Introduction

WHY TORTURE MATTERS

On September 11, 2001, I woke up in a motel room along a highway in New Mexico. I was on a cross-country trek to a new job at the University of California—Santa Barbara. When I turned on the television to watch the morning news, I saw the footage of the collapse of the World Trade Center, which had been hit by two hijacked commercial airplanes. The scene was unfathomable. Then there was footage of the Pentagon, which had been hit by another plane. A fourth plane crashed in a field near Shanksville, Pennsylvania, and it was later reported that passengers had overpowered their hijackers. The morning anchors were scrambling to cloak their panic and confusion in broadcaster professionalism. They were seeking answers from official spokespeople and national security experts who had been hastily recruited for on-air interviews. Finally, I turned off the television. I had to move on.

Somewhere along the road, I pulled over to call the switchboard of my new university. I asked to be connected to one of my new colleagues, an expert on religiously motivated terrorism. Although he and I had not yet met, I wanted to do something, and the only thing I could think of was reaching out to him to offer my services if the university were to organize an event to address these terrible attacks and think together about what it meant for the nation.

The first week of the fall 2001 quarter, the university hosted a teach-in, and I was one of the speakers. The large auditorium was crowded with somber students and faculty.

By then, President George W. Bush had already announced that the response to the attacks of September 11 would be to launch a “war on terror.” Congress had already passed legislation authorizing the president to use all necessary and appropriate force against those he determined to be responsible
for the attacks, as well as nations that harbored or abetted the perpetrators. And Vice President Dick Cheney had already given an interview on *Meet the Press* in which he stated: “A lot of what needs to be done here will have to be done quietly, without any discussion, using sources and methods that are available to our intelligence agencies—if we are going to be successful... [I]t’s going to be vital for us to use any means at our disposal... to achieve our objectives.”

Any means at our disposal? I heard that remark by Cheney as a hint that he wanted the government to resurrect something like the Phoenix program, a Vietnam War counterinsurgency strategy that involved capturing and torturing thousands of people for information about the Viet Cong on the assumption that this would provide a war-winning advantage. With Cheney’s comments in mind, I warned my new colleagues and students of the possibility that we—the nation, that is—were likely to respond to terror with torture.

This wasn’t the kind of concern that most people were thinking about so soon after 9/11, as the horrific event had already been named. But torture was always on my mind.

I started my academic career in the early 1990s as a graduate student doing research on the Israeli military court system in the West Bank and Gaza. My original plan had been to study how conflicting nationalisms—Israeli and Palestinian—played out in these military courts. But once I got to the field, I learned two things that changed the focus of my research and the trajectory of my career. One was the importance of torture—specifically tortured confessions—to Israel’s strategies to control and punish Palestinians in the occupied territories. The other lesson was that law is a battlefield in its own right. I saw law’s capacity to function as a double-edged sword: It can be wielded by government lawyers and officials to produce legal justifications for security policies with oppressive and discriminatory consequences, and it also can be wielded by victims and critics to challenge unlawful state policies. As I dug into research on the workings of the Israeli military courts, I came to appreciate the unique role that lawyers play in this conflict because only they are trained to make legal arguments and positioned to use legal processes to combat their adversaries on the terrain of law. Many of the Israeli and Palestinian lawyers who taught me this lesson were, themselves, cynical about the law. But I came to love the law—not as a lawyer, which I am not, but as a sociologist. I became fascinated by fights over what is legal and what isn’t, who wins and who doesn’t, and why.
The terrain of law and conflict in Israel/Palestine had been dramatically altered in 1987 when Israel became the first government in the world to publicly claim the right to use violent interrogation techniques as a legitimate prerogative to protect national security. This decision followed the recommendation of an official commission of inquiry, headed by Moshe Landau, a retired High Court justice. The Landau Commission had been created to investigate the General Security Services, or Shin Bet, which recently had been implicated in two scandals. One was the revelation that an Israeli Circassian army officer had been court-martialed and convicted of treason on the basis of a tortured confession; the other was the cold-blooded execution of two Palestinian bus hijackers immediately after they were taken into custody. The Landau Commission cast a wide net to examine other possible Shin Bet transgressions and its report confirmed something that had long been alleged, but that the Israeli government had resolutely denied: Shin Bet agents had been using violent interrogation techniques on Palestinians since at least 1971.

What scandalized the Landau Commission was not this abuse, but the fact that Shin Bet agents routinely lied to military court judges when defense lawyers challenged their clients’ confessions as coerced. The commissioners could not abide perjury, but they accepted the Shin Bet’s contention that abuse, which they euphemized as “moderate amounts of physical pressure,” was necessary to fight “hostile terrorist activity,” which encompassed not only acts of violence but any expressions of Palestinian nationalism or opposition to the occupation. In their thinking about how to justify this reliance on interrogational violence, the commissioners looked to the first major court case that tested the question of how to draw the line between what was and was not torture: In the 1970s, the Republic of Ireland sued the United Kingdom in the European Court of Human Rights (ECHR) over British interrogators’ use of the so-called “five techniques”—prolonged wall standing, hooding, subjectation to loud noise, deprivation of sleep, and deprivation of food and drink—on Northern Irish Republicans in the context of “the troubles.” Although the ECHR majority decided that none of these techniques, individually, rose to the level of torture, they found that the techniques did constitute cruel, inhuman, and degrading treatment. For the ECHR minority, the British techniques did constitute torture because they were used in combination. The lesson the British government took from the case was to stop using those techniques. The Landau Commission took a different lesson: since the ECHR had decided that Britain’s five techniques
were not torture, the Shin Bet’s methods, which approximated those used by the British, were not torture either. The commission recommended that the Israeli government sanction these abusive interrogation techniques so that Shin Bet agents could stop lying about their use to judges.

The Landau Commission rationalized this recommendation by distorting the concept of the necessity defense. This is a legal defense that an individual can claim when she or he has broken the law in order to prevent a grave harm of an immediate kind—for example, if a bystander assaults a kidnapper who is trying to snatch a child. The commissioners contended that this necessity defense could shield systematic abuses by state agents who were acting to protect Israeli security. The Israeli government accepted the Landau Commission’s recommendation to own up to coercive interrogation tactics and the distorted necessity defense rationale that came with it. As a result, what had previously been extralegal and deniable torture became publicly acknowledged official policy covered with a patina of legality.

As coincidence would have it, one week after the Israeli government endorsed the Landau Commission’s recommendations, Gaza and West Bank Palestinians started an intifada (uprising) to protest the brutalities of military rule and the political stalemate that frustrated their aspirations for national self-determination. To put down this intifada, the Israeli army and the Shin Bet embarked on a program of mass arrests. Palestinians by the thousands—mostly men and teenaged boys, but some women and children as well—were channeled through interrogation, then through the military court system that was working overtime to handle the deluge, and then into prisons. Tortured confessions were at the heart of the strategy to break the intifada with mass incarceration. In the late 1980s, Israel/Palestine had the largest per capita prison population in the world.

At the beginning of the 1990s, while I was doing my fieldwork, Israeli human rights lawyers started challenging the government’s interrogation policy in the High Court of Justice (HCJ). This running battle pitted the universal right not to be tortured against official claims of national security prerogatives. In 1999, the HCJ issued a landmark ruling prohibiting the routine use of coercive interrogation tactics. But the court left a crack in the door on the presumption that, in emergencies, torture can save innocent lives.

Torture became a central focus of my research and writing, and a consuming topic of my thoughts. I came to understand that torture is distinct from other forms of violence because of the context in which it occurs and the status of victims and perpetrators: torture involves intentionally harming
individuals—physically, psychologically, or both—who are in custody but have not been convicted of a crime. Legally, torture is an extralegal practice because it excludes harms resulting from court-ordered punishments that comport with a country’s criminal laws. The use of torture serves different purposes in different contexts. If the objective is to imprison people, as was the case in Israel and the occupied territories, torture may be used to elicit confessions that a court can use to convict them. If the objective is to elicit information from suspected enemies in the context of a war or armed conflict, torture may be used to gather actionable intelligence. If the objective is to quell political dissent and intimidate opponents of a government, then the purpose of torturing some people may be to instill fear in other people or society at large. But under all circumstances, it was well established and universally agreed that torture is illegal. Even the Israeli government acknowledged the illegality of torture by adopting the “moderate physical pressure” euphemism.

I vividly recall a moment in 1997 when I had what felt like an epiphany: Because the prohibition of torture is absolute, everyone everywhere and under all circumstances has the right not to be tortured. This makes the right not to be tortured the most universal right that human beings have, paralleled only by the right not to be enslaved, because there are no exceptions to these prohibitions. The right to life doesn’t compare because there are many ways in which people legally can be killed and circumstances when killing is not a crime. Other kinds of political and civil rights can be suspended or even violated temporarily in times of emergency. The unique strength of the right not to be tortured, I realized, gives all people a kind of sovereignty over their bodies. Sovereign bodies, like modern sovereign states, are independent and autonomous and have borders that should not be aggressively invaded. The “problem of torture,” therefore, could be understood as sovereign states transgressing sovereign bodies for whatever security or political reasons drive custodial abuse in any given context.

My fascination with this notion of competing sovereignties only deepened when, in 1998, British police, acting on a Spanish warrant, arrested former Chilean dictator Augusto Pinochet while he was in London. The Spanish judge who issued the warrant wanted Britain to extradite Pinochet to Spain to stand trial for his role in the torture and murder of thousands of people during Chile’s “dirty war” years. When the British House of Lords evaluated the charges in the warrant, they decided that murder isn’t an extraditable offense because killing enemies is a legitimate aspect of war. But to the shock
of the champions of unaccountable state power, the law lords decided that, because the prohibition of torture is absolute, Pinochet could not claim sovereign immunity for the legal consequences of this crime, although for political reasons, the British government decided to send him back to Chile rather than extradite him to Spain. Nevertheless, this “Pinochet precedent,” which held that even a former head of state is prosecutable for the crime of torture, offered a forceful answer to the question about the limits of state sovereignty. Torture was beyond the limit.

By September 2001, I was primed to hear the dog whistle in Cheney’s *Meet the Press* comment about using “any means at our disposal.”

Within weeks of 9/11, a full-blown debate about torture erupted in the United States as politicians and commentators fixated on whether it might be justified under exceptional circumstances. A dominating theme in this debate was the hypothetical ticking bomb; in this scenario, a bomb is set to explode, endangering the lives of hundreds, thousands, or even millions of people, depending on its location and destructive force. The person who knows how to defuse the bomb has been captured but is refusing to divulge the information. The debate turns on the question: should the recalcitrant terrorist be tortured to avert a catastrophic attack? Some people argued that certain exceptional circumstances might warrant torture to get lifesaving information. Those who took this position were not suggesting that the government should forsake the principle that torture is wrong, but rather that the principle could be temporarily suspended to keep innocent people safe. On an October 27 segment of CNN’s *Crossfire*, for example, commentator Tucker Carlson said: “Torture is bad. [But] some things are worse. And under some circumstances, it may be the lesser of two evils.” Alan Dershowitz, a Harvard law professor, became a prolific advocate for exceptions to the prohibition of torture. In an article titled “Let America Take Its Cues from Israel Regarding Torture,” he wrote: “I have absolutely no doubt that . . . the vast majority of Americans would expect the officers to engage in that time-tested technique for loosening tongues, notwithstanding our unequivocal treaty obligations never to employ torture, no matter how exigent the circumstances. The real question is not whether torture would be used—it would—but whether it would be used outside of the law or within the law.” Dershowitz offered a suggestion reminiscent of England’s medieval Star Chamber that torture could be brought within the law by empowering special judges to issue torture warrants.

In order to hold the line at lesser evil and not slide into the terrain of absolute evil, the pro-torture advocates in this public debate insisted on
limits to the kinds of techniques that would be acceptable. The terrorist couldn’t be put on the rack or burned with a blowtorch. Rather, they advocated what they liked to refer to as “torture lite”—tactics that don’t permanently damage or destroy the body. Dershowitz proposed sterilized needles under the fingernails. “I wanted to come up with a tactic that can’t possibly cause permanent physical harm but is excruciatingly painful... I want maximal pain, minimum lethality.”

On the other side of post-9/11 torture debate were human rights practitioners and civil rights advocates who argued that no cause or crisis justifies disregarding the prohibition. They explained that torture is always illegal, desperate, and a patently unreliable means of obtaining accurate information. Variations of the anti-torture position included moral arguments that using torture makes you no better than your enemy, and empirical slippery-slope arguments that there is no such thing as just a little torture, because once you start torturing suspected terrorists, you open the door to torturing anyone in the future.

Those on the pro-torture side of the debate referenced the past death and destruction of 9/11 to rationalize the necessity of future torture, and they tried to shame anyone who opposed torture under all circumstances by arguing that the latter were less concerned about the safety of innocent victims than the sanctity of legal principles and/or the rights of terrorists. But their arguments depended entirely on the belief that torture works. As this belief infused the popular imagination, ginned up by the hypothetical ticking bomb scenario, torturing terrorists came to be imagined as a heroic enterprise. Fox Television tapped this zeitgeist with a new drama series, 24, which aired its first episode on November 1, 2001. The show’s lead character, a vigilante named Jack Bauer (played by Kiefer Sutherland), became a national icon as enthralled viewers cheered the ways he brutally tortured bad guys to elicit some lifesaving piece of information.

Meanwhile, unbeknownst to the public, policy decisions were being made about how to wage the “war on terror” that would congeal, by the first anniversary of 9/11, into official authorization for torture. Cheney, who assumed control of the national security portfolio, was driving this decision-making, aided by his legal counsel David Addington. They wanted to unfetter the president’s powers from the system of checks and balances designed by the nation’s founders and to inoculate those who carried out the president’s orders from judicial scrutiny. A tight circle of like-minded lawyers from the White House, the Pentagon, and the Justice Department, who referred to
themselves as “the war council,” were busy crafting legal arguments and reinterpreting laws to empower the president to authorize anything deemed necessary to combat terrorism and protect national security. The war council rejected the idea that the president’s options must comport with the 1949 Geneva Conventions, which they scorned as too quaint to be relevant to this new kind of war. As had been the case when Israel publicly claimed the right to use violent interrogation tactics, these lawyers wanted the US government’s prerogative to brutalize terror suspects to have the imprimatur of law.

The public was exposed to very few glimpses of this “new paradigm,” as its intellectual authors described the expansion of executive power that they were constructing in the shadows. One glimpse was President Bush’s November 13, 2001, military order regarding the treatment of captured enemies. He pronounced that our enemies in this war are “unlawful enemy combatants.” This was a radical repudiation of the laws of war because, in any armed conflict, people fall into one of two categories: combatants, meaning soldiers, and civilians, which encompasses everyone else. This new category of unlawful enemy combatants was cut from whole cloth, and it flowed from the earlier decision to classify the terrorist attacks of 9/11 as an act of war rather than what they actually were: a crime against humanity. If the attacks were an act of war, this reasoning went, then the perpetrators weren’t civilians, because civilians can’t start a war and you can’t declare war on civilians. If they weren’t soldiers either, you wouldn’t have to treat those who were captured like prisoners of war. According to President Bush’s order, foreigners taken into US custody in the “war on terror” would be barred from challenging their detention or appealing to any court anywhere over how they would be treated. The order threw habeas corpus—Latin for “show us the body,” which prohibits secret detention—under the bus. Perhaps because these foreign enemies would be detained overseas, habeas corpus wasn’t a right they could claim anyway. But neither would they be put through any kind of military vetting process of the kind available to POWs because, although they were captured in a war, they weren’t soldiers. Hence, by order of the president, anyone who was captured, kidnapped, or sold for bounty into US custody was an unlawful enemy combatant and had no rights. The other element of the president’s military order was that any detainees the government chose to prosecute would be tried in a new military commission system created just for them.

To understand the public reception of the president’s military order, we must recall that in November 2001, the World Trade Center was still a
disaster site where human remains were being excavated. The month before, al-Qaeda leader Osama bin Laden, who was deemed responsible for the attacks, had evaded capture in Afghanistan and gone into hiding. The hunt was on for terrorist sleeper cells inside the United States who might be planning more attacks, and for terrorist leaders and operatives overseas. The torture debate, going full throttle, had already lubricated public discourse with the idea that the law could be bent or set aside to respond to a national emergency. Public reception of the president’s order regarded it as an appropriately muscular response to deal with such nefarious enemies.

The next glimpse of the new paradigm was the release of trophy-shot photos of the first prisoners to arrive at Guantánamo on January 11, 2002. The month before, the US naval base on the south side of Cuba had been selected as the site for long-term interrogation and detention of unlawful enemy combatants. The Pentagon assumed that a vengeful public would celebrate the images of men kneeling on the ground in a barbed wire pen, wearing blackout goggles, earmuffs, and padded mittens. This assumption proved to be a slight miscalculation. For it was one thing to debate torture in the abstract but another to see pictures of actual people bound up in contorted positions in sensory deprivation gear. People who voiced criticisms of what these images depicted were countered with officials’ forceful claims that the men in the photos were “the worst of the worst.” Nevertheless, as prisoners continued to be airlifted into Guantánamo, it was decided that, from then on, all information about them would be tightly restricted. The public could know almost nothing about them, including their identities or how they were being treated by interrogators and guards.

This is where the story of the fight against torture in the “war on terror” begins.

Michael Ratner, president of the Center for Constitutional Rights (CCR), a progressive legal organization, was alarmed by the president’s military order. He was even more alarmed by the selection of Guantánamo as a detention site because he had been there before. In the 1990s, Ratner was part of a team of lawyers who fought the administrations of George H. W. Bush and Bill Clinton for using that naval base to detain Haitian refugees interdicted at sea before they could reach the shores of Florida. When Guantánamo was resurrected as a detention facility, Ratner decided he had to fight the government, again. He and his CCR colleagues joined forces with two death penalty lawyers, Joseph Margulies and Clive Stafford Smith. In February 2002, they took the difficult and politically unpopular decision to file a lawsuit
challenging the president’s authority to secretly detain people at Guantánamo. This lawsuit, *Rasul v. Bush*, was the first salvo of what would eventually develop into a war in court.

For the first two years of the “war on terror,” the public knew almost nothing of the CIA’s kill-or-capture mission, which President Bush had authorized six days after 9/11. The exceptions were occasional pronouncements about the capture of individuals touted as top al-Qaeda operatives who were being questioned in undisclosed locations. There were hints, though. On September 26, 2002, Cofer Black, a CIA counterterrorism analyst, testified in Congress that there “was a before 9/11 and an after 9/11, and after 9/11 the gloves came off.”

The first major reveal that there might be a torture policy occurred on December 26, 2002, when the *Washington Post* published a groundbreaking article by investigative journalists Dana Priest and Barton Gellman. They reported that US agents were using “stress and duress” tactics to interrogate people captured in Afghanistan and elsewhere, and that detainees who couldn’t be broken by such methods might be given mind-altering drugs or be “extraordinarily rendered” (extralegally transported) to foreign countries with well-documented records of torture, like Egypt and Morocco. According to Priest and Gellman, “While the US government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary. They expressed confidence that the American public would back their view.”

I gleaned from this *Washington Post* article that the US government was emulating the Israeli model by euphemizing torture as stress and duress and rationalizing it as a national security necessity. I crafted this idea into a paper which I presented in November 2003 at the annual meeting of the Middle East Studies Association (MESA). That year, the conference was held in Anchorage, Alaska, a rather odd setting for a gathering of Middle East Studies scholars. Not many people had chosen to attend. At my panel, the small audience included five people wearing US military uniforms who sat in the back row. Why, I wondered, was a group of soldiers at MESA, and my panel? They were obviously paying close attention and taking notes. The next day, a couple of friends and I decided to take a walk in the tundra on the outskirts of town. Because the path through the permafrost was narrow, we had to walk single file. On the way back, I was in the lead. Down the path heading toward us was a group of people, and in their lead was a woman wearing a pink parka. She shouted my name and rushed toward me. Who
was this hot pink apparition in the Alaska twilight? As it turned out, her name was Sharon Shaffer—Lieutenant Colonel Sharon Shaffer. She said that she had come to Alaska to hear my paper. She was one of five JAGs (judge advocates general) recently appointed to be defense lawyers for the first Guantánamo detainees whom the government planned to prosecute in the new military commissions. Although she hadn’t been assigned a client yet, she knew that people detained at Guantánamo had been abused, and that the rules of the military commissions would allow prosecutors to use coerced statements in the trials. She was furious. But she was on legally uncharted territory so she wanted to hear my presentation in order to see what she could learn from me. I wanted to see what I could learn from her too, and we exchanged numbers.

Shaffer’s shocked frankness about prisoner abuse and her professional gall about the military commissions inspired the research that culminates in this book. Shaffer and her JAG colleagues played an early and important role in the fight against torture when they decided to challenge the Pentagon over the military commissions. Their actions sowed the seeds for an unprecedented military–civilian alliance that mobilized to wage the war in court.

A week after I returned from Alaska, my university invited me to give a public lecture about my research. I picked a title, “Torture and the Future,” and a date, May 4, 2004. Over the winter and spring, I worked on the talk. I would tell my audience about the history of torture, from its invention by the ancient Greeks to elicit statements from slaves to be used as evidence in trials, which the Greeks also invented, to its incorporation into the law of the Roman Empire. The twelfth century “rediscovery” of Roman law in continental Europe spurred the vast use of torture by medieval rulers and religious inquisitors to garner confessions—commonly referred to as “the queen of proofs”—that were needed to enforce criminal and ecclesiastical laws. I would tell the audience why torture became a casualty of the Enlightenment because it was scorned as an unenlightened way to govern, and why the prohibition of torture became a cornerstone of the modern rule of law. I would explain why torture, which was abolished from the law by the end of the eighteenth century, made a comeback outside the law in the twentieth century with the rise of the national security state. I would discuss the “paradox of torture”—the fact that, in the modern era, it is illegal under all circumstances, yet so pervasive that millions of people are its victims every year. I would explain why, of all the horrors in the world, it was torture that instigated the birth of a human rights movement in the 1960s, and how, after the
end of the Cold War, the work of some lawyers had made it possible, finally, to pursue accountability for government officials responsible for torture—like Pinochet. As I prepared my lecture, I decided to make my maiden voyage into the world of PowerPoint. I wouldn’t use it in the boring way that many academics do, loading slides up with words; rather, I would use it to illustrate my talk with images of torture, ancient and modern, so that the audience could visualize the horrors.

On April 28, 2004, six days before my lecture, CBS’s 60 Minutes II broadcast photos of abused, humiliated, bloodied, and dead prisoners from the Abu Ghraib prison in Iraq. There were photos of naked detainees chained to metal bars with women’s underwear on their heads, menaced with snarling dogs, and piled up in pyramids with grinning US soldiers behind them. There was a photo of a female soldier holding a leash attached to a collar around the neck of a naked man lying on the ground, one of a hooded man standing precariously on a cardboard box with his arms outstretched and wires attached to his fingers, and one of a dead man on ice with a female soldier giving a thumbs up to the camera.

Figure 1. Abu Ghraib prison in Iraq: two US soldiers with naked, hooded prisoners who were forced to form a human pyramid. Source: Wiki Commons.
I hustled to develop an analysis of what these revelations meant, and I incorporated some of the Abu Ghraib photos into my PowerPoint. On May 4, with the scandal dominating the news, seven hundred people crowded into the auditorium to hear about “Torture and the Future.” It was a rare kind of experience for an academic to be in front of a breaking story. As my talk wound into the part about Abu Ghraib and some of the images were projected on the large screen, I could hear gasps from the audience. I could see my chancellor sitting in the front row, ashen faced. I concluded the talk by stating that US torture was now an irrefutable reality.

The immediate official response to the Abu Ghraib scandal was to lay all the blame on the soldiers in the photos, who were branded “bad apples.” Even as officials were trying to deflect blame for prisoner abuse, there were people who applauded the horrors the photos depicted. Right-wing politicians and commentators insisted that these people—the humiliated, abused, and dead men at Abu Ghraib, along with any other Muslims in the lands where the “war on terror” was being waged—deserved this and worse. A Republican senator from Oklahoma, James Inhofe, said he was “more outraged by the outrage” over the photos than the torture they depicted. “These prisoners,” he claimed, “they’re murderers, they’re terrorists, they’re insurgents. Many of them probably have American blood on their hands, and here we’re so concerned about the treatment of those individuals.” Right-wing radio personality Rush Limbaugh told his millions of “dittohead” fans: “I don’t understand what we’re so worried about. These are the people that are trying to kill us.”

Official excuses that Abu Ghraib was an aberration collapsed in early June. The Bush administration, under pressure from Congress for information about interrogation and detention operations, declassified some policy documents and legal memos. Others were leaked to the press. Although these documents were peppered with redactions, they exposed the fact that violent and degrading interrogation tactics had been sanctioned from the top. The documents were instantly and aptly nicknamed the “torture memos.”

The torture memos provided substantive evidence that the Bush administration had authorized military interrogators, CIA agents, and government contractors to strip prisoners naked; short-shackle them to the floor for protracted periods; force them to defecate and urinate on themselves; subject them to days or weeks of sleep deprivation by bombarding them with constant light, excruciatingly loud music or grating sounds, and extremes in temperature; put them in stress positions such as “long time standing”; hang them from hooks on the ceiling; bash them into walls; and waterboarding,
which involved strapping people to a board while water was poured on their cloth-covered faces to induce the feeling and fear of death by drowning.

A new wave of torture debating flooded the land in the summer of 2004, this time with a decidedly partisan cast. Because a Republican administration had instituted this torture policy, defending it became a matter of Republican Party pride. Some politicians, echoing statements by officials, insisted that these tactics were necessary, effective, and “not torture,” at least not when used by US agents on our enemies. Waterboarding was the hardest to pass off as not torture because it had been used by medieval inquisitors and Nazis, and in the twentieth century, there were cases in which soldiers and police officers were prosecuted for it in US courts. A vocal constituency took up the cause of defending waterboarding (which became the catchphrase for US torture more broadly), and painted critics as unpatriotic or even terrorist sympathizers.

One sociological truism is that members of the general public, when confronted with new issues or complex problems, often adopt ideas and embrace beliefs advocated by figures they trust, including influential politicians and pundits. The shift in official and right-wing discourse in mid-2004 to openly advocate interrogational abuses as necessary, effective, and justifiable caused public support for torture—not hypothetical scenarios or “torture lite,” but confirmed, violent, and degrading techniques used on people in US custody—to swell. This made the fight against torture significantly harder and more protracted.

There were, of course, many Americans who were disturbed by the revelations of a torture policy. But one sector, people schooled in the law, were especially appalled by the torture-friendly, outcome-driven, intellectually weak legal interpretations crafted by government lawyers to green-light prisoner abuse. Angry lawyers got the opportunity to translate their rage to action in late June 2004, when the Supreme Court did something that the Bush administration had banked on not happening. In a landmark ruling in Rasul v. Bush, the Supreme Court decided, contrary to the president’s November 2001 military order, that people held at Guantánamo have habeas corpus rights to challenge their detention. CCR had won its case. Over the following months, lawyers by the hundreds started volunteering to represent Guantánamo detainees.

In the autumn of 2004, the first lawyers began traveling to Guantánamo to meet the individuals they were assigned to represent, all of whom, they would learn, had been tortured to some degree. I started collecting these
lawyers’ names and conducting interviews. As I learned when I spoke with them, most had no prior experience or expertise about torture, but they were gaining that knowledge on the job. The government imposed stringent protective orders that lawyers had to sign to access Guantánamo, so they couldn’t discuss details about their clients’ treatment with me. But they could speak in general terms about the devastating effects of that treatment, as well as how their own decisions to assume an adversarial position against the government were affecting them professionally and personally. Many also expressed how heartened and moved they were that so many other lawyers—including dyed-in-the-wool conservatives and white-shoe corporate lawyers—had enlisted for this mission.

The Bush administration demonstrated its hostility to legal interventions and judicial oversight with a line in the 2005 National Security Strategy of the United States: “Our strength as a nation-state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism.” But the habeas attorneys as well as the JAGs assigned to defend detainees in the military commissions were unimpressed and undeterred. If the president wanted a fight about prisoner abuse, lawyers were going to give it to him, and many told me that they saw their work in precisely those terms. David Luban, a legal ethicist at Georgetown Law School, coined the term “lawriors” to describe lawyers who decided to do battle with the government. Another term, “lawfare,” a neologism of law and warfare (whose coinage predates 9/11), became a popular way to describe fights over the government’s war policies on the terrain of law.

Despite a continuing flow of revelations about the torture of people in US custody, the Bush administration insisted that its interrogation and detention operations were legal. Twelve separate investigations were authorized by government agencies to look into prisoner abuse, but none was allowed to follow leads up the chain of command, and as a result none ascribed blame to the nation’s top civilian and military leaders who bore responsibility for the torture policy. Compounding these orchestral moves to guarantee officials’ impunity for the crime of torture, the fog machines of classification made access to accurate information about the treatment of prisoners an integral part of the fight against torture.

The death knell for the torture policy was the June 2006 Supreme Court ruling in *Hamdan v. Rumsfeld*, a case brought by one of Shaffer’s JAG colleagues, Lieutenant Commander Charles Swift. The Court canceled the presidially created military commissions as unconstitutional and rejected the
Bush administration’s claim that the Geneva Conventions don’t apply to the “war on terror.” The Court decided that Common Article 3, which prohibits torture, cruel treatment, and outrages on personal dignity, applies to everyone detained overseas by the United States, including those in CIA custody.

President Bush responded to the ruling at a press conference on September 6, 2006. He publicly acknowledged, for the first time, the CIA’s top-secret rendition, detention, and interrogation (RDI) program. He claimed that “high value” detainees interrogated by CIA agents and contractors had divulged vital information about terrorist plots. By omitting facts and presenting a misleading account of the successes of violent, “alternative” interrogational techniques, Bush was laying the foundation for the grand deception that “this program has saved lives.” He added, “I want to be absolutely clear with our people and the world: The United States does not torture. It’s against our laws and it’s against our values.” Bush also announced that he would be sending new legislation to Congress to recreate the military commissions that Hamdan had wiped out. We need those commissions, he explained, because fourteen prisoners in CIA custody, including Khalid Sheikh Mohammed, the alleged “mastermind” of 9/11, were about to be transferred to Guantánamo. “As soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans . . . can face justice.”

The following month, Congress passed the Military Commissions Act (MCA). In addition to resurrecting the military commissions, it included a blanket grant of ex post facto immunity for violations of the 1996 War Crimes Act, thereby fulfilling the new paradigm’s vision of total unaccountability for torture and other gross crimes, at least in US courts. Hamdan may have doomed the torture policy, but rather than bringing government behavior back in line with the law, what ensued in its wake opened new fronts in the war in court.

Lawyers representing victims of US torture started filing civil lawsuits in federal courts against specific officials responsible for the abuse of their clients, and private contractors who abetted it. The Bush administration denounced such litigation and invoked state secrets to persuade courts to dismiss torture-victim lawsuits, which they did in every case. Some American human rights lawyers, including those from CCR, teamed up with some European lawyers to pursue criminal prosecutions of US civilian and military officials in the courts of Germany, Italy, France, and Spain. The Bush administration fought on this front by using diplomatic pressure to persuade
these allied governments to clip their own prosecutors’ pursuit of cases against Americans, even when the people who had been tortured were their own citizens or residents.

By the last year of Bush’s second term, there was growing recognition that coercive interrogations had not only been ineffective, but also had done irreparable damage to national security and other US interests. A 2008 Senate Armed Services Committee report concluded that the use of aggressive techniques and “the redefining of law to create the appearance of their legality damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority.” Alberto Mora, the top lawyer for the Navy in the early years of the “war on terror,” had protested Defense Secretary Donald Rumsfeld’s 2002 authorization of torture for military interrogators. In 2008, Mora testified in Congress: “To use so-called ‘harsh’ interrogation techniques during the war on terror was a mistake of massive proportions. It damaged and continues to damage our nation . . . The net effect of this policy of cruelty has been to weaken our defenses, not to strengthen them.”

During the 2008 presidential campaign season, the nation was so consumed by the economic meltdown that torture barely registered as an election issue. But to their credit, both candidates—Republican John McCain and Democrat Barack Obama—vaunted their anti-torture credentials on occasion. Obama was the favored choice of most people involved in the war in court because he was more forceful in his condemnation of torture. As a senator, he had voted against the MCA, and he pledged that when he became president, he would restore the rule of law that had been so badly damaged by Bush administration policies.

Those who celebrated Obama’s win were cheered that his first official act as president was to sign three executive orders, one shuttering the CIA black sites and essentially taking the spy agency out of the interrogation business, another vowing to close Guantánamo within a year, and a third suspending the military commissions. Many of the lawyers engaged in the war in court assumed that with these executive orders, their mission would soon be accomplished, and they could start demobilizing.

But where torture was concerned, Obama’s victory proved to be a pyrrhic victory. While he did keep his promise to end “enhanced interrogation techniques,” he refused to pursue any form of accountability for those responsible for the crime of torture and rationalized this refusal with the facile proposition that it was time for the nation to “look forward, not backward.”
Despite Obama’s willingness to let past crimes be bygones, his acknowledgment that the torture policy was wrong incited former Vice President Cheney to assail the new president for relinquishing methods that, he claimed, work. Cheney’s media offensive triggered another round of torture debates, and his assertions about the putative effectiveness of violent and degrading interrogation techniques emboldened pro-torture enthusiasts to take command of the field of public discourse about interrogation policy past, present, and future.

Over Obama’s two terms in office, he failed to close Guantánamo. He adopted many of the contra-legal policies instituted during the Bush years, including the use of the military commissions. Since every person put on trial had been tortured, the commissions became the main battleground in the fight against torture.

My research evolved with the shifting terrain of the war in court, but my methods, mainly interviewing people in their offices or by Skype, kept me removed from the action. When I had researched the Israeli military court system, I was able to go into the courts to immerse myself in what I was studying, but I couldn’t go to Guantánamo. Or at least that’s what I thought. In June 2010, I had lunch with a psychologist friend who was working with defense lawyers in a Guantánamo case. She suggested that I could go to Guantánamo if I went as a journalist. I seized on her advice and applied to join the media delegation for a hearing in July 2010. That was my first trip to Guantánamo. Over the following decade, I went back thirteen more times.

Since 2013, most of my trips were to observe military commission hearings in the 9/11 case against Khalid Sheikh Mohammed and four other defendants who are accused of playing various roles in the attacks. This case was supposed to provide justice for the thousands of people who were killed on that terrible day. As the years passed and the events of 9/11 faded in the public mind, the government hoped this group trial would refocus attention on the terrorist attacks, and that justice would be served by an outcome of guilty verdicts followed by executions.

Yet through four administrations, and more than two decades since 9/11, the case remains mired in the pretrial phase. The main reason is because the defendants were tortured for years by the CIA. The 9/11 case is a perfect illustration of the costs and consequences of government decisions to authorize a torture program, and subsequent efforts to try to keep shameful details secret. Along with many other cases that have been part of the war in court, it shows us that torture and justice are incompatible.
As an educator, I often ponder how these lessons about the high costs of torture will be taught to future generations. The lessons certainly haven’t been learned yet. A majority of US citizens have bought into the spurious idea that torture is necessary and effective and, when done or authorized by the US government, is “legal.” Some subscribe to the notion that their fellow countrymen and women who have criticized torture and challenged the government in court should be scorned as un-American. Those who assume this position posit torture as some kind of national virtue.

Over the years since 9/11, I have taught numerous courses about torture and the law. Like an itinerant preacher, I have traveled to colleges and universities and community centers across the United States bringing the message about what is wrong with torture. With this book, I offer readers an account of the long and difficult fight against torture in the “war on terror,” and the lessons I learned from the hundreds of lawyers I interviewed about their roles in the war in court. I hope that the story I tell in this book will be a small contribution toward the goals that motivated and animated the fight against torture. This war in court is a piece of US history which holds lessons that shouldn’t be ignored. It is a history that is still being written.