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Torture Debates in the post-9/11 United States:
Law, Violence, and Governmentality

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Any instances of torture in liberal democracies are primarily considered to be either a feature of the past or, at best, aberrations that occur rarely. As the 1999 U.S. Report on Torture presented to the UN Committee against Torture stated, "Torture does not occur in the United States except in aberrational situations and never as a matter of policy."[1] Even when acts of torture by U.S. soldiers were exposed at the Abu Ghraib prison in Iraq in 2004 alongside secret memos apparently justifying the use of torture in Guantánamo Bay, Cuba, U.S. state officials denied any authorization of torture in case of either Iraq or Guantánamo. As Judge Gonzales, the then White House Counsel, said in 2004,

The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the Torture Convention or the Torture Statute, or other applicable laws.[2]

In this paper, I analyze the post-9/11 debates on torture in the U.S. concerning Guantánamo Bay, Cuba. In particular, I focus on recent theorizations by scholars that Guantánamo constituted a state of exception or a space without legal and political rights.[3] By analyzing the narratives created by the U.S. policy makers in formerly classified memos, I ask whether the state of exception argument adequately captures the torture debate in the context of Guantánamo (and by extension Abu Ghraib). While Guantánamo has certainly not been the only site of the torture debates especially given the extraordinary rendition program under which detainees were transferred to countries that torture or to secret CIA prisons, here I focus on Guantánamo as a primary site of the torture debates in part due to the symbolic and normative significance of this space for the post-9/11 debates.

In the paper, I suggest that in contrast to the state of exception argument a more useful framework for understanding the torture debate is to analyze the tension between law and violence in liberal democracies. This tension is most apparent in the withdrawal of the so-called torture memo by the U.S.[4] The liberal state's need to distinguish its own "humane" violence from "inhumane" violence forces the state to find ways of "taming" the violence both rhetorically and literally. Rhetorically, the state first attempts to deny the very existence of torture and subsequently characterizes the acts of violence as "not torture" rather than torture.[5] The reason why it is able to do so is because the extent of violence permitted is by definition ambiguous.

The withdrawal of the torture memo, of course, does not indicate that the liberal state stops using violence or (what I term) excess violence. Excess violence refers to the violence that the state claims as unnecessary but still struggles to contain it and accommodates it in some form or another. The state allows law to accommodate the possibility of using excess violence as long as it does not reach the threshold of state definition of torture. Thus, the introduction of the aggressive methods against particular subjects at Guantánamo is a manifestation of a constant negotiation of the state and law with excess violence. The broader implication of this argument is a reconceptualization of state power by rethinking Foucault's notion of governmentality. I suggest that excess violence should not merely be considered as a remnant of past spectacular torture, but rather more centrally as a part and parcel of the art of government. Here I illustrate the use of medical personnel in developing interrogation techniques as just one instance of how excess violence functions within the art of government through the formation of what Foucault has termed the juridico-medical complex.

Torture in Democracies: A Liberal Paradox

One of the self-defining features of liberal democracies is the absence of torture or indeed any "unnecessary" state violence.[6] This appears both in the political rhetoric (noted earlier) as well as in liberal theory. Thus, Michael Ignatieff in his discussion of the United States as a liberal democracy refers to it as "a constitutional order that sets limits to any government's use of force."[7] Of course liberal democracies are characterized not just by their relationship to violence. As Steven Lukes notes,

Democracy, definable in different ways, is on almost every account a system with mechanisms that hold its officials responsive and responsible to the people's wills or preferences. A liberal democracy will have a further feature: it will hold its officials responsible for respecting the principles of liberal equality: for not violating their citizens' rights and *respecting their dignity*.[8]

Thus, there are a number of other features that characterize liberal democracies such as a rule of law, representational government, state accountability through a system of checks and balances, separation of powers, and protection of individual rights and liberties including a respect for human dignity.[9] All these features have one thing in common that they are conceptually and ostensibly based on consent.

After all, as one of the foremost theorists of classical liberalism, John Locke put it, "…For 'tis not every compact that puts an end to the state of nature between men, but only this one of *agreeing together mutually* to enter into one community and make one body politic."[10] Locke goes on to explain, "…all men are naturally in that state [of nature], and remain so, till by their *own consents* they make themselves members of some politic society…[11] Thus, John Locke emphasized the importance of consent in the formation of government in society.

Of course, the liberal state while being based on consent continues to be closely related to violence as noted in Max Weber's famous statement that "legal coercion by violence is the monopoly of the state."[12] As Weber explains,

Sociologically, the question of whether or not guaranteed law exists in such a situation depends on the availability of an *organized coercive apparatus* for the nonviolent exercise of legal coercion. This apparatus must also possess such power that there is in fact a significant probability that the norm will be respected because of the possibility of recourse to such legal coercion.[13]

Weber does recognize the significance of norms in the regulation of society, but he considers the respect for these norms existing because they can be backed by legal coercion. Thus, the functioning of this consent based state is closely related to the concrete possibility of legal coercion. Liberal theorists, while

accepting this role of violence, however specify that the state does not govern primarily through violence and that any violence it employs is actually constrained. As Ignatieff puts it,

… liberal states seek both to create a free space for democratic deliberation and to set *strict limits to the coercive and compulsory powers of government.* This is the double sense in which democracies stand against violence: positively, they seek to create free institutions where public policy is decided freely, rather than by fear and coercion: negatively, they seek to reduce, to a minimum, the coercion and violence necessary to the maintenance of order among free peoples.[14]

For Ignatieff, the liberal state both ensures the freedom of people to deliberate and also subjects them only to minimal violence required to maintain law and order in society.[15] Indeed, apart from acknowledging coercion as a necessary "evil," even the pain and suffering administered by the liberal state is subject to much introspection. As Ignatieff puts it, "only in liberal societies have people believed that the pain and suffering involved in depriving people of their liberty must make us think twice about imposing constraint even on those who justly deserve it."[16] Thus, coercion, violence, pain, and suffering are subject to scrutiny and kept to a minimum according to Ignatieff's framework of a liberal state and democracy.

Therefore, despite Weber's blatant assertion about the monopoly of violence that the state personifies, it is an undisputed fact that the liberal state exhibits an attempt to constrain the violence. This makes torture, an excessive form of violence, a particularly paradoxical proposition for liberal states than other kinds of states. When acts of torture occur, undoubtedly neither totalitarian nor liberal states proclaim that they torture, but the latter are more concerned with maintaining the legitimacy of their institutions by pointing to their legal and moral prohibitions against the practice. In other words, the liberal state is more invested (as discussed in the following sections) in distancing itself from the consensually defined "illegitimate" forms of violence while maintaining space for "legitimate" forms, always a negotiated process of differentiation. Whether the limits to violence are for masking its real nature, gaining legitimacy, or because of a particular respect for human dignity, it is this self defining feature of liberal democracy that makes torture a particularly paradoxical proposition and its appearance either denied by official narratives and/or analyzed as an exceptional event.[17]

Do the Post-9/11 U.S. Policies Represent a State of Exception?

A number of scholars in recent times have argued that the post-9/11 context represented a "state of exception," a state where laws applicable under ordinary times were suspended. Giorgio Agamben, for instance, argued that not only did the post-9/11 context of the U.S. represent a state of exception but it reflected a process of exception becoming a rule.[18] He considered the "unclassifiable and unnamable" status of the detainees in Guantánamo as the perfect example of "bare life" that is a life reduced to being "subhuman," in a state of exception.[19] Within Agamben's framework, one could argue that torture only *now* became a part of the governance in a liberal democracy. Invoking an image similar to Agamben, Amy Kaplan states that Guantánamo will become the story of (our) future where, "this floating colony will become the norm rather than the anomaly..."[20] This language of the state of exception is also reflected in the statements of former government officials while characterizing the post-9/11 context. As the former President stated in his memo in February 2002, post-9/11 is a "New paradigm" …that "require(d) a new thinking in the law of war…"[21] Similarly, Judge Gonzales wrote in January 2002, "In my judgment, this *new paradigm* renders *obsolete* Geneva's strict limitations on questioning of enemy prisoners and renders *quaint* some of its provisions..."[22] Thus, the language of "exception," "new paradigm" or "legal black hole" gained currency in recent times suggesting that the post-9/11 policies on torture and interrogation were the result of the suspension of pre-existing laws.

Agamben bases his ideas regarding the state of exception on Carl Schmitt's conception that "Sovereign is he who decides on the Exception."[23] The sovereign is the one who decides on all important aspects of the emergency. The sovereign declares the emergency, decides when to declare it and makes all the decisions in relation to that time in practice. For Agamben, it is not just totalitarian systems that deal with the problem of the state of exception. Rather, the state of exception is increasingly becoming more visible as a technique of government even in democracies. Within his framework, Guantánamo was a lawless exception where the sovereign (Commander-in-chief) made a decision to suspend existing laws, regarding detention and interrogation, for the detainees.

This frame work of a state of exception where all pre-existing laws seemed to be inapplicable was also the theoretical basis for the critique developed by human rights groups and scholars. For instance, Joseph Margulies, a leading lawyer for the detainees at Guantánamo, explains that the very conceptualization of this space by the U.S. was that of a "lawless"[24] prison or a "prison beyond the law"[25] representing the abuse of power by the President. Judith Butler characterized the treatment of the detainees in the "Guantánamo Limbo" in the following way, "They are outside the law, outside the framework of countries at war imagined by the law, and so outside the protocols governing civilized conduct."[26] In contrast to this conceptualization of the post-9/11 polices on detention and interrogation as an exception, a closer analysis of the memos suggests that Guantánamo exhibited not a suspension of laws per se but a more selective albeit aggressive engagement with the laws.

Here Nasser Hussain's analysis of some memos that focus on detention and lack of rights for detainees is useful. As Nasser Hussain put it, Guantánamo was more of a "legal loophole" rather than a "legal black hole."[27] Hussain notes:

It is empirically the case that what one witnesses in contemporary emergency is a proliferation of new laws and regulations passed in an ad hoc or tactical manner, administrative procedures, and the use of older laws and cases tweaked and transformed for newer purposes.[28]

Hussain terms this proliferation of laws and detailed analysis in these memos as exhibiting a form of "hyper legality."[29] Indeed, even though he does not include the torture memo in his analysis, I illustrate that the latter also represents a form of "hyper legality" that involved a more aggressive use of gaps within the pre-existing laws on torture. Thus, the torture memo could be termed as an instance of "aggressive hyper legality" where the hyper legality is meant specifically to narrow the protections possible under the laws. Further, even conceptually, the meaning of emergency or exception is belied by the recent policies. As Hussain writes,

That is, traditionally an emergency or exception, at least as an ideal type, operated by suspending regular law and utilizing a range of maneuvers that were both temporary and specific in order to confront a given situation. Today most emergency laws are neither temporary nor categorically distinct from a larger set of state practices.[30]

Thus, both in terms of the traditional notion of exception as a more bounded concept-- temporary and specific--as well as the aggressive use of gaps within actual laws against torture and detention, the state of exception framework appears inadequate. In particular, I contend that the state of exception argument does not explain three aspects of the torture debate. First, the state of exception framework does not address why the liberal state withdrew the so called torture memo despite insisting on the validity of its arguments. Second, it does not acknowledge that the state memos did not represent complete lawlessness but rather exhibited an aggressive use of pre-existing gaps within the laws. Third, it does not address the continuities in the practices of torture in the pre and post-9/11 period that is crucial to understand the significance of violence in the art of government. The analysis of the post-9/11 memos as aggressive

hyper legality thus becomes particularly crucial at this time because, as I illustrate, even when some of the so called "exceptional" policies are withdrawn, the pre-existing tension in law towards excess violence still remains functioning as a continuously negotiated part of governmentality.

Contextualizing the Memo Controversy

The post-9/11 torture saga in the United States became explicitly visible only in 2004. The infamous abuses in the Abu Ghraib prison, Iraq emerged in the public arena in the CBS show *Sixty Minutes* in 2004 when the show aired the pictures of Iraqis being tortured and abused by U.S. personnel. Even though there had been numerous allegations of torture immediately after 9/11, it was the shocking pictures of torture that confirmed the presence of these practices at Abu Ghraib. These abuses ranged from acts of physical torture such as beating, jumping on the back and legs, sexual assault, kicking to the point of bleeding and often becoming unconscious to forms of mental torture, for example, being stripped naked, men being forced to wear women's underwear (up to 51 days as the only cloth), hooding, food deprivation at required time, and denial of religious requirements.[31]

The pictures were soon followed by the leak of a number of formerly classified memos. These memos written in the 2001-2003 period seemed to suggest that the acts of torture were not "aberrations" but a part of an authorized policy for Guantánamo (if not for Iraq). If one looked at the methods authorized by the state for Guantánamo at some point or the other, they were sleep deprivation, stress positions, isolation up to thirty days, use of phobias such as fear of dogs, removal of clothes, mild, non injurious physical contact such as grabbing and poking in the chest with the finger as well as light pushing.[32] Thus, there appeared to be a clear relationship between many of the methods authorized in the leaked memos and the acts at Abu Ghraib. The state responded by first trying to de-link the discussions in the memos and the use of aggressive methods in Guantánamo Bay and torture in Iraq. Yet that strategy did not work because one could find the logic of the memos being used in the review of methods authorized for Guantánamo Bay and seen in the pictures of torture at Iraq. The second major step in 2004 was the withdrawal of the most egregious of these memos, the Bybee memo, (that I discuss below) and the replacement of this by the Levin memo. I use this example of withdrawal of the memo as both symbolic of the limitations of the state of exception analysis and for strengthening an alternative framework for analyzing the torture debate: namely the continuing struggle of law with excess violence.

Liberal State and the Act of Withdrawal: Why was the Bybee/Yoo Memo Withdrawn?

States rarely admit their reliance on torture, but a liberal state in particular has to distance itself from torture precisely because the absence of these acts represents the success of a "progressive narrative" that Paul Kahn refers to.[33] Thus, when memos linking the acts of torture to actual policy discussions and authorizing documents emerged in 2004, a moment of crisis was potentially created. The anxiety was reflected in the multiple strategies of the U.S. that initially denied the existence of torture and in the absence of that possibility denied any authorship of policies related to these acts. Stanley Cohen in his fascinating work *States of Denial* discusses three different kinds of classic official denials in the context of torture and other atrocities: literal denial (no torture), interpretive denial (something happened but not torture) and implicatory denial (happened but necessary).[34] The category of interpretive denial is particularly pertinent in the post-9/11 context though more recently implicatory denials have also emerged.[35] In interpretive denial, Cohen explains, "The harm is cognitively reframed and then reallocated to a different, less pejorative class of event."[36] According to Cohen, usually the legal and common sense meaning of the term torture is interpretively denied in four ways: euphemism, legalism, isolation, and denial of responsibility. The last two strategies are best illustrated in the "few bad apples" theory and denial of any official responsibility propounded by the U.S. regarding the Abu Ghraib prison in 2004. Euphemism is explained by the language of "enhanced interrogation techniques" used in post-9/11

Guantánamo to deny the narratives of torture. Finally, the legalism or the use of law to negate the presence of an act also contributes towards a denial. As Cohen brilliantly puts it, "Then comes the magical syllogism: torture is strictly forbidden in our country; we have ratified the Convention against Torture; therefore what we are doing cannot be torture."[37] In former President Bush's assertions that "we don't torture people in America. And people who make that claim just don't know anything about our country,"[38] one observes as much a moral claim as one based on legalism.

Despite these classic strategies of official denial that the U.S. invoked, a particularly crisis generating memo in the post-9/11 period was the August 2002 memo signed by the then Assistant Attorney General, Department of Justice, Jay S. Bybee (although it is now widely believed that the memo was authored by another state official John Yoo, henceforth, the Bybee/Yoo memo). This memo has been considered an exceptional document because of its attempt to narrow protections against torture, thereby, threatening to challenge one of the basic premises of a liberal democracy that democracies do not condone torture under any circumstances.[39] A close examination of the Bybee/Yoo memo illustrates the ways in which it transgressed the delicate balance that a liberal state seeks to maintain between its reliance on legal violence without transforming itself into the "brutal other." The Bybee/Yoo memo attempted to maintain the balance by indulging in what I term an aggressive hyper legality and yet had to be withdrawn precisely because of its inability to do so.

Many scholars suggest that the Bybee/Yoo memo was primarily written for the CIA and, therefore, may not be directly relevant for understanding the torture debate at Guantánamo because of the latter's status as a U.S. naval base.[40] However, I focus here on the Bybee/Yoo memo because the memo remains both symbolically and conceptually one of the most controversial and significant moments of the torture debate. This is because it was one of the first memos to emerge after the Abu Ghraib pictures were leaked and it soon became a symbol of the exceptional policies of the administration read to mean that torture was being authorized. The memo became so controversial that it was publicly withdrawn and replaced by a new memo: an action unprecedented as far as the other memos and documents are concerned (until the recent change in government). Further, the Bybee/Yoo memo is pertinent because even its arguments regarding the scope of the Commander-in-chief powers and the definition of torture is reiterated in many different memos and documents of the post-9/11 context. Indeed, some of the same arguments that form the foundation of the Bybee/Yoo memo were echoed in another John Yoo memo, written in March 2003 (that surfaced in 2008), this time explaining how protections against torture were limited in relation to the military as well.[41] Thus, even though the continued emergence of new memos explains specific parts of the puzzle regarding different sites, the Bybee/Yoo memo retains particular significance in understanding the torture debate.

The Bybee/Yoo memo follows the same framework as the other formerly classified memos in the 2001-2002 period regarding the non applicability of U.S. and international laws to the detainees at Guantánamo.[42] Two of the more controversial suggestions of the Bybee/Yoo memo in 2002 (reiterated in other memos) were that the executive as Commander-in-Chief could unilaterally introduce aggressive methods of interrogation beyond the ones permissible under the Federal Torture Statute and certain excuses or justifications could be provided for methods that violate this statute. The Federal Torture Statute, introduced in the United States in 1994 on the basis of the U N Convention against Torture, characterized any attempt or act of torture by U.S. state officials outside the U.S. as a criminal offense.[43] The Bybee/Yoo memo emphasized the unprecedented nature of the terrorist attacks and suggested that even if cases regarding the aggressive methods of interrogation authorized by the President come up for prosecution under the Federal Torture Statute, the courts should not entertain these cases since that would challenge the President's authority.[44] In fact, the memo suggests that even the application of the Congressional statute against torture could be considered unconstitutional if the Commander-in-Chief authorized certain methods as necessary for the war.

The Bybee memo also stated that in case some officials did violate the statute, "standard criminal law defenses of necessity and self-defense" may be used to bypass criminal prosecutions.[45] The conditions for evoking the necessity and self-defense arguments were by definition fulfilled by the context of terrorism. Ironically enough, the source of such constitutional authority was taken from the Supreme Court's acceptance that the President has the power to decide the exact nature of the operations within the context of the war.[46] This argument about "inherent powers" of the executive during war time has also been defended very vigorously by the author of these memos, John Yoo, in other contexts reflecting another instance of aggressive hyper legality in the process.[47]

As a further indication of its aggressive hyper legality, the Bybee/Yoo memo also circumscribed the scope of the Federal Torture Statute by suggesting a very high standard for defining torture. Even while the signed Yoo memo claimed that the Federal Torture Statute may not even be applicable to the naval base, just in case the statute was considered applicable, both the memos made sure that the definition of torture was restricted to the most egregious acts.[48] The Federal Torture Statute (Section 2340A) defines torture as an,

act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.[49]

It is important to note here that the U.S. had introduced certain reservations during the ratification of the UN Convention against Torture that were reflected in the Federal Torture Statute. But as an indication of its aggressive hyper legality, the Bybee/Yoo memo used these reservations to vigorously restrict the scope of the U.S. statute especially with regards to defining terms such as "severity" and "specific intent." First of all, one of the major differences between the U.S. statute and the UN Convention is that in the UN Convention there is little clarity about "intent" but the U.S. wanted to emphasize "specific intent" rather than "general intent" as far as the act of torture is concerned. The Bybee/Yoo memo went a step further to ensure that specific intent is extremely narrowly defined "as the intent to accomplish the precise criminal act that one is later charged with."[50] In this case, "severe pain and suffering" should be the precise purpose of the act for it to be culpable, thereby, rendering mere knowledge of pain resulting from the actions as inadequate for culpability, making it almost impossible to prove specific intent.

Further, in the absence of an accepted definition of "severity" in the legal discourse, the memo specified an understanding of severity based on discussions in certain health statutes. The Bybee memo states,

These statutes suggest that "severe pain," as used in Section 2340, must rise to a similarly high level-the level that would ordinarily be associated with a sufficiently *serious physical condition or injury such as death, organ failure, or serious impairment of body functions*—in order to constitute torture.[51]

Here the lack of clarity in discussions within the Congress on the precise meaning of the term "severe" led to the focus by the memo on other statutes regarding health benefits to shed light on what constitutes severity. Thus, a particularly narrow legal regime seemed to have been created by the John Yoo and Bybee/Yoo memos where the protections against torture were limited to the most egregious physical pain. A narrow way of defining torture made it difficult to consider a number of controversial methods of interrogation authorized and visible at Guantánamo and Abu Ghraib as torture and if they were challenged under the torture statute, the methods could be defended as having being authorized by the Commander-in-chief.

Unsurprisingly, the Bybee memo has been the subject of much criticism. The memo has been criticized from a more normative point of view as being a "disgrace" for the U.S.[52] Some others have considered

this memo as exemplifying the role of "right wing radicals" under the current administration.[53] Thus, both these formulations see this memo as an exceptional moment in the U.S. context. A very powerful critique of the memo is by David Luban who not only looks at the fallacies in the legal arguments used by the Bybee/Yoo memo but also suggests that the memo represents an explicit creation of a "liberal ideology of torture."[54] Liberal ideology of torture is a peculiarly liberal phenomenon which ironically emerges from a rejection of four other aims of torture namely cruelty, punishment, judicial torture, and terrorizing people, each of which is, according to Luban, unacceptable to liberalism due to the latter's emphasis on human dignity.[55] Thus, only one particular aim for torture was conceivable for the liberals namely for the purpose of intelligence gathering in order to stop future harm. And because torture was used for this "purer" purpose it may not even be considered torture and, indeed, there were limits to the nature of torture allowed.[56] Luban, of course, questions even this form of torture as being unacceptable because its basis--ticking bomb scenario-- is never reliable and threatens to be unabashedly consequentialist.[57]

Luban and others also critique the Bybee/Yoo Memo as a legal document claiming that none of its arguments are very convincing and lack adequate evidence. For instance, Luban and Margulies critique the inappropriateness of using a definition of "severity of pain" based on a health statute about an "emergency medical condition" to analyze U.S. protections against torture.[58] Jeremy Waldron also points to the faulty understanding of severity in the Bybee/Yoo memo that considers the impact of an untreated condition leading to impairment or dysfunction as the meaning of severity itself.[59] Further, according to Luban, the emphasis on the "specific intent" requirement and the use of "self-defense" and "necessity" defenses were either misconstrued or had little precedents in U.S. law and were primarily meant to deliberately create a liberal ideology of torture. As Margulies explains, while difference between "intent" and "knowledge" can be used in the case of a surgeon who may know that pain would be caused by her actions but did not intend to cause it, in case of interrogation this has little meaning because the point in interrogation is to inflict pain.[60] While all these arguments present effective critiques of the legal arguments in the Bybee/Yoo memo portraying it as an example of bad lawyering, they underscore the aggressive hyper legality in the memo, rather than considering the memo as a lawless attempt.

A significant question that is neither addressed by exception theorists nor by these critiques is why, after creating and justifying the narrowing of protections against torture, the liberal state had to withdraw the egregious memo on torture from the realm of the public discourse. In particular, I am referring to the need for the Bybee/Yoo memo to be withdrawn after the memo provided ways to narrow the protections against torture. In the new Levin memo, the section on necessity, self-defense and the Commander -in-Chief powers was dropped in entirety by the administration claiming that the "President's Commander-in- Chief power and potential defenses to liability (that) was - and remains -unnecessary."[61] The use of the term "unnecessary" is significant because it shows the belief among state officials that the President can authorize methods in violation of the Federal Torture Statute. However, the fact remains that the blatant aspects of the torture memo were withdrawn in the Levin memo.

The symbolic act of withdrawal cannot be explained either by the exception argument or by a critique of bad lawyering. I suggest that the withdrawal of the memo was necessary because, first, it created a direct link between the U.S. policy makers and the actors of violence and second, the memo explicitly provided a framework of authorizing acts that superseded the acceptable levels of violence in a liberal democracy.

In this context, contributions by Robert Cover, Austin Sarat, Timothy Kaufman-Osborn and others on the ambivalent relationship of law to violence becomes useful.[62] Apart from pointing to ways in which mainstream theorists such as Hart and Dworkin focus on law as primarily rules, norms and principles, leading to what Sarat and Kearns have famously termed a "forgetting of violence," these scholars illustrate how the liberal state tries to deny the role of violence in law despite its use.[63] According to Austin Sarat and Thomas Kearns, the dominant theory of legal violence suggests that "necessary"

violence is primarily the action of agents who enforce the decisions made on the basis of abstract rules and principles. The emphasis of the mainstream legal theorists is on a bureaucratic structure of judicial decision-making rather than the concrete acts of legal interpretation by the judges. This, in turn, denies the important fact pointed out by Robert Cover that "legal interpretation takes place in a field of pain and death" and has physical implications.[64]

The example of death penalty illustrates how the judges distance themselves from the acts of violence. As Kaufman-Osborn explains, the violence is seen as being reflected only in the "deeds" of the executioner while carrying out the act of execution and not in the "words" of the judge proclaiming the execution, thereby, ignoring the integral relation between the two.[65] Thus, liberal states attempt to show violence as being marginal to law, rather than being integrally pervasive at all levels: legal interpretation and legal enforcement. In the post-9/11 context, the presence of the justificatory memos (that informed decisions) alongside the acts of torture in Abu Ghraib created a direct link between the interpreters of law (memo writers) and the acts of torture. Yet, the liberal state initially denied the presence of these acts of torture. When the pictures of torture confirmed the presence of these acts, the state started denying any authorization of these acts and when that failed, withdrew the explicit justificatory discourses. The symbolic significance of the act of withdrawal is that even at the height of the "war on terror" rhetoric, the Bush Administration could not defend torture as torture and when the leaked Bybee/Yoo memo appeared to be the genesis of the torture and abuse at Abu Ghraib (via Guantánamo), the memo had to be publicly withdrawn.

This is because the liberal state always attempts to portray its own violence as "humane" in opposition to "inhumane" non state violence. This is most visible in the change in the methods of execution in the United States from hanging to gas chamber, to electric chair and finally to lethal injection.[66] Each time the newer method was proclaimed as a less painful method of execution and lethal injection was considered as the most humane method. The withdrawal of the Bybee/Yoo memo, thus, has to be seen as the liberal state's attempt to ensure that the distinction between the humane "self" and the inhumane "other" is clearly maintained. By allowing for torturous methods, this major distinction between the controlled state and the brutal other would have been questioned. Here again the parallel between the methods of execution and methods of interrogation becomes important. In the case of developing humane methods of execution, as Austin Sarat notes, it is not due to the concern for the executed that the methods of execution change, rather it is to constantly ensure that the liberal state seems more humane than the other. The humane methods exist also to spare the witnesses from watching the pain and marks on the body of the condemned.[67] In fact, the recent debates on botched up executions by lethal injections indicate the inability of the state to do away with pain even in its most humane method of killing.[68] In the case of interrogations, it is the narrow definition of torture alongside the use of terms such as harsh or enhanced interrogation techniques in place of torture, on the one hand, and the emphasis on mental rather than physical methods of torture, on the other, that allowed the state to proclaim that it did not use torture. Thus, the withdrawal of the memo became necessary because the Bybee/Yoo memo alongside the Abu Ghraib pictures explicitly linked the state to unacceptable levels of violence that the denial strategies could not contain creating a crisis in the legitimacy of the liberal state.

When does violence become of a magnitude that it threatens the legitimacy of a state? Here the argument is not so much a particular identifiable or fixed threshold of violence that the state crosses but rather a combination of contingent circumstances that create the anxiety for the state. In the post-9/11 context, it was the leak of the photos, the emergence of the memos and documents, and the Bybee/Yoo memo clearly articulating the overstepping of some boundaries of unacceptable violence (always negotiated as the next section will illustrate) that required a withdrawal of this egregious document. The focus, therefore, is on the symbolic act of withdrawal that follows precisely because of a peculiar relationship that law has with violence in liberal states: the state cannot embrace its own violence when it is too

explicit but still requires it and, hence, finds ways of reining in the violence to acceptable levels. The difficulties in doing so is illustrated in both the death penalty debates mentioned earlier, but also will be more specifically discussed in the last section of this paper: in liberal state's innovative and constantly negotiated attempts to accommodate excess violence through, for example, the creation of a juridico-medical apparatus.

The reason why the state needs to constantly negotiate the levels of permissible violence is because of its desire to accommodate excess violence to the extent possible. To put it another way, the reason why the torture debate is better explained by analyzing law's relationship to violence is because the Bybee/Yoo memo's definition of torture is not an entirely new creation. I argue that while Bybee/Yoo memo is significant to the extent that it narrowly reads the protections against torture, some of its arguments rely on torture debates in the pre-9/11 period making it difficult for the liberal state to completely do away with the problems in dealing with this form of excess violence.

Definitional Ambiguities Traversing the Pre and Post-9/11 period

The Bybee memo was focused by critics as an exceptional moment in the torture debate and its withdrawal thereby indicated that the liberal state could rest all suspicions regarding its reliance on illegitimate violence. However, in this section, I note how one of the more controversial sections of the Bybee/Yoo memo--namely the narrow definition of torture-- is not just a creation of the post-9/11 period. Rather, it is a reflection of a more ambiguous relationship that U.S. law has to the definition of torture that was present in the very formulation of the Federal Torture Statute.[69] By analyzing the tensions regarding the definition of torture in the very ratification of the same statute indicates the constantly negotiated nature of law with excess violence even while the liberal state emphatically claims both legally and morally that torture is impermissible in a democracy. Further, the pre-9/11 debates also register ways in which the liberal state often struggles to find ways of accommodating excess violence even while trying to conform to its legal obligations. It is this tension that underlies the quote from Judge Gonzales noted at the beginning of the paper:

The administration has made clear before, and I will reemphasize today that the President has not authorized, ordered or directed in any way any activity that would transgress the standards of the Torture Convention or the Torture Statute, or other applicable laws.[70]

The emphasis on legal obligations, rather than a general denial of torture points to the ambiguities that remain in the laws regarding the definition of torture in the Federal Torture Statute from the pre-9/11 context.

The narrow definition of torture has of course not been the only area of concern as far as aggressive interrogation methods are concerned. The U.S. also claimed that the protections against Cruel, Inhuman and Degrading Treatment (CIDT) were not applicable to the detainees. Thus, even if many non torture methods were considered CIDT by critics, the state represented them as acceptable because of the apparent inapplicability of the laws.[71] Further, the state use of euphemisms or sanitized terms such as "sleep adjustment" or a Frequent Flyer Program for sleep deprivation is also a significant attempt to hide the violence in the interrogations.[72] While these are additional strategies applied by the liberal state to mask its tension with violence in other contexts, in this paper, I focus on the definition of torture in the Federal Torture Statute as an illustration of the liberal state's continued tension with excess violence. In particular, I point to the similarities between the definitions of torture in the U.S. Senate ratification debates in 1990 and the Bybee/Yoo memo. While the similarities themselves are not surprising given the fact that the Bybee/Yoo memo is merely interpreting the same statute, it is a reminder that these

definitional ambiguities troubled the Senate ratification debates as well and that the withdrawal of the Bybee/Yoo memo does not actually resolve these tensions.

The definition of physical and mental torture was a subject of much concern in the U.S. Congress during the ratification of the UN Torture Convention. For instance, In 1990, Mark Richards, the then Deputy Assistant Attorney General in the Department of Justice stated in his written and oral statement in front of the Senate Foreign Relations Committee: "Torture is understood to be that barbaric cruelty which lies at the top of the pyramid of human rights misconduct."[73] Richards goes on to explain what he calls a "relatively general definition." According to Richards, there seemed to be a "degree of consensus" on physical torture-- "the mere mention of which send chills down one's spine: the needle under the fingernail, the application of electric shock to the genital area, the piercing of eye balls etc."[74] Indeed, he terms techniques that "inflict such excruciating and agonizing physical pain…as the essence of torture."[75] Hence, he writes 'the Convention chose the word "severe" to indicate the high level of the pain required to support a finding of torture.'76 Thus, the 1990 Justice department lists techniques that cause long lasting physical injuries on the body as the "essence" of torture and link this to the term "severity," thereby, exhibiting the origins of some of the arguments found in the Bybee/Yoo memo.

In fact, even the Levin memo (that replaced the Bybee/Yoo memo) inherited a more ambiguous understanding of torture based on the 1990 Senate discussions. The Levin Memo clarifies that they disagree with the statements made by the Bybee/Yoo Memo that torture includes only acts causing "excruciating and agonizing" pain or suffering and reject the specific definition of severity given in the memo based on the health statutes (pain in relation to death, organ failure and impairment of bodily function).[77] The question is whether the Levin Memo is able to explain the terms-- severe pain and suffering—in a more encompassing way.

After stating the problem of objectively defining these terms, the Levin Memo turns to the Torture Victim Protection Act cases for explicating the meaning of torture.[78] The cases primarily include "extreme" acts such as "electric shock, severe beating on genitals, cutting a figure on forehead," "removal of teeth with pliers" although ostensibly "less (visibly) painful" acts such as "extreme limitations of food and water, sleep deprivation" and "shackling to a cot" were also included as forms of torture.[79] The question, however, is whether these "less visibly painful" forms by themselves are adequate to constitute torture, something not addressed by the cases and the memo. In other words, while the Levin memo distances itself from the Bybee/Yoo Memo's emphasis on extreme acts, it does not clarify what its own interpretation of these terms are. Thus, the Levin memo's own definition and citation of cases seem closer to what the Bybee/Yoo memo suggested because of the common source of these definitions being the Senate discussions on torture. There is, of course, a distinction to be made between the 1990 Senate discussions that left room for ambiguity and the Bybee memo which aggressively narrowed the protections against torture. Nonetheless, the discussions in the Levin, Bybee/Yoo memos and the Senate indicate that only the most brutal forms of physical torture were consensually considered as torture leaving room for interpreting the less brutal methods (or mental torture) in different ways.

The debate on mental torture in the 1990 Senate debates, thus, has significant implications for the current context. According to Mark Richards, while there was some consensus on physical torture, it was mental pain that was seen as the "greatest problem" since it is "by its nature subjective."[80] He explains: "action that causes one person severe mental suffering may seem inconsequential to another person." Furthermore, he writes that "mental suffering is often transitory, causing no lasting harm."[81] Thus, the U.S. emphasized "prolonged mental harm" and the four predicate acts that would encompass the arena of mental torture. The predicate acts that led to "prolonged mental harm" were "infliction (or threat) of severe physical pain and suffering, administering (or threatening to administer) mind altering substances, threatening imminent death and threatening to do all these acts to a third person."[82]

One of the examples of vagueness of the definition of mental torture mentioned by Mark Richards is the characterization by some international law treatises of "solitary confinement, insulting language or having been forced to strip naked" as mental torture.[83] In light of some of the methods of interrogation that have been used in the war on terror namely isolation, stress positions, removal of clothes, and sexual humiliation, it may be useful to note the lack of consensus on these methods even in the 1990s.

It is this emphasis on physical torture and a limited understanding of mental torture that allowed the Bush administration not only to claim that torture was never authorized but also that torture never took place in Guantánamo (and even Abu Ghraib). To give just one example, the Church Committee report, one of the most detailed reports on the "comprehensive chronology regarding the development, approval and implementation of interrogation techniques," denies the presence of serious abuse at Guantánamo and defines serious abuse in the following way.[84] The Church Report writes, "…we considered *serious abuse* to be misconduct resulting, or having the potential to result, in *death or grievous bodily harm*." Here the report uses the definition of "grievous bodily harm" found in the *Manual for Court Martial* - where "black eye" or "bloody nose" is not grievous, rather grievous harms constitute incidents involving "fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other serious bodily injuries."[85] Thus, one can see the use of a narrow definition of torture emphasizing primarily long lasting physical injuries as "serious abuse."

The definitional ambiguities particularly concerning acts of mental torture, especially in a context where Geneva Conventions were not considered as applicable, led to the authorization of certain methods such as sleep deprivation, isolation up to thirty days, use of phobias and the removal of clothes, for the first few months at Guantanamo in November-December 2002.[86] But these methods were withdrawn because of their possible controversial nature and instead the methods that were authorized in 2003 were sleep adjustment, environmental manipulation, isolation and dietary manipulation.[87] The criteria for determining whether a method was to be allowed or not was whether there was "an intent" to injure or not, whether "severe" physical or mental pain was involved or not and finally whether there was a "legitimate government interest" or not, echoing the language of the Bybee/Yoo memo.[88] Later, the military explicitly excluded some of the more controversial methods from its arsenal but it is important to note that before that all these methods were used both by the CIA and the military interrogators at Guantánamo and indeed, these methods have a longer history than that, at least for the CIA.[89] Thus, a revisiting of the debates on the definition of torture in the 1990 Senate discussion reflects a similar tension regarding the protections against mental torture that one observes in the withdrawn Bybee/Yoo and the Levin memo. Not only do the definitional ambiguities reflect the liberal state's constant tension with violence but leads us to explore the specific ways in which the state finds ways of accommodating excess violence within an art of government.

Excess Violence as a part of Governmentality: Building the Juridico-Medical Complex

As the preceding discussion indicates, the continuing struggle of law with violence is an ongoing theme in a liberal democracy and is unaddressed by the state of exception analysis. The Foucauldian paradigm, similarly, assumes the disappearance of excessive violence in contemporary societies because of the emphasis on an art of government that controls individuals primarily through channeling their productive power. In particular, Foucault's notion of governmentality focuses on harnessing the productive capacity of individuals within a population: "the government has as its purpose…the welfare of the population, the improvement of its conditions, the increase of its wealth, longevity, health etc…"[90] Indeed, governmentality studies post-Foucault has primarily been concerned with understanding how "…liberal democracies developed technologies of governance which shifted away from 'top down' disciplinary and repressive controls to more indirect and persuasive controls…"[91] As David Garland notes, it is the decentered state analysis emphasizing two poles of governance: how authorities govern and individuals

self regulate that is at the center of governmentality studies.[92] This framework largely seems to suggest the insignificance of the role of excess violence in modern societies. As Colin Gordon puts it,

The idea of an 'economic government has, as Foucault points out, a double meaning for liberalism: that of a government informed by the precepts of political economy, but also that of a government which economizes on its own costs: a greater effort of technique aimed at *accomplishing more through a less exertion of force and authority.*[93]

Foucault's own trajectory from *Discipline and Punish* to his essay on governmentality reflects that spectacular forms of violence including torture are rendered unnecessary because sovereignty based on obedience and fear is replaced by a decentralized power that works through disciplinary mechanisms and manages the conduct of populations. In the course of this transformation in the system of social control, there is no longer a "recourse, in principle at least, to excess, force or violence. It is a power that seems all the less 'corporal' in that it is more subtly 'physical.'"[94] The "economy of power" thus required that disciplinary practices take over from the use of excess violence. Foucault in his attempt to explain the emergence of governmentality suggests that one of the features of the government would be "a bumble bee ruling the bee hive *without a sting*"[95]

In this paper, in contrast to this Foucauldian reading of state power, I reclaim certain key Foucauldian terms and concepts to account for the process of accommodation of excess violence by the modern state. This is significant because, while for the most part, there is a transformation in the nature of state power such that the reliance on physical pain and suffering is less visible in modern societies, there remains a space for what I call excess violence. Excess violence is a term I reclaim from Foucauldian literature and define it as violence that the state claims as unnecessary but still struggles to contain it and accommodates it in the process. Thus, it is a constantly negotiated category that exists on a continuum of acts ranging from coercion to torture. Here I use the term excess violence because this is conceptually distinct from coercion inherent in state action and the "necessary pain" authorized by the state in its very functioning.[96] While the difficulties in defining "inherent coercion" and "necessary pain" are significant for debates on law and violence, this paper primarily focuses on the "excess pain and suffering" that the liberal states themselves claim as "unnecessary" and yet in this paper I show how there continues to be a space for this excess violence. The category of excess violence is used precisely to capture the constant difficulty in defining and distinguishing between different forms of state violence: torture, cruel, inhuman, degrading, humiliating treatment and coercion. Since it is a constantly negotiated category, the attempt is always to define it within the law, rather than based on an exceptional sovereign decision. Yet due to its slippery nature and the inability of the law to clearly define it, there is always tentativeness to it. As I illustrate in the context of the juridico-medical apparatus, it is always an ongoing process of negotiation and accommodation. There are just two benchmarks of this negotiation: one that it illustrates the constant struggle of law with violence in liberal states and second that the nature of violence is such that it cannot appear to supercede the acceptable levels of excess violence in a society.

The emphasis on excess violence does not indicate that there has been no transformation in the nature of state power. Rather it is to emphasize that the art of government does not work only through disciplinary mechanisms and the conduct of populations but also by the use of excess violence. Thus, even though Foucault does undermine the role of excess violence in modern societies especially where the art of government emerges as a prominent mode of control, his notion of governmentality can actually be reinterpreted to allow for an understanding of how excess violence could be addressed within that framework. Here I turn to Kevin Stenson's formulation that since liberalism always struggles to maintain sovereignty, it turns to "harsh despotic technologies of rule to bring government to areas and groups deemed to be most troublesome."[97] The emphasis on these harsh technologies of rule by Stenson easily fit within the Foucauldian framework if one were to understand the workings of sovereignty, discipline and

governmentality not in a chronological way with the latter replacing the former two, but rather all three working together in a "synchronic" way.[98] Thus, even though governmentality studies for the most part have not focused on the role of excess violence in modern states, the Foucauldian framework does allow for such exploration.

Here, I develop the Foucauldian notion of governmentality by indicating just one instance of how excess violence is accommodated in the art of government. Using Foucault's concept of juridico-medical complex, I analyze how medical professionals have actually been drawn into the state's attempt to accommodate excess violence. In the post-9/11 U.S. context, there have been different kinds of allegations against the medical professionals in the context of Iraq, Guantánamo and Afghanistan: ranging from non-reporting of torture and ill treatment,[99] non intervention in cases of torture[100] to actual participation in interrogations including its "harsh or enhanced" forms. It is the latter that is of most interest to this argument because it notes a long standing history of psychologists being involved in developing interrogation techniques.

Many scholars including Alfred McCoy and Naomi Klein have pointed out that the genesis of the "harsh" methods of interrogation used in the post-9/11 period lies in the experiments and studies conducted by psychologists during the Cold War.[101] The similarities between the methods used by the CIA in 1960s till date is so strong that Alfred McCoy writes,

Across the span of three continents and four decades, there is a striking similarity in U.S. torture techniques—from the CIA's original Kubark manual, to the agency's 1983 Honduras training handbook, all the way to General Ricardo Sanchez's 2003 orders for interrogation in Iraq.[102]

During the Cold War, the CIA funded a number of studies that looked into the possibility of using psychological methods of control. The first phase of these studies and experiments were focused on mind-control with the help of "hallucinogenic drugs and hypnosis."[103] The experiments with drugs and hypnosis, however, failed. As Mark Bowden puts it, "fear and anxiety turned into terrifying hallucinations and fantasies, which made it difficult to elicit secrets, and added a tinge of unreality to whatever information was divulged."[104]

This led to a focus, in the second phase, on sensory deprivation and self-inflicted techniques or what McCoy calls a 'new approach to torture that was psychological, not physical, perhaps best described as "no-touch torture."'[105] Relating these methods to the post-9/11 conflict, McCoy points out that the classic Abu Ghraib picture with the hooded Iraqi man with arms extended and wires attached to him exemplifies the methods of sensory deprivation (hooding) combined with extended arms as an example of the self-inflicted pain. Self-inflicted pain occurs when the subject's own action-extended arms- is responsible for the pain rather than an external force.[106] Well known psychologists at famous universities such as McGill in Canada conducted many of these studies. McCoy points to one such study where student subjects were put in isolation, with reduced stimuli: 'light "diffused" by translucent goggles, "auditory stimulation" limited by sound proofing and constant low noise, and "tactual perception" blocked by thick gloves and a U-Shaped foam pillow about the head."'[107] McCoy points to the similarities of these methods to the "goggled and muffled prisoners" at Guantánamo, thus, illustrating the actual use of methods developed as a result of these studies and experiments.[108] What emerged from a number of studies and experiments funded and/or supported by the CIA was the Kubark Manual in 1963 that emphasized the importance of using these psychological techniques to create "regression," "dependence" and "confusion" to make the situation "mentally intolerable" for the subjects.[109]

Even when CIA programs (exported to Asia and Latin America among others) were uncovered and U.S. Congressional enquiries were held, according to McCoy, these enquiries did not look into the extent and

source of psychological torture.[110] In fact, McCoy explains that the need to narrow the definition of mental torture was precisely because the state wanted to exempt some of these methods used by the CIA. As McCoy writes, "Strikingly, Washington's narrow definition of "mental harm" excluded sensory deprivation (hooding), self inflicted pain (stress positions) and disorientation (isolation and sleep denial)"- the very techniques the CIA had refined at such great cost over several decades."[111] Thus, even while excluding egregious forms of physical torture and some forms of mental torture (limited to the four predicate acts), this is another instance of how the liberal state allowed for a limited understanding of torture that accounts for a number of psychological techniques in the current times.

As Darius Rejali points out, the development of these techniques was not a chance of history but was necessary for democracies such as the United States. Rejali writes that these "clean" (non scarring) "stealth techniques," are developed not by authoritarian governments as is commonly believed but rather have been the product of the main western democracies-England, France, and the United States.[112] Indeed, one of the main reasons why these are primarily found in democracies is because of their history of monitoring of human rights, thus, requiring these democracies to use torture techniques that leave fewer marks and allows them to evade detection. As Rejali explains:

Public monitoring leads institutions that favor painful coercion to use and combine clean torture techniques to evade detection, and, to the extent that public monitoring of human rights is a core value in modern democracies, it is the case that where we find democracies torture today we will also be more likely to find stealthy torture.[113]

Thus, Rejali forcefully illustrates that it was necessary for these states to develop less visible forms of torture to maintain their legitimacy. This further strengthens the central argument that not only is torture an ongoing issue for liberal states but rather there is a longstanding history of these techniques being constantly developed in order to evade detection by leaving fewer marks, further exhibiting a constant negotiation with excess violence. The question is the exact nature of this excess violence: is it lawless? What are the parameters of its functioning? Taking the case of the juridico medical complex, I suggest that the state constantly negotiates the boundaries of excess violence to ascertain what is permissible and the extent to which it can push them without explicitly appearing lawless. The threshold of that violence depends on a range of factors including the success of the rhetoric, the transparency of the act, the legal loopholes, the subjects of control, and the political climate of a particular moment.

In the post-9/11 context, the role of psychologists was not just restricted to conducting studies for developing psychological techniques for the CIA but rather the medical professionals became an actual part of a juridico medical complex. In 2002, Geoffrey Miller, who was in charge of Guantánamo, set up what is called a Behavioral Science Consultant Team (BSCT).[114] These BSCT teams always had a psychologist and a psychiatrist who helped in developing strategies of interrogation. The strategies were based on a study of psychological profiles of the detainees assessed either by an actual participation in interrogations or by observation of the sessions and giving feedback to those involved in interrogations. Many of these interrogation techniques were based on specific medical information. This medical information was given by care givers ostensibly based on a 2002 memo that suggested that privacy rights did not apply to detainees at Guantánamo and another 2005 memo that allowed for medical information to be used in interrogations.[115] Even when the Pentagon created guidelines regarding the involvement of medical care givers in interrogations, prohibiting those directly engaged in care giving from participating, they did not clarify whether non care givers could still be involved.[116] While the BSCT developed customized methods for individual detainees, the base material appears to have been provided by the army's own program: SERE (Survival, Evasion, Resistance, Escape) -- a program meant to train military personnel in ways of resisting torture when confronted by enemy forces. Jane Mayer describes the SERE training as including the following:

…trainees are hooded; their sleep patterns are disrupted; they are starved for extended periods; they are stripped of their clothes; they are exposed to extreme temperatures; and they are subjected to harsh interrogations by officials impersonating enemy captors.[117]

The DOD Inspector General's report notes that, in September 2002, there was a meeting in Fort Bragg at which the Behavioral Science Consultation Team from Guantánamo got familiarized with the SERE methods that they could potentially develop for use by the interrogators (JTF 170) at Guantánamo. These methods eventually got used as counter resistance techniques in Guantánamo and later traveled to Iraq. The DOD continues to oppose the understanding that "SERE training was a determinate variable in the development of JTF-170 interrogation techniques…"[118] However, it is important for our purpose to note the debate on the role of psychologists that has ensued as a result of these revelations. In other words, regardless of whether SERE methods were directly exported or not, the coincidental similarity between the methods used at Guantánamo, SERE and the studies conducted in the past is striking especially because of the central role of psychologists in all these contexts.

As a result, the medical professionals seem to have emerged as central actors in the debate on interrogations pointing to a key role of medicine in state power as noted by Foucault in his own work. Foucault in an interview in 1976 writes,

Medicine has taken on a general social function: it infiltrates law, it plugs into it, it makes it work. A sort of juridico-medical complex is presently being constituted, which is the major form of power.[119]

Foucault notes how law and medicine work together in what he terms as the juridico-medical complex. The relationship between law and medicine in modern societies is of course an uneasy one as illustrated in the dilemma faced by the doctors in another context of state power namely executions by lethal injections. Timothy Kaufman-Osborn eloquently writes about this paradox for state (law) and doctors (medicine) regarding executions:

On the one hand, the state has an interest in medicalizing capital punishment as fully as possible since it thereby assumes the character of a depoliticized humanitarian (non) event, a painless matter of putting someone "to sleep."…On the other hand, the medical profession has an obvious interest in resisting the conscription of its members for this purpose…"[120]

Thus, as far as the doctors are concerned, the dilemma is that as healers they are unwilling to participate in state killing. However, as Kaufman-Osborn points out they also risk being found guilty of violating their code of ethics by not providing suitable medical services during executions and in the process making the state look incompetent.[121]

The role of the psychologists in the post-9/11 context has also raised similar questions about law and medicine. In response to the various criticisms of the role of psychologists in developing interrogation methods, there has been a very intense debate within the American Psychological Association (APA) on the role of psychologists in interrogations.[122] The APA set up a Presidential Task force on Psychological Ethics and National Security (PENS) to look into the issue especially since many of its members criticized the psychologists for violating U.S. and international laws against torture, cruel, inhuman and degrading treatment.[123] The PENS report however concluded that:

The Task Force believes that a central role for psychologists working in the area of national security-related investigations is to assist in ensuring that processes are *safe, legal, and ethical* for all participants.[124]

The PENS report confirmed their commitment against torture and CIDT stating that psychologists have a responsibility towards not only staying away from these practices, but reporting it and making sure that they do not get involved in situations where there could be a conflict between their role as consultant and a care giver. Yet the Report accepted a central role of psychologists in interrogations that was reiterated by the Association in 2007. Some members of the Psychological Association, in contrast, criticized the report claiming that members of the PENS were actually those directly involved in creating interrogation methods for Guantánamo, Iraq and Afghanistan and three members actually converted the SERE methods into harsh interrogation methods for Guantánamo.[125] More recently, the APA managed to find a majority willing to bar its members from participating in interrogations.[126] However, what this intense debate indicates in the post-9/11 context is yet another illustration of the uneasy relationship between law and medicine in the juridico medical complex.

In the Working Group on Detainee Interrogations, the U.S. officials write that before introducing interrogations, the officials should ensure that:

…the detainee is *medically and operationally evaluated as suitable* (considering all techniques to be used in combination); (iv) interrogators are specifically trained for the techniques; (v) a specific interrogation plan (including reasonable safeguards. limits on duration, intervals between applications, termination criteria and the *presence or availability of qualified medical personnel*) has been developed; (vi) there is appropriate supervision; and, (vii) there is appropriate specified senior approval as identified by 205th MI BDE Commander for use with any specific detainee (after considering the foregoing and receiving legal advice).[127]

The role of the psychologists being defined by both the Working Group and the PENS report requires special note. The psychologists and other qualified medical personnel here have to ensure that the interrogation techniques are safe and legal. However, safety here not only means protecting the welfare of the detainee but more significantly refers to making it safe for the interrogator who is interested in indefinite information even while trying to avoid the violation of any laws against torture and CIDT. The psychologists then have to make sure that the interrogations continue as long as they do not reach the threshold of state definitions of torture (and CIDT if applicable) and this is suggestive again of the anxiety of the liberal state. The state cannot give up relying on excess violence but has to ensure that the severity does not reach the levels that would constitute torture and CIDT under international and national laws. What the psychologists supporting a ban understand is that while formal laws against torture and CIDT would serve as some protections against illegal interrogations, they still allow for a great deal of flexibility and accommodation of excess violence especially when these terms and laws are narrowly defined. Thus, the post-9/11 context brings to the fore another instance of negotiating excess violence where the psychologists are forced to balance their role as healers while responding to the state's need for excess violence. The juridico-medical complex, thus, formed is unstable and under attack and yet it indicates an instance of excess violence functioning within the art of government and not outside of it.

Conclusion

In this paper, I suggest the inadequacies of the "state of exception" argument in addressing the post-9/11 U.S. debate on torture and propose that a more useful framework for understanding the recent debates is to consider torture as a manifestation of law's tension with violence. Although liberal states proclaim themselves as not being dependent on excess violence, I illustrate (by tracing the rise and fall of the Bybee memo) how these states constantly negotiate this relationship. The significance of this argument is that even when the so called "exceptional polices" are withdrawn (as evident in the Obama era), the liberal state and law continue to confront the pre-existing tensions with excess violence.

The continuing tensions of law with violence indicate that state power in liberal democracies has to be understood in relation to the negotiation with and accommodation of excess violence. While the state and law constantly try to define the limits of this violence, there is always tentativeness to this process, thereby making it difficult to clearly demarcate the boundaries. The threshold of any such accommodation is that it cannot appear to supersede the acceptable levels of violence. Hence, what prevents forms of violence from appearing in the more brutal forms is the need for the state to portray its own violence as more humane than those used by the "other." This paper thus argues that the liberal state, while engaging in multiple forms of social control, still retains its ability to engage in excess violence within an art of government pointing to the continued centrality of violence in liberal governance.

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Notes

1. U.S. Report to CAT. (1999). Initial Report of the United States to the United Nations Committee against Torture (CAT). October, p. 6.

2. Press Briefing by White House Counsel, Judge Alberto Gonzales (June 22, 2004). http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (last visited July 6, 2004).

3. Giorgio Agamben. (2005). *State of Exception.* Translated by Kevin Attell. Chicago and London: University of Chicago Press.

4. Torture memo is the memo signed by Jay S. Bybee though written by John Yoo. Memorandum for Alberto R. Gonzales, Counsel to the President, From U.S. Department of Justice, Office of the Attorney General, Jay S. Bybee (August 1, 2002) "Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A." In *Torture and Truth: America, Abu Ghraib and the War on Terror*, edited by Mark Danner .(2004). 115-166. New York: New York Review of Books.

5. Kim Lane Scheppele. "Hypothetical Torture in the War on Terrorism." *Journal of National Security Law & Policy* 1(2005): 285-340, p. 289.

6. The debates on "necessary" and "unnecessary violence" are particularly visible in the jurisprudence on capital punishment in the United States. See Austin Sarat. (2001). *When The State Kills: Capital Punishment and the American Condition.* Princeton and Oxford: Princeton University Press.

7. Michael Ignatieff. (2004). *The Lesser Evil: Political Ethics in an Age of Terror.* Princeton and Oxford: Princeton University Press, p. 2.

8. Steven Lukes. "Liberal Democratic Torture." *British Journal of Political Science* 36 (2005), 1-16, pp. 12-13, emphasis added.

9. Each of these features are of course subject to much debate in terms of their access but they continue to be ways in which liberal democracies are defined as separate from non democracies.

10. John Locke. (1948). *The Second Treatise of Civil Government and A Letter Concerning Toleration*. Oxford: Basil Blackwell, p. 9, emphasis added.

11. Ibid., p. 10.

12. Max Weber. (1966). "The Economic System and the Normative Orders." In *Law in Economy and Society* edited with Introduction and Annotations by Max Rheinstein, 10-40. Cambridge, MA: Harvard University Press, p. 14.

13. Ibid., p. 14, emphasis added. Weber does consider legal orders to be constituted not just by the state but any entity backed by coercive power but still the state has a particular significance among all these institutions. Ibid., p. 17. See discussion in David M. Trubek. "Max Weber on Law and the Rise of Capitalism." *Wisconsin Law Review* 3 (1972): 720-753.

14. Ignatieff, *The Lesser Evil*, p. 15, emphasis added.

15. Belaboring the point even more, Ignatieff writes that "Coercion may be necessary to maintain social order, but in a democratic theory of government, it is an evil, and it must be kept to a minimum." Ibid., p. 16.

16. Ibid., p. 17.

17. See Edward Peters. (1996). *Torture.* Philadelphia: University of Pennsylvania Press. Despite a worldwide condemnation and development of a legal regime against torture in the past few centuries, reported incidents of torture take place every year in more than a hundred countries. The persistence of torture assumes significance also because more than 136 countries have signed and ratified the UN Convention against Torture. Duncan Forrest. (1998). ed. *A Glimpse of Hell: Reports on Torture World Wide (Amnesty International)*. New York: New York University Press.

18. Agamben, *State of Exception*.

19. Ibid., p.3.

20. Michelle Brown. '"Setting the Conditions" for Abu Ghraib: The Prison Nation Abroad.' *American Quarterly* 57 (2005): 973-998. pp. 975-6.

21. President's Memo. "Humane Treatment of al Qaeda Prisoners and Taliban Detainees." (Feb 7, 2002). In Danner, *Torture and Truth*, 105-6.

22. Memorandum for the President from Alberto R Gonzales. "Decision regarding Application of the Geneva Convention on Prisoners of War to the Conflict with al Qaeda and the Taliban." (January 25, 2002).In Danner, *Torture and Truth*, 83-87.

23. Carl Schmitt. (1985). *Political Theology: Four Chapters on the Concept of Sovereignty.* Translated by George Schwab. Cambridge, Massachusetts: MIT Press, p. 5.

24. Joseph Margulies. (2006). *Guantanamo and the Abuse of Presidential Power*. New York: Simon & Schuster, p. 40.

25. Ibid. p. 45.

26. Judith Butler. (2002). "Guantánamo Limbo." *The Nation*, April 1, 2002.

27. Nasser Hussain. (2007). "Beyond Norm and Exception: Guantanamo." *Critical Inquiry*. Summer, p. 739.

28. Ibid., p.741

29. Ibid.

30. Ibid., p. 735.

31. Mark Danner, Torture and Truth.

32. Memorandum for the Commander, U.S. Southern Command. "Counter Resistance Techniques." (January 15, 2003) (signed by Secretary Rumsfeld). In Danner, *Torture and Truth*, 183.

33. See Paul Kahn. 2008. *Sacred Violence: Torture, Terror, and Sovereignty*. Ann Arbor: The University of Michigan Press, p. 9.

34. Stanley Cohen. 2001.*States of Denial: knowing about atrocities and suffering*. Cambridge: Polity Press. Cohen has a broader project that considers not just official denials but also personal denials by bystanders and observers but here I primarily draw upon his formulation of state denials. See discussion on denial using Stanley Cohen's work also in Lisa Hajjar. "Torture and the Future." *Middle East Report Online*, May, 2004. http://www.merip.org/mero/interventions/hajjar_interv.html (last visited November 2008).

35. See David Edwards and Stephen C. Webster. "Cheney admits authorizing detainee's torture." December 15, 2008. http://rawstory.com/news/2008/Cheney_admits_authorizing_detainees_torture_1215.html (last visited January 15, 2009).

36. Cohen, *States of Denial*, p.106.

37. Ibid., p. 108.

38. Edward Greer. '"We don't torture people in America": Coercive Interrogation in the Global Village.' *New Political Science* 26 (2004): 371-387, p. 386.

39. Indeed, one could argue that the Bybee memo was more crisis generating than even the recent memos precisely because now a lot of documents are emerging as moments of the past than as representing the policies of a government in power.

40. This is because many of its suggestions do not explain why military interrogators would not be inhibited by the Uniform Code of Military Justice and other laws concerning the military. Marty

Lederman. "Heather MacDonald's Dubious Counter-"Narrative" on Torture," January 11, 2005. http://balkin.blogspot.com/2005/01/heather-macdonalds-dubious-counter.html (last visited, June 26, 2007).

41. The Yoo memo is even more egregious because it went beyond the Bybee memo and argued that the Commander-in-chief could bypass all laws regarding the interrogations: Fifth and Eighth amendments of the U.S. Constitution, federal criminal laws if "properly authorized interrogations of enemy combatants" based on Commander- in-chief powers. Here I primarily focus on the Commander-in-chief powers, the necessity defenses and the definitions on torture that are common to both the Bybee and Yoo memos. Memorandum for William J. Haynes II, General Counsel of the Department of Defense. "Re: Military Interrogation ofAlien Unlawful Combatants Held Outside the United States (March 14, 2003)." http://gulcfac.typepad.com/georgetown_university_law/files/march.14.memo.part1.pdf and http://gulcfac.typepad.com/georgetown_university_law/files/march14.memo.part2.pdf (last visited September 23, 2008).

42. The 2002 John Yoo memo on detention, for instance, claimed that the Geneva Conventions were not applicable to the detainees at Guantánamo Bay because of the unique nature of the conflict. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo and Robert J. Delahunty. "Application of Treaties and Laws to al Qaeda and Taliban Detainees (January 9, 2002)." In *The Torture Papers: The Road to Abu Ghraib*, (2005) edited by Karen J. Greenberg, and Joshua L. Dratel, 38-79.New York: Cambridge University Press, pp. 43-47.

43. U.S. Report to CAT, 1999.

44. Bybee Memo in Danner, *Torture and Truth*; Memorandum for James B. Comey, Deputy Attorney General from Daniel Levin, Acting Assistant Attorney General. "Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A." (December 30, 2004) http://www.usdoj.gov/olc/dagmemo.pdf (last visited March 3, 2006).

45. Bybee Memo in Danner, *Torture and Truth*, p.149.

46. The inherent powers doctrine has been used a number of times in the war on terror such as in the context of the secret CIA prisons and NSA wiretapping. The court's decision in old and new cases is used to bolster this argument. See Department of Justice Defense on NSA wiretapping, December 2005. http://www.sinc.sunysb.edu/Class/pol325/DoJ%20Letter%20on%20NSA%20Eavesdropping.htm (Last Visited, October 21, 2006).

47. John Yoo. "Commentary: Behind the 'torture memos' As attorney general confirmation hearings begin for Alberto Gonzales, Boalt Law School professor John Yoo defends wartime policy." January 4, 2005 http://www.berkeley.edu/news/media/releases/2005/01/05_johnyoo.shtml (last visited July 5, 2007).

48. Since the state officials were not sure whether the courts would agree that the Federal Torture Statute would not be applicable at Guantánamo as they were also arguing that constitutional protections were not available to the detainees at the base, they suggested multiple ways of bypassing the protections.

49. Bybee memo in Danner, *Torture and Truth*, p. 108; Levin Memo, 2004, p. 3.

50. Black's Law Dictionary quoted in Bybee memo, in Danner, *Torture and Truth* p. 117. Also see Joan Dayan's work that points to the fact that specific intent has been an important requirement in the applicability of the protections under the 8th amendment in recent years. Joan Dayan. "Cruel and

Unusual: The end of the Eighth Amendment." *Boston Review*. October/November, 2004. http://bostonreview.net/BR29.5/dayan.html (last visited March 31, 2006).

51. Bybee Memo, (emphasis added) in Danner, *Torture and Truth*, pp. 119-120

52. Jeremy Waldron. "Torture and Positive Law: Jurisprudence for the White House." *Columbia Law Review.* 105 (October 2005: 1681-750.

53. See Lisa Hajjar. "What's the Matter with Yoo? The Crime of Torture and the Role of Lawyers." Paper Presented at *Law and Society Association Annual Meeting*, Las Vegas, 2005.

54. David Luban. (2006)."Liberalism, Torture and the Ticking Bomb." in Greenburg, *The Torture Debate in America*, pp. 35-83.

55. Ibid., 38-42

56. Ibid., pp. 43-44.

57. Ibid., pp. 44-45.

58. Ibid., p. 57. Margulies, p. 91.

59. Waldron, "Torture and Positive Law."

60. Margulies, p. 92.

61. Levin Memo, p. 2.

62. Austin Sarat.(2001). "Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction." In *Law, Violence and the Possibility of Justice*, edited by Austin Sarat, 3-16. Princeton: Princeton University Press. Timothy Kaufman-Osborn. (2002). *From Noose to Needle: Capital Punishment and the Late Liberal State.* Ann Arbor: Michigan University Press.

63. Austin Sarat and Thomas R. Kearns. (1991). "A Journey through Forgetting: Towards a Jurisprudence of Violence." In *Fate of Law*, edited by Austin Sarat and Thomas Kearns, 219-273. Ann Arbor: University of Michigan Press, p. 14.

64. Robert Cover .(1992). "Violence and the Word." In *Narrative, Violence and the Law: the Essays of Robert Cover*, edited by Austin Sarat, Michael Ryan and Martha Minow, 203-238. Ann Arbor: University of Michigan Press, p. 203.

65. Kaufman-Osborn, From Noose to Needle.

66. Austin Sarat. (2001).*When The State Kills: Capital Punishment and the American Condition.* Princeton and Oxford: Princeton University Press.

67. Ibid.

68. Kate Randall.(2006). "Executions on hold in two US states." *World Socialist Website* 18 December http://www.wsws.org/articles/2006/dec2006/leth-d18.shtml (last visited, May 1, 2007).

69. Whether a similar tension of law with violence is present within the U.S. constitutional protections against torture is beyond the scope of this particular paper. See John T. Parry. (2004). "Escalation and Necessity: Defining Torture at Home and Abroad." In *Torture: A Collection*, ed. Sanford Levinson, 145-164. New York: Oxford University Press.

70. Press Briefing by White House Counsel, Judge Alberto Gonzales (June 22, 2004). http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (last visited July 6, 2004).

71. In its ratification of the UN Convention, the U.S. limited the protections against Cruel Inhuman and Degrading Treatment to violations disallowed by the Fifth, Fourteenth and Eighth Amendments. This is argued in the Yoo March 2003 memo. Further, since the Fifth Amendment was not considered as applicable outside the United States, there was an assumption that there was no prohibition on CIDT abroad. See critique in Seth F. Kreimer. "Torture Lite," "Full Bodied" Torture, and the Insulation of Legal Conscience." *Journal of National Security Law & Policy*, 1 (2005): 187-229.

72. See discussion in Jinee Lokaneeta. "A Rose by another Name: Definitions, Sanitized Terms and Imagery of Torture in *24*." *Law, Culture and Humanities*, Forthcoming.

73. Statement of Mark Richards, Senate Foreign Relations Committee, 1990, p. 13.

74. Ibid., p. 16.

75. Ibid.

76. Ibid.

77. Levin Memo, p. 8.

78. Claims for civil damages are allowed under the TVPA (Torture Victim Protection Act) but are primarily for torture committed by non U.S. officials or foreigners.

79. Levin Memo, pp. 9-10.

80. Mark Richards, P. 17.

81. Ibid.

82. When the U.S. signed and ratified the treaty in 1994, it put forward this particular understanding of the definition of torture. This specific version of the UN Convention subsequently became the basis of Federal Torture Statute. U.S. Report to CAT, 1999, p. 25.

83. Mark Richards, P. 17.

84. Church Report. *Review of Department of Defense Detention Operations and Detainee Interrogation Techniques*, 2005, p. 23.

85. Ibid., pp. 95-96.

86. For Secretary of Defense from William Haynes. "Counter Resistance Techniques." (November 27, 2002) (Signed by Secretary Rumsfeld, December 2002). In Danner, *Torture and Truth*: 181-182.

87. Memorandum for the Commander, US Southern Command, from Secretary of Defense. "Counter Resistance Techniques in the War on Terrorism," April 16, 2003, In Ibid.

88. Memorandum for Commander, Joint Task Force, from Diane Beaver. "Legal Review on Aggressive Interrogation Techniques." (11 Oct 2002). In Ibid, 169.

89. In September 2006, the military introduced a new manual that explicitly prohibited certain methods of interrogation including hooding, electric shocks, food deprivation, mock executions, water boarding, use of military dogs and sexual humiliation. Field Manual No. 2-22.3, 2006, http://www.fas.org/irp/doddir/army/fm2-22-3.pdf (last visited December 25, 2007).

90. Michel Foucault. (1991). "Governmentality." In *The Foucault Effect: Studies in Governmentality*, edited by Graham Burchell, Colin Gordon and Peter Miller, 87-104. Chicago: University of Chicago Press, p. 100.

91. Kevin Stenson. (1999). "Crime Control, Governmentality and Sovereignty." In *Governable Places: Readings on Governmentality and Crime Control* .edited by Russell Smandych, 45-73, Dartmouth: Ashgate, p. 47.

92. David Garland. (1999). "Governmentality and the Problem of Crime." In Ibid., pp. 15-43.

93. Gordon, "Introduction." In Burchell et. al, *The Foucault Effect*, p. 24 (emphasis added).

94. Ibid., p. 177.

95. Foucault, "Governmentality," p. 96 (emphasis added).

96. State action always contains a degree of coercion for instance as exemplified in the inherently coercive nature of interrogations as defined in *Miranda v. Arizona* (1966). Some pain is always authorized in state action. The criterion is always that it has to avoid unnecessary pain as identified in the Eighth Amendment jurisprudence.

97. Stenson, "Crime Control, Governmentality and Sovereignty," p. 46.

98. Ibid.

99. Lifton writes that there were instances when nurses and doctors saw injuries such as dislocated shoulder as a result of handcuffing and holding their hand over the head but did not report it. Robert Jay Lifton. "Doctors and Torture." *The New England Journal of Medicine*, July 29, 2004.

100. Physician for Human Rights point out that apart from issues of quality and access that was really a problem in Iraq, Afghanistan, doctors did not try to intervene when they saw the use of torture. Sometimes they were present and actually revived the detainee so that the torture could continue. And

even when they saw the impact of torture on the detainees, they did not intervene. *Broken laws, Broken Lives* . (2008). Physician for Human Rights, P. 86.

101. Alfred W. McCoy. (2006) A *Question of Torture: CIA Interrogation from the Cold War to the War on Terror*. New York: Metropolitan Books. Naomi Klein. (2007).*The Shock Doctrine: The Rise of Disaster Capitalism*. New York: Metropolitan Books.

102. McCoy, p. 12.

103. Ibid, p. 26.

104. Mark Bowden. 2003. "The Dark Art of Interrogation." *The Atlantic Monthly*. October. Ibid., p. 57.

105. McCoy, p. 7.

106. Ibid., p. 8.

107. Ibid.

108. Ibid., p. 35.

109. *KUBARK Counterintelligence Interrogation*. Central Intelligence Agency. (July 1963). http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB122/ (last visited March 3, 2006).

110. McCoy, *A Question of Torture*.

111. McCoy, Ibid.

112. Rejali uses the term non scarring to note that the distinction between physical and psychological is not adequate to explain the nature of some of these techniques. He notes that many of these are physical techniques except that they do not leave marks. Darius Rejali. 2007. *Torture and Democracy*, Princeton and Oxford: Princeton University Press, p.4.

113. Ibid., p. 8.

114. M Gregg Bloche, Jonathan H Marks. "Doctors and Interrogators at Guantanamo Bay." *The New England Journal of Medicine*. July 7, 2005.

115. Ibid.

116. Jane Mayer. "The Experiment The military trains people to withstand interrogation. Are those methods being misused at Guantánamo?" *The New Yorker*, July 11, 2005. http://www.newyorker.com/archive/2005/07/11/050711fa_fact4?printable=true (last visited September 25,2008).

117. Other methods mentioned are noise stress, water boarding, and sexual humiliation. Some of these were used in Qahtani case and log shows participation of a psychologist. Ibid.

118. *Review of DoD-Directed Investigations of Detainee Abuse.* Office of the Inspector General of the Department of Defense. August 25, 2006. See appendix, p. 117.

119. Michel Foucault. (1996). *Foucault Live: Collected Interviews, 1961-1984*, edited by Sylvere Lotringer New York: Semiotext, p. 197.

120. Kaufman-Osborn, *From Noose to Needle.*

121. The inability of the state to visibly use pain in its executions as reflecting the basic instability between the state's punitive functions (sovereignty) and its welfare functions (juridico-medical complex in the realm of governmentality). Ibid.

122. Here I focus on the psychologists because the American psychiatric association and American Medical Association bars its members from participating in interrogations. http://www.psych.org/MainMenu/Newsroom/NewsReleases/2008NewsReleases/APAStatementonInterrogation.aspx (last visited September 25, 2008).

123. "How Pentagon Report Contradicts APA Statements Q&A." June 9, 2007. http://www.scoop.co.nz/stories/WO0706/S00114.htm (last visited September 25, 2008).

124. Report of the American Psychological Association. *Presidential Task Force on Psychological Ethics and National Security*. June 2005. http://www.apa.org/releases/PENSTaskForceReportFinal.pdf (last visited September 25, 2008).

125. "How Pentagon Report Contradicts APA Statements Q&A."

126. Recently, the American Psychological Association has banned its members from participating in interrogations. However, this was adopted in 2009 and has no enforceable impact. "Psychologists Ban Role In Interrogations," Sept. 18, 2008. http://www.cbsnews.com/stories/2008/09/18/terror/main4457822.shtml (last visited September 30, 2008).

127. *Review of DoD-Directed Investigations of Detainee Abuse.* Working Group Report quoted, p. 111.