on the other hand, the interrogators had an innocent person in their custody, he would be likely to say whatever he thought the interrogators wanted to hear in order to bring the pain and suffering to an end. As the British government learned to its cost, coercive interrogation strategies falling short of torture were incredibly successful in procuring false confessions from suspected members of the Irish Republican Army in the 1970s (see Gudjonsson). For this reason, experienced interrogators counsel against torture (see Budiansky). A former chief psychologist of the Naval Criminal Investigation Service, who retired from that post in late 2006, has added his voice to the chorus of experts who advocate that rapport-building interrogation tactics be deployed against Al Qaeda suspects, even in alleged ticking bomb scenarios (see Gelles, McFadden, Borum, Vossekuil). Despite these views and the professional expertise that informs them, ticking-bomb scenarios continue to fuel public support for torture as a necessary evil. This is because they have a dramatic impact and, consequently, an emotive force that overwhelms reasoned objections to the use of torture.

Ticking-bomb tales are usually propelled, either explicitly or implicitly, by an omniscient narrator and, in Hollywood productions, dramatic tension is most acute when the audience shares the

narrator's knowledge but those on the trail of the terrorists do not. These fictions slip surreptitiously into the real world at the hands of advocates of so-called "interrogational torture," and lay the foundations for what David Luban has called the "liberal ideology of torture" (1427). Justifications for torture become premised on supposedly real but hypothetical ticking-bomb scenarios and they depend for their moral suasion on what I call the "omniscient narrator fallacy." The advocate of torture adopts the role of omniscient narrator, telling us that 1) the person in our custody is a terrorist, 2) another terror attack is imminent, putting the lives of many innocent civilians in danger, 3) the terrorist knows where the device is located, and 4) the only way we can find out where the device is located (and thereby intercept the attack) is by torturing him. The advocate-narrator shares all this information with us except, of course, the location of the bomb. An interrogator who possessed all the information described above in 1-4 would be so well-informed that, in all likelihood, he would already know where the bomb was too. But rarely do interrogators operate in such an information-rich environment. Even if interrogators are confident they have a terrorist in their custody, there will almost inevitably be great uncertainty about the possibility of another attack and the knowledge of this particular detainee. In the real world, interrogators are far from omniscient. They are, like the rest of us, flawed human beings dealing with uncertainty. Despite their skill at manipulating others, interrogators may themselves be vulnerable to manipulation. The risk of manipulation is particularly acute in light of their dependence on others -- associates who may eagerly assume the role of quasi-omniscient narrator -- for information about the world outside the interrogation room (including the provenance of those in their custody).

Although the traditional ticking-bomb scenario may not have played out in exactly the way I describe at Guantanamo, narrative constructs operated in similar ways. General Miller, former camp commander at Guantanamo, told his staff that the detainees were "the worst of the worst" (Saar and Novak 193). One of the prisoners, Mohammed Al-Qahtani, was dubbed "the 20th hijacker," -- a moniker he shared with at least one other Al Qaeda suspect (Hersh) -- before being subjected to between 18 and 20 hours per day of aggressive interrogation for 48 days over a 54 day period at the end of 2002 and beginning of 2003 -- an interrogation which reduced his body temperature to 95 degrees on two occasions, and his pulse to a life-threatening 35 beats per minute (see Zagorin and Duffy). The allegation that Al-Qahtani was the supposed 20th hijacker on 9/11 has never been substantiated and we now know that many Guantanamo detainees had no intelligence value whatsoever. According to Department of Defense documents, the vast majority of Guantanamo detainees were handed over to U.S. forces by Pakistan or the Northern Alliance in Afghanistan in exchange for large bounties -- after the U.S. had airdropped leaflets promising "wealth and power beyond your dreams" (Denbeaux, Denbeaux, Gratz, Gregorek, Darby, Edwards, Hartman, Mann, Skinner, *Report on Guantanamo Detainees* 23-25). Many prisoners have been detained solely on the grounds that they were allegedly associated with supposed terror groups (see Denbeaux, Denbeaux, Gratz, Gregorek, Darby, Edwards, Hartman, Mann, Skinner, *Second Report*), although membership of several of these groups would not have prevented the detainee (or any other traveler) from lawfully entering the U.S. as a disembarking passenger at Newark Airport.

The power of narrative operates in both directions in the chain of military command. It works not merely as a mandate from a commander to his subordinates, implicitly authorizing abusive treatment of detainees. In reverse, it enables interrogators (or those who oversee interrogators) to seek explicit permission higher up the chain of command for more aggressive treatment of detainees. This is illustrated vividly by a memo sent by Colonel Thomas Pappas, former head of military intelligence at Abu Ghraib to the Iraqi commander on the ground, Lt. General Ricardo Sanchez (Pappas). Its narrative begins with a brief description of the detainee (focusing on the circumstances of his capture) and follows with a putative psychological profile: "Circumstances of capture: Detainee is a Syrian male [age redacted] years of age, captured in an attempted IED [Improvised Explosive Device] attack in Baghdad, IZ. Detainee is an admitted foreign fighter who came to commit Jihad

against Coalition Forces in Iraq. He was captured with [name redacted] while attempting to set up an IED. ... Assessment of detainee: Detainee is at the point where he is resigned to the hope that Allah will see him through this episode in his life, therefore he feels no need to speak with interrogators. Detainee will not answer open ended questions, has a smug attitude and is running counter approaches on interrogators. Detainee needs to be put in a position where he will feel the only option to get out of jail is to speak with interrogators" (Pappas 1). The memo proceeds to make the case for the authorization of more aggressive interrogation strategies by describing the "potential information" the prisoner might possess: "Detainee can provide information related to safe houses facilitators, financing, recruitment and operations of foreign fighter smuggling into Iraq. Detainee can also potentially provide names and target information of local facilitators in Ar-Ramadi. Detainee can also confirm information provided from others captured with him" (Pappas 2). The aggressive techniques Pappas wants permission from Sanchez to use are then articulated in some detail (Pappas 2). He wants his interrogators to be able to "throw tables, chairs, invade [the detainee's] personal space and yell continuously" at him, while taking "all necessary precautions that all thrown objects are clear of the detainee and will not coerce the detainee in any way." Once this has been done, if the detainee "has not broken yet," Pappas wants to move him to the "segregation phase," during which he is to be transported to another location and strip-searched in the presence of barking military dogs. This is to occur after a sandbag has been placed over the detainee's head "for the safety of himself" and others. Following this, he is to be placed on a seventy-two hour "adjusted sleep schedule," during which he will be interrogated continuously using such approaches as "fear up harsh," as well as silence, loud music, and stress positions. This aggressive regime and, to an even greater extent, the life-threatening treatment of Al-Qahtani at Guantanamo Bay went well beyond the traditional approach to interrogation set out in the Army field manual of 1992 in force at the time. That manual made clear that coercion (including intimidation, threats, and insults) is "not necessary to gain the cooperation of sources for interrogation . . . is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear" (Department of the Army, FM 34-52, 1.8). But growing frustration with the lack of intelligence being produced by interrogations at Guantanamo Bay led to the abandonment of this doctrine.

Rather than accept that many detainees simply did not have any intelligence, actionable or otherwise, the Department of Defense assumed that they did have intelligence, but that the traditional techniques were simply inadequate. In a desperate search for more aggressive techniques, the Army drew on tactics deployed in SERE training-- a course designed to prepare U.S. soldiers for mistreatment at the hands of foreign captors by exposing them to the very tactics that communist soldiers and agents had used on US-American prisoners (see Bloche and Marks, "Do Unto Others"). This was, however, a strategic error since those techniques were not used to extract intelligence from American prisoners, actionable or otherwise. On the contrary, they were designed to procure sham confessions in order to embarrass and undermine the U.S. government—and they had the desired effect. Thirty-six American airmen confessed to a non-existent American conspiracy to bomb civilians in Korea, having spent several hours in uncomfortable stress positions (Margulies). In spite of this, so-called "torture lite" approaches also appear to have informed the development of CIA interrogation tactics, particularly during the Cold War (see McCoy 86-99).

It is often assumed that prolonged isolation, sleep deprivation and stress positions (among other "torture lite" techniques) leave no permanent scars, unlike physical mutilation or injury. However, all the scientific evidence is to the contrary. Long-term effects of psychological interrogation stressors may include memory impairment, reduced capacity to concentrate, somatic complaints (such as headache), avoidance, irritability, severe depression, nightmares and, of course, full-blown post traumatic stress disorder (see Physicians for Human Rights 9). These consequences are all the more likely when more aggressive interrogation tactics are used in combination, as is generally the case.

Peter Kooijmans, the former United Nations Special Rapporteur on Torture, has noted: "Even when the most brutal physical means are used, the long-term effects may be mainly psychological, even when the most refined psychological means are resorted to, there is nearly always the accompanying effect of severe physical pain. A common effect is the disintegration of the personality" (see Physicians for Human Rights 49). So there is very little that is "lite" about "torture lite." Even when stressors fall short of causing mental torture as a matter of law, the psychological sequelae of cruel, inhuman, and degrading treatments may be grave, and they should not be discounted or ignored. Ironically, while the overwhelming majority of pundits in both the media and the academy focused the public debate on torture, it was the Bush administration who recognized that prohibitions on cruel, inhuman and degrading treatment also needed to be addressed.

In order to pave the way for the deployment of more aggressive interrogation strategies, the administration went in search of supportive counsel in the White House, the Office of Legal Counsel in the Department of Justice, and the Department of Defense. While Joe Public -- and, in many cases, Joe P. Intellectual -- embarked on exercises in moral reconstruction in order to address the moral dissonance inspired by ticking-bomb narratives, the administration recognized that the real battle would be fought on legal (rather than moral) fronts. As a result, it embarked on a campaign of legal exceptionalism in which legal protections and prohibitions were dispensed with on the grounds that they were geographically limited (spatial or geographic exceptionalism), that they did not apply to a particular group (collective exceptionalism) or that their true meaning had been hitherto misunderstood (interpretive exceptionalism) (see Marks, "What Counts" 578-83). And these approaches were not mutually exclusive; they operated in combination to achieve the same goals. Deploying a cadre of lawyers to implement this exceptionalist framework, the administration set about dismantling legal protections for detainees which they perceived as impediments to aggressive interrogation tactics necessitated by Al Qaeda terrorism. At the same time, they sought to construct *ex ante* a defensive edifice against prosecutors who might subsequently challenge the use of those tactics in criminal courts.

One of the first goals was to ensure that the prohibition on torture would not be an obstacle to the use of more aggressive interrogation techniques. International law does not look any more favorably on interrogational torture than it does on gratuitous torture that lacks an intelligence motive or other instrumental objective. On the contrary, the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention," Article 1[1]) is formulated expressly to address torture "for such purposes as obtaining ... information or a confession." The treaty also makes clear that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." The administration recognized that it could not call into question the international ban on torture as many academics have done. This would have been far too shocking and politically untenable. Instead, the administration verbally affirmed its commitment to the international prohibition on torture and, simultaneously, sought to narrow the definition of torture (Marks, "Doctors as Pawns?"). There had already been some effort to do this when the United States ratified the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984) in 1994 (see McCoy 100-02). But the Bush administration was at pains to ensure that, after the gloves came off (as Cofer Black, former head of CIA counterterrorism put it famously), interrogators would not be at risk of prosecution for torture. In an effort to achieve that goal, then White House counsel, Alberto Gonzales, commissioned the infamous August 2002 "torture memo" from Assistant Attorney-General Jay Bybee -- now a federal judge on the Ninth Circuit Court of Appeals. Bybee did not disappoint Gonzales. The memo narrowly defined physical torture to require pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, the permanent impairment of a significant bodily function, or even death" (Bybee 1). For pain or suffering to rise to the level of mental torture, the memo insisted that, "it must result in significant

psychological harm of significant duration, e.g. lasting for months or even years" (Bybee 1). Even if these thresholds are crossed and the interrogator is aware that they are being crossed, the memo contends that he would still not be guilty of torture under U.S. criminal law "if causing such harm is not his objective" (Bybee 4). Nor would he have committed torture if he "could show that he acted in good faith by taking steps such as surveying professional literature, consulting with experts, or reviewing evidence gained from past experience" (Bybee 8; Consistent with the advice in the memo, the Department of Defense provided purported experts to insulate interrogators from criminal liability -- psychiatrists and psychologists attached to military intelligence and tasked with advising interrogators on how to ramp up the stressors [see Bloche and Marks, "When Doctors Go to War"; "Doctors and Interrogators at Guantanamo"]). The "torture memo" was not revoked by the Department of Justice until June 2004, two months after the photographs of detainee abuse at Abu Ghraib had been published and it was not replaced until December 2004, just days before the confirmation hearings following Alberto Gonzales's nomination as Attorney General of the United States. By that time, however, the memo had had two years to influence detention and interrogation policy on the ground. This is just one example of what I have termed "interpretive exceptionalism" (Marks, "What Counts" 581), in which legal norms are reinterpreted in order to narrow the scope of protection conferred or conduct prohibited. Some other related examples also merit brief mention.

An early casualty in the administration's exceptionalist framework was the system of protections established by the Geneva Convention of 1949. The Convention presented a serious obstacle to the aggressive interrogation of detainees, particularly those who qualified for prisoners of war status. The Third Geneva Convention provides that prisoners of war should not be subjected to physical and mental torture and "any other form of coercion" (Article 17). Moreover, they must be protected against "acts of violence or intimidation and against insults and public curiosity," and if they refuse to answer questions during interrogation, they "may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind" (Article 17). Recognizing the obstacles this created, the White House made a blanket determination in February 2002 that Taliban detainees from Afghanistan did not qualify for prisoner of war status and, more fundamentally, that Al Qaeda suspects were not protected by the Geneva Conventions at all, since Al Qaeda was not a state party to the Conventions (White House, 2002). This was clearly a form of collective exceptionalism (Marks, "What Counts" 579-80) in which group membership or characteristics are relied upon to justify exclusion from the application of protective norms. The designation of detainees as "unlawful enemy combatants," a term that is not found in the Geneva Conventions (but was recently embraced and expanded by the U.S. Congress in the Military Commissions Act of 2006) was also an attempt to both formalize and legitimize these exclusions.

Such exceptionalism has a long and unpleasant history. In the wars between the city states of ancient Greece, prisoners of war were treated with dignity and exchanged. (Marks, "What Counts" 579). But similar treatment was not accorded to captured members of barbarian armies. One hundred years ago, in the war in the Philippines, the U.S. army considered local "insurgents" to be undeserving of the protections of the laws of war because they were "not civilized" (Hughes 65; these were the predecessors of today's "unlawful enemy combatants"). As a result, detainees during that conflict were subjected to torture and aggressive interrogation. Congressional testimony records the administration of the "water cure" in which salty water was siphoned into the nose of an interrogatee, notably with the aid of a physician and under the direction of a lawyer (see Riley; this treatment was sometimes followed by interrogators jumping on the stomach of the detainee in order to expel water that had been forcibly swallowed). Few could endure this treatment for long. When the detainee finally named a village in which insurgents were allegedly hiding, that village was burned to the ground -- whether or not insurgents were, in fact, hiding there. These were, of course, poorly-targeted or untargeted retributive measures that did not procure any real security benefits. But they may well have provided some form of emotional satisfaction or reassurance by creating the illusion of control in

the face of the inherent uncertainties of an insurgency. As I argue elsewhere, we have yielded to analogous temptations in the war on terror (Marks, "Doctors of Interrogation"), not least by detaining and mistreating many innocent Muslims at Guantanamo Bay, and -- as in the Philippines -- this process was enabled by legal exceptionalism.

In the summer of 2006, however, the Supreme Court concluded that Al Qaeda suspects, although not subject to the higher level of protections for prisoners of war, were protected by the basic provisions of Common Article 3 of the Geneva Conventions (see *Hamdan v. Rumsfeld*). This article, which provides the low watermark for the treatment of detainees, requires (*inter alia*) that they should be protected from cruel, humiliating or degrading treatment and from outrages on personal dignity. They must also be treated humanely. Initially, the Department of Defense responded with a memo stating that all detention procedures should be reviewed to ensure compliance with Common Article 3 (see England). A few weeks later, however, President Bush criticized publicly the basic protections in Common Article 3 for being "very vague." He explained: "What does that mean, 'outrages upon human dignity'? That's a statement that is wide open to interpretation" (White House, "Press Conference of the President"). Just days later, Congress responded to the President's concern by passing the Military Commissions Act of 2006 ("MCA"). This purports to confer power on the President to "interpret the meaning and application of the Geneva Conventions" (MCA, § 6[a][3][A]). So, to paraphrase Humpty Dumpty, the President is to determine which meanings will be "master" -- at least, for the time being (see Marks, "Doctors as Pawns?").

The selection of Guantanamo Bay for the detention of suspected terrorists (and those handed over to U.S. forces in exchange for a bounty) also reflects what I have called "spatial exceptionalism" - in which physical location is relied upon to justify the non-application of protective norms or procedures (Marks, "What Counts" 580). The administration hoped that, by holding detainees at Guantanamo Bay -- which was leased from Cuba and was not strictly U.S. territory -- it would deprive federal courts of jurisdiction to hear *habeas corpus* petitions brought on their behalf, on the grounds that the court has no jurisdiction to hear claims brought by "aliens" held outside the United States ("Alien" is, of course, the legal term for non-citizen, derived from the Latin *alius* meaning "other." Since the administration accepted readily that federal courts would have jurisdiction over U.S. citizens held at Guantanamo Bay, its claim in relation to aliens was also an example of "collective exceptionalism"). The Supreme Court ultimately rejected the administration's argument, noting that the U.S. had complete jurisdiction and control over the base at Guantanamo (see *Rasul v. Bush*). Since then, however, Congress has twice come to the President's aid by passing laws that attempt to strip federal courts of jurisdiction to hear habeas corpus petitions brought by detainees seeking to challenge their detention (Detainee Treatment Act 2005; Military Commissions Act, 2006). The detention of other terror suspects by the CIA at "black sites" across the globe is a similar exercise in spatial exceptionalism, and the secrecy surrounding these detentions creates one further obstacle to legal challenges.

A further exercise in combined collective and spatial exceptionalism was designed to address the prohibition on cruel, inhuman, and degrading treatment (CID) found in two core human rights treaties -- the International Covenant on Civil and Political Rights (1966) and the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment (1984) -- to which the United States is a party. When the United States ratified these two treaties, it made reservations tying the definition of CID to cruel, unusual and inhumane treatment prohibited by the 5th, 8th, and 14th Amendments to the U.S. Constitution. The Bush administration argued that this also served to limit the geographic scope of its obligations under these treaties, and that they did not apply to alien detainees held outside the U.S. That was the argument that the so-called McCain Amendment (now section 1003 of the Detainee Treatment Act 2005) was intended to address. Its provisions make clear that the prohibitions on cruel, inhuman or degrading treatment apply irrespective of the nationality of the detainee or the location of his detention. However, when the President signed the Act into law, he

issued a signing statement asserting that he would interpret its provisions "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief" (Signing Statement, H.R. 2863). Not surprisingly, this led many to doubt that the Act signaled a sea-change in the administration's detention and interrogation policy.

Some recent developments have undoubtedly been designed to allay concerns about the treatment of detainees. A new army interrogation manual appears to reflect a move to re-establish traditional army interrogation practices (Department of the Army, FM 2-22.3). It prohibits, among other interrogation tactics, "waterboarding" (a technique designed to simulate the experience of drowning), hooding and the use of dogs. However, there are a number of reasons to suspect that the CIA will be the licensed practitioner of aggressive interrogation strategies, and a safehouse for exceptionalism in the war on terror. First, the new Army field manual obviously does not protect detainees in the custody of the CIA, whether at "black sites" or elsewhere. Second, when the President signed the Military Commissions Act of 2006 into law, he made clear that it "will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives" (White House, "President Bush Signs Military Commissions Act of 2006"). He added that the Act "allows for the clarity our intelligence professionals need to continue questioning terrorists and saving lives" and "provides legal protections that ensure our military and intelligence personnel will not have to fear lawsuits filed by terrorists simply for doing their jobs" (White House, "President Bush Signs Military Commissions Act of 2006"). Third, while lawyers and commentators were debating the effect of the Act on permissible interrogation strategies, Vice-President Cheney revealed that little has been learned at the highest levels of government regarding permissible interrogation strategies. In a radio interview, he was asked: "Would you agree a dunk in water is a no-brainer if it can save lives?" Mr. Cheney replied, "It's a no-brainer for me." In the same interview, he also agreed that the debate over interrogation techniques was "a little silly" (Sevastopulo 6). The Vice-President's views notwithstanding, the debate over the use of aggressive tactics by the CIA continues. President Bush's July 2007 executive order addressing the CIA's detention and interrogation program did little to allay the legitimate concerns of human rights groups that the CIA will continue to deploy aggressive interrogation tactics (White House, "President Bush Signs Executive Order"). And those concerns were exacerbated during the Senate confirmation hearings of Attorney General Michael Mukasey when the nominee refused to express an opinion on whether waterboarding by the CIA was illegal (see Milbank).

In an outmoded conception of the human body, where the brain is the seat of reason and cognition, and the heart is the locus of emotion, the use of torture as an interrogation tool is, in a sense, a "no-brainer." The practice of such techniques is fueled by an emotive response to terrorism and reflects the circumvention (or, at the very least, a distortion) of cognitive processes that counsel strongly against its use, whether on practical grounds, deontological grounds or—as some have argued persuasively (see, e.g., Arrigo) -- utilitarian ones. Consequentialist arguments against the use of torture and aggressive interrogation techniques are not limited to claims about the poisonous effects of its practice on institutional culture, and the psychological damage done to perpetrators as well as victims. As a result of our exercises in moral reconstruction and legal exceptionalism -- which have licensed the abuses of detainees at Abu Ghraib, Guantanamo Bay, and elsewhere -- we have failed to meet head on the threat presented by Al Qaeda. We have wasted time and resources detaining and abusing many whom intelligence officials have long acknowledged are not terrorists and do not have any intelligence value. By treating fundamental human rights and basic protections of the laws of war as impediments to the United States' military and intelligence missions, we have destroyed the moral authority of the United States in the war on terror, weakened its credibility and undermined its powers of diplomacy. We have also allowed those who would do us harm to multiply. This is not just the view of critics outside the administration. It is supported by official government statements -- most notably, a recent report of the National Intelligence Council which observed that the Iraq conflict was "cultivating supporters for the global jihadist movement" (Sanger A16). At the

same time, much of our transportation infrastructure (including commercial air travel) remains vulnerable to attack, as do our nuclear facilities, chemical plants and our sea ports (see Marks, "What Counts"). At the time of writing this article, we have not yet had another attack on the U.S. mainland since 9/11. But this may have more to do with good fortune than with our counterterrorism efforts. When another attack does occur, the temptation to use torture (or, at the very least, interrogation tactics that are cruel, inhuman, or degrading) will recur with even greater force. If we acknowledge this temptation now and the powerful emotions that will fuel it, we may have a better chance of avoiding a painful repetition of the same old mistakes.

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