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# Abu Ghraib

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## ABU GHRAIB

DIANE MARIE AMANN<sup>†</sup>

Seared now into memory is the image of a black-hooded figure standing atop a box. He is naked beneath the black robe that drapes outstretched arms, from which wires run to some unseen source of electricity.<sup>1</sup> Digital scrapbooks of Americans' abuse of this man, and of others at Iraq's Abu Ghraib prison, became public just hours after a government lawyer had assured the Supreme Court that no detainee endured torture at U.S. hands. The image eviscerated that assurance. The man soon became the faceless face of Abu Ghraib; "Abu Ghraib" itself became a catchphrase for the dark underbelly of the United States's detention policy since September 11, 2001. Government reports released in the wake of the disclosure told unsettling truths. Abuses were not due solely to acts by rogues of low military rank, nor were they aberrations at a single prison. Abuses occurred at many antiterror flashpoints—even at the Executive's showcase center at Guantánamo—and with some sanction from the highest ranks. And though victims were dispersed across the globe, each suffered within the same perverse vacuum: a space so freed from the constraints of law and decency that abuse became possible, even, perhaps, inevitable.

This Article asks how that space came to be; more precisely, how the U.S. Executive succeeded in maintaining a zone governed almost exclusively by a singular will to extract information from anyone

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<sup>1</sup> For the first of countless publications of this photograph, see *Abuse of Iraqi POWs by GIs Probed*, CBS, 60 Minutes II (Apr. 28, 2004), at <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> [hereinafter 60 Minutes II Report].

thought to know anything about the enemy. The Article shows that this space was the self-conscious creation of the Executive, which asserted that the country was at war, and that in wartime, courts must bow to a boundless and unreviewable presidential prerogative. Initially, courts opted to defer to much of this argument, and so reinforced the Executive's construct. Then, however, a trilogy of Supreme Court opinions issued in June 2004 appeared to catch the Executive short.<sup>2</sup> Coincident documentation of widespread detainee abuse, combined with the release of internal memoranda that evinced deliberate executive construction of law-free zones of detention, provoked a popular outcry that seemed likely to apply a further brake on the detention policy. In the months that followed, though, little seemed to have changed. One onshore detainee was sent home,<sup>3</sup> but two others remained in legal limbo.<sup>4</sup> A few soldiers were prosecuted for detainee abuse, but generals implicated in government reports were not, and high-ranking civilians won promotion. Trial courts pressed the Supreme Court's order that the Executive accord rudimentary rights to detainees, but the Executive proceeded as if no such order had been given. Contributing to this state of affairs were many factors, not the least of them the stymying effect of the campaign that led to reelection of the President responsible for the policy.

This Article underscores a different, less evident factor. It attributes the persistence of the policy of detention to a lack of vision regarding legal constraints. At the moment terrorists attacked on September 11, there was no absence of law. Norms and doctrines, enforcement regimes, and compliance mechanisms comprised a

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<sup>2</sup> *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

<sup>3</sup> Yaser Hamdi was released after three years in custody. See, e.g., Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

<sup>4</sup> The case of José Padilla remained pending as this Article neared publication. A federal judge granted Padilla a writ of habeas corpus and ordered that he be released by mid-April 2005. *Padilla v. Hanft*, No. Civ.A. 2:04-2221-26A, 2005 WL 465691, at \*13 (D.S.C. Feb. 28, 2005). The Attorney General suggested that the government might return him to the ordinary criminal justice system instead. Richard B. Schmitt, *U.S. May Still Charge 'Enemy Combatant,' Gonzales Says*, L.A. TIMES, Mar. 8, 2005, at A10. Also in the brig in South Carolina was Qatari citizen Ali Saleh Kahlal al-Marri, who lost a bid to have his habeas petition heard in Illinois, the site of his initial arrest. *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir.) (holding that Illinois court had no jurisdiction given that petitioner was in custody outside the district), *cert. denied*, 125 S. Ct. 34 (2004); see also *U.S. Supreme Court Won't Hear Terrorism Case*, AP ONLINE, Oct. 4, 2004, Westlaw, APWIRE database (indicating that with Court's rejection of petition, al-Marri would need to refile his challenge in South Carolina).

complex map of laws concerning detention and interrogation. These ranged from the 1949 Geneva Conventions on the laws of war<sup>5</sup> to the common law's habeas corpus guarantee, and were domestic as well as international, recent as well as deeply rooted. Yet key actors—civilian executive officials, judicial officers, and military personnel—went about their work with blinders on. Failing to apprehend the existence and import of multiple sources of pertinent law, they acknowledged no clash among those laws nor any need for the reasoned resolution of such clashes. Persons charged with making, evaluating, and implementing policy thus looked to some laws and ignored others. At times the choice of law seemed driven by little more than institutional default: the executive lawyer tended to privilege presidential power; the Army officer, military regulations and the Geneva Conventions; the judge, the principle of judicial review. Even among the nine Justices, laws deemed pertinent varied considerably, as did the interpretations placed on those laws. Moreover, most of the Justices, like most military personnel, embraced essential pillars of the Executive's construction; for instance, the Executive's designation of disfavored detainees as "enemy combatants" and its insistence that its campaign against terrorism constitutes a "war."

Conflict of laws might have offered a legal framework for analysis; however, this field, grounded in doctrines benefitting the nation-state, proved ill-suited to the task. The same was true of public international law, the field to which conflicts often cedes transnational matters. The result has been regrettable; indeed, to use the Army's own term, "reprehensible."<sup>6</sup> Pervasive failure to comprehend potentially applicable laws enabled the Executive to maintain its zones of detention. It may have led some Justices to deny a citizen protection that otherwise would have inhered under national law. And it left the implementers

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<sup>5</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. This Article refers to these four conventions collectively as the Geneva Conventions. The United States ratified these conventions in 1955.

<sup>6</sup> See Interview by Dan Rather, 60 Minutes II, with Brigadier General Mark Kimmitt, Deputy Director of coalition operations in Iraq, *available at* <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>. For further discussion of this interview, see *infra* text accompanying note 17.

of executive policy—among them, the military police on guard at Abu Ghraib and the intelligence officers who conducted interrogations at Guantánamo—in a place without law, where inhumane treatment of detainees came to seem acceptable.

### I. TERRORIST ATTACK, EXECUTIVE DETENTION

Following the terrorist assaults of September 11, 2001, the United States struck back against the Taliban regime that had provided Al Qaeda safe haven in Afghanistan. Thousands were captured, among them Taliban fighters and Al Qaeda operatives, as well as others who said they were noncombatant bystanders. The desire to detain them indefinitely gave rise to the Executive's policy of detention.<sup>7</sup>

#### A. *Guantánamo*

Exactly four months after the attacks in New York and Washington, a cargo plane delivered the first group of captives, hooded, shackled, and clad in lurid orange jumpsuits, to cages erected inside the military base at Guantánamo Bay, Cuba. Eventually the cages of Camp X-Ray gave way to the cinder-block structures of Camp Delta, as Guantánamo became the premier site at which the U.S. Executive subjected captives to interrogation, without access to family or counsel and with little hope for release. At one point the detainee population approached 700. Detainees reportedly came from dozens of countries. They may have been as young as eleven and—according to the claim of one released detainee—as old as 105.<sup>8</sup> International objections were swift and loud. Critics tended to disregard the many hundreds

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<sup>7</sup> For accounts of the events and legal developments that preceded Supreme Court review, see Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT'L L. 263, 266-85 (2004).

<sup>8</sup> On the elderly detainee, see Todd Pitman, *Karzai 'Surprised' by Advanced Age of Ex-Detainees, Sending Delegation to Guantanamo: Spokesman*, AP WORLDSTREAM NEWSWIRE, Oct. 30, 2002, Westlaw, APWORLD database (stating that two released detainees claimed to be 90 and 105, respectively, and that they "appeared to be at least in their late 70s"). On the youth of some detainees, see Ian James, *U.S. Officials Still Holding Juveniles in Guantanamo Prison for Terror Suspects*, AP ONLINE, Jan. 31, 2004, Westlaw, APWIRE database (stating that the youngest of three just-released youths "could have been just 11 years old at the time" of his capture); John Mintz, *U.S. Releases 3 Teens from Guantanamo*, WASH. POST, Jan. 30, 2004, at A1 (stating that after the release of three boys aged 13 to 15, seven boys aged 16 and 17 remained at Guantánamo); see also Melissa A. Jamison, *Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children*, 9 U.C. DAVIS J. JUV. L. & POL'Y 127 (2005) (analyzing executive detention of minors in light of international norms).

held at the Bagram prison and elsewhere in Afghanistan, as well as others at the CIA's so-called undisclosed locations. They aimed their attacks at Guantánamo: the fact and terms of detention, they said, conformed neither with U.S. criminal procedure nor with procedures spelled out in the Geneva Conventions. The Executive deflected these complaints, maintaining that detention was essential in the fight against what it described as a new kind of national security threat, a "new paradigm."<sup>9</sup> Thus did Deputy Assistant Attorney General John Yoo explain: "What the Administration is trying to do is create a new legal regime."<sup>10</sup>

U.S. officials insisted that no court of the United States, let alone any other enforcement mechanism, possessed the power to make them give non-Americans at the offshore base the benefits of the rule of law. The cases of Yaser Esam Hamdi and José Padilla, two Americans suspected of terrorist activity, required a slightly different tack: conceding that the reach of the U.S. judiciary might extend to U.S. citizens held extraterritorially, the Executive designated these two "enemy combatants" and sent them to a military brig in South Carolina. Like the Guantánamo captives, Hamdi and Padilla also endured incommunicado detention and unimpeded interrogation.

Challenges to detention were filed in national and international fora; at first these efforts were unsuccessful. The U.S. Executive rebuffed demands of extranational bodies such as the Inter-American Commission for Human Rights and the U.N. Working Group on Arbitrary Detention.<sup>11</sup> A rare public entreaty by the International Committee for the Red Cross had no effect; nor did that Committee's many

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<sup>9</sup> An early public use of this term occurred in GEORGE TERWILLIGER ET AL., *THE WAR ON TERRORISM: LAW ENFORCEMENT OR NATIONAL SECURITY?* (Federalist Soc'y Nat'l Sec. White Papers, 2003), at <http://www.fed-soc.org/Publications/Terrorism/militarytribunals.htm> (last visited Mar. 22, 2005). Documents disclosed years later showed that executive officials were using the same term at the same time. See, e.g., Memorandum re: Humane Treatment of Al Qaeda and Taliban Detainees, from George W. Bush, President of the United States, to Vice President et al. 1 (Feb. 7, 2002) [hereinafter Bush Memorandum], available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf> (last visited Mar. 22, 2005); Memorandum re: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, from Alberto R. Gonzales to George W. Bush, President of the United States 2 (Jan. 25, 2002) [hereinafter Gonzales Memorandum], available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf> (last visited Mar. 22, 2005).

<sup>10</sup> Warren Richey, *How Long Can Guantanamo Prisoners Be Held?*, CHRISTIAN SCI. MONITOR, Apr. 9, 2002, at 1 (quoting Yoo).

<sup>11</sup> See Amann, *supra* note 7, at 275-76, 321-22 (discussing U.S. response to these initiatives).

private pleas.<sup>12</sup> National courts inside and outside the United States judged themselves without jurisdiction to enjoin the U.S. Executive.<sup>13</sup> Then, nearly two years after the opening of Camp X-Ray, the Supreme Court announced that it would review the federal cases.

### B. *Abu Ghraib*

At the April 2004 argument in *Hamdi*, Justice John Paul Stevens asked Deputy Solicitor General Paul D. Clement: “But do you think there is anything in the law that curtails the method of interrogation that may be employed?”<sup>14</sup> “I think that the United States is signatory to conventions that prohibit torture and that sort of thing,” Clement replied. “And the United States is going to honor its treaty obligations,” he added; yet he saw no “basis for bringing a private cause of action against the United States.”<sup>15</sup> Clement thus reaffirmed the administration’s pledge to abide by its obligations under the Convention Against Torture—including prevention of “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”—even though it did not welcome judicial review of its conduct.<sup>16</sup> Oral arguments ended at lunchtime, and the trilogy of detention cases rested under Supreme Court advisement.

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<sup>12</sup> See Neil A. Lewis, *Red Cross Criticizes Indefinite Detention in Guantánamo Bay*, N.Y. TIMES, Oct. 10, 2003, at A1; Operational Update, Int’l Comm. of the Red Cross, *Guantánamo Bay: Overview of the ICRC’s Work for Internees* (Jan. 30, 2004) [hereinafter Red Cross, *Overview*], available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/951C74F20D2A2148C1256D8D002CA8DC> (last visited Mar. 22, 2005).

<sup>13</sup> See Amann, *supra* note 7, at 274-75 (describing extranational litigation).

<sup>14</sup> Transcript of Oral Argument at 48, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), available at [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts.html](http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html) (last updated Mar. 16, 2005).

<sup>15</sup> *Id.* at 49. Clement mentioned only the Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C.A. § 1350 note) (allowing private lawsuit by person who suffers torture at hands of agent of a “foreign nation”), a statute that he correctly stated would provide no basis for relief. Transcript of Oral Argument at 49, *Hamdi* (No. 03-6696).

<sup>16</sup> Letter from William J. Haynes II, General Counsel, Department of Defense, to Patrick J. Leahy, United States Senator 1 (June 25, 2003) (quoting Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment, *opened for signature* Dec. 10, 1984, art. 16, S. TREATY DOC. NO. 100-20, at 19 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture]), available at <http://www.hrw.org/press/2003/06/letter-to-leahy.pdf> (last visited Mar. 22, 2005); see also *Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003) (repeating government’s argument that courts have no power to review the Executive’s conduct of detention “even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees”), *vacated and remanded by* 124 S. Ct. 2932 (2004); George W. Bush, Statement by the President on United Nations International Day in

Hours later, viewers of *60 Minutes II* were confronted with a color photograph of a bare-legged man cloaked in black.<sup>17</sup> “Americans did this to an Iraqi prisoner,” CBS correspondent Dan Rather declared. The image still on the screen, he continued: “According to the U.S. Army, the man was told to stand on a box, with his head covered, with wires attached to his hands. He was told that if he fell off the box he would be electrocuted. It was this picture and dozens of others that prompted an investigation at the U.S. Army.” The screen then moved to other photos, as Rather said: “The pictures show Americans, men and women, in military uniforms, posing with naked Iraqi prisoners. There are shots of the prisoners stuffed in a pyramid. And in most of the pictures the Americans are laughing, posing, pointing, or giving the camera a thumbs up.” Viewers then saw Rather in an office, his back to the camera as he looked at a video screen. On it was Brigadier General Mark Kimmitt, deputy director of operations for the U.S.-led coalition in Iraq, who said of the photos: “What would I tell the people of Iraq? ‘This is wrong. This is reprehensible, but this is not representative of the 150,000 soldiers that are over here.’ I’d say the same thing to the American people: ‘Don’t judge your Army based on the actions of a few.’” Public outcry spread as the images, and more like them, appeared and reappeared in newspapers and magazines, on television, and on websites throughout the world. President George W. Bush quickly registered his “‘deep disgust’”; Secretary of Defense Donald H. Rumsfeld called the conduct “‘totally unacceptable and un-American’”; and Congress convened a series of hearings.<sup>18</sup> Although rumors long had swirled of detainee maltreatment by U.S. personnel on the battlefield, in Afghanistan, and even at Guantánamo,<sup>19</sup> officials echoed Kimmitt’s assertion that the abuses were the

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Support of Victims of Torture (June 26, 2003) (“I call on all governments to join with the United States and the community of law-abiding nations in prohibiting, investigating, and prosecuting all acts of torture and in undertaking to prevent other cruel and unusual punishment.”), available at <http://www.whitehouse.gov/news/releases/2003/06/20030626-3.html> (last visited Mar. 22, 2005).

<sup>17</sup> *60 Minutes II* (CBS television broadcast, Apr. 28, 2004). Described here is a video clip available for viewing at *60 Minutes II* Report, *supra* note 1.

<sup>18</sup> Thom Shanker & Jacques Steinberg, *Bush Voices ‘Disgust’ at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1 (quoting President Bush); Bradley Graham & Charles Babington, *Probes of Detainee Deaths Reported*, WASH. POST, May 5, 2004, at A1 (quoting Secretary of Defense Rumsfeld); FDCH E-Media, *Rumsfeld Testifies Before Senate Armed Services Committee*, at <http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7.html> (last visited May 3, 2005).

<sup>19</sup> See Amann, *supra* note 7, at 280, 323-29, and authorities cited therein; see also LAWYERS COMM. FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S.*



regrettable fault of a few soldiers at Abu Ghraib. But even as “Abu Ghraib,” already infamous for its use as a torture site during the dictatorial regime of Saddam Hussein,<sup>20</sup> was becoming the shorthand term for excesses of executive detention, further revelations undermined any claim that abuse was limited to that prison alone.

Disclosed less than a week after the CBS program was an internal Army report which found that “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees” at Abu Ghraib; among these were incidents of kicking, punching, and other physical abuse, coerced masturbation and other sexual humiliation, forced nudity, and the use of unmuzzled dogs as weapons of intimidation.<sup>21</sup> The report by Major General Antonio M. Taguba attributed the “systemic and illegal abuse of detainees” to “several members of the military police guard force.”<sup>22</sup> Yet it refuted the claim that only these rogues abused detainees, and only at this prison. The report found, rather, that the Army’s and “Other US Government Agency’s (OGA) interrogators”—the latter typically a reference to the CIA—“actively requested that MP guards set physical and mental conditions for favorable interrogation of witnesses.”<sup>23</sup> At the behest of OGAs, guards “routinely” held unidentified captives, Taguba wrote; at least

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LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES 49 (Sept. 2002-Mar. 2003) (discussing news reports “that U.S. interrogators are using psychological and physical coercion,” and that “prisoners have been transferred for interrogation to states known to use torture”), available at [http://www.humanrightsfirst.org/us\\_loss/loss/imbalance/powers\\_chp4.pdf](http://www.humanrightsfirst.org/us_loss/loss/imbalance/powers_chp4.pdf) (last visited Mar. 22, 2005); Letter re: Arbitrary Detention of Presumed Members of Al-Qaeda at Guantanamo Bay, from Sidiki Kaba, President, International Federation for Human Rights, to President-Rapporteur, United Nations Working Group on Arbitrary Detention OHCHR (Jan. 22, 2002) (asserting that “detainees are being subjected to inhuman and degrading treatment”), available at [http://www.fidh.org/article.php3?id\\_article=1488](http://www.fidh.org/article.php3?id_article=1488) (last visited Mar. 22, 2005).

<sup>20</sup> See John F. Burns, *How Many People Has Hussein Killed?*, N.Y. TIMES, Jan. 26, 2003, § 4, at 1 (discussing Abu Ghraib’s use during Hussein’s regime); John F. Burns, *Hussein and Mobs Virtually Empty Iraq’s Prisons*, N.Y. TIMES, Oct. 21, 2002, at A1 (describing Abu Ghraib as “a sprawling compound on the desert floor 20 miles west of Baghdad that has become a notorious symbol of fear among Iraqis for its history of mass executions and allegations of torture”).

<sup>21</sup> DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, at 16-17 (prepared by Major General Antonio M. Taguba, Investigating Officer) (May 27, 2004) [hereinafter TAGUBA REPORT], available at <http://www.aclu.org/torturefoia/released/TR3.pdf> (last visited Mar. 22, 2004). The executive summary of this redacted report carries the date “5/27/04,” although an unredacted version was released earlier and posted at <http://www.msnbc.msn.com/id/4894001/> (updated May 4, 2004). For ease of page citation, this Article refers to the officially released version.

<sup>22</sup> TAGUBA REPORT, *supra* note 21, at 16.

<sup>23</sup> *Id.* at 18. Taguba acknowledged that this finding disagreed with an earlier re-

“routinely” held unidentified captives, Taguba wrote; at least once, these “ghost detainees” were hidden from the International Committee of the Red Cross, the body charged with monitoring compliance with the Geneva Conventions.<sup>24</sup> In Taguba’s view, the mistreatment violated two pertinent bodies of law; specifically, the Army’s own regulations and the Third Geneva Convention. Taguba drew a link, moreover, between those activities and Guantánamo: he noted that the abuses he documented had occurred right after the visit to Abu Ghraib of Major General Geoffrey D. Miller, commander of the Joint Task Force at Guantánamo. After stating that Miller’s team deemed it “essential” that prison guards “be actively engaged in setting the conditions for successful exploitation of the internees,” Taguba voiced his own disagreement with any adoption in Iraq of techniques used at Guantánamo.<sup>25</sup>

### C. Executive Memoranda

The Abu Ghraib photos and Taguba’s report opened a floodgate. Leaked within weeks were Justice Department memoranda that formed the legal backbone for the Executive’s contention that offshore detainees had no recourse to U.S. courts,<sup>26</sup> plus a governmental report that parsed international and domestic law in the course of determining the legality of various methods of interrogation.<sup>27</sup> Alberto

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port, written by Major General Donald J. Ryder, Provost Marshal General of the Army. *Id.*

<sup>24</sup> *Id.* at 26-27.

<sup>25</sup> *Id.* at 8-9 (quoting the Executive Summary prepared by Major General Miller’s team).

<sup>26</sup> Memorandum re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees, from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense (draft dated Jan. 9, 2002) [hereinafter Yoo/Delahunty Memorandum], available at <http://www.msnbc.msn.com/id/5032094/site/newsweek> (last visited Mar. 22, 2005); Memorandum re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba, from Patrick F. Philbin, Deputy Assistant Attorney General, and John C. Yoo, Deputy Assistant Attorney General, to William J. Haynes, II, General Counsel, Department of Defense (Dec. 28, 2001) [hereinafter Philbin/Yoo Memorandum], available at <http://www.msnbc.msn.com/id/5022681/site/newsweek> (last visited Mar. 22, 2005); see also Bush Memorandum, *supra* note 9, at 1-2 (calling for “new thinking in the law of war . . . consistent with the principles of Geneva,” even though Geneva’s explicit protections were deemed not to apply on the grounds that Al Qaeda is not a state and that Taliban detainees were “unlawful combatants”).

<sup>27</sup> Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (draft dated Mar. 6, 2003) [hereinafter Working Group Report], available at <http://www>.

R. Gonzales, then-Counsel to the President, was revealed to have advised Bush that “the war against terrorism is a new kind of war,” which creates a new need for “the ability to quickly obtain information from captured terrorists and their sponsors,” and so “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint” other provisions in the treaty.<sup>28</sup> Also leaked was an August 2002 Justice Department memorandum prepared at Gonzales’s request.<sup>29</sup> Based on its survey of domestic and international law, the Justice Department maintained that “certain acts,” though they “may be cruel, inhuman, or degrading,” still might “not produce pain and suffering of the requisite intensity” to violate U.S. law implementing the Convention Against Torture.<sup>30</sup> Physical suffering would not constitute torture unless it was “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” the memorandum stated; as for mental suffering, there would be no torture absent “significant psychological harm . . . lasting for months or even years.”<sup>31</sup>

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npr.org/documents/dojmemo30020306.pdf (last visited Mar. 22, 2005). This draft, portions of which cribbed passages from the later-disclosed but earlier-written Memorandum re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Interrogation Memorandum], available at <http://www.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf> (last visited Mar. 22, 2005), discussed, inter alia, the following sources of law: U.S. CONST. amends. V, VIII, XIV; Convention Against Torture, *supra* note 16; Geneva Conventions, *supra* note 5; customary international law and military law; American Convention on Human Rights: Pact of San José, Costa Rica, Nov. 22, 1969, 1144 U.N.T.S. 123; Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], available at <http://www.un.org/documents/ga/res/3/ares3.htm> (last visited Mar. 22, 2005); and foreign and domestic case law. A final version of this Working Group Report, dated April 4, 2003, to which were attached recommendations for use of a number of techniques later authorized for use at Guantánamo, see *infra* text accompanying notes 32-34, was released by the Pentagon and is available at <http://www.washingtonpost.com/wp-srv/nation/documents/040403dod.pdf> (last visited Mar. 22, 2005).

<sup>28</sup> Gonzales Memorandum, *supra* note 9, at 2, quoted in John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26, 30-31.

<sup>29</sup> See Letter from John C. Yoo, Deputy Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President I (Aug. 1, 2002) (discussing the genesis of Bybee Interrogation Memorandum, *supra* note 27), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html> (last visited Mar. 22, 2005).

<sup>30</sup> Bybee Interrogation Memorandum, *supra* note 27, at 1 (interpreting 18 U.S.C. §§ 2340-2340A (Supp. 2003)).

<sup>31</sup> *Id.* at 1.

The leaks produced a tumult that prompted the Pentagon to make public a sheaf of documents in the third week of June 2004. Thus it was confirmed that late in 2002 Guantánamo interrogators had been authorized to employ so-called “counter-resistance techniques”—some of which later found their way to Abu Ghraib.<sup>32</sup> Milder techniques included sensory deprivation, hooding, and forced nudity; removal of religious items; “use of stress positions (like standing), for a maximum of four hours”; playing on “phobias (such as fear of dogs) to induce stress”; and claiming that the interrogator came “from a country with a reputation for harsh treatment.” The most severe techniques included the “use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family,” “[u]se of mild, non-injurious physical contact,” and “[u]se of a wet towel and dripping water to induce the misperception of suffocation.”<sup>33</sup> Such techniques would not violate U.S. law, an Army memorandum argued, and added “international law analysis is not required for the current proposal because the Geneva Conventions do not apply.”<sup>34</sup> Rumsfeld agreed, and in approving the request added a handwritten note: “However, I stand for 8-10 hours A day. Why is standing limited to 4 hours?”<sup>35</sup>

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<sup>32</sup> Memorandum re: Counter-Resistance Techniques, from William J. Haynes II, General Counsel, to Secretary of Defense (Nov. 27, 2002) [hereinafter Action Memorandum], available at <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf> (last visited Mar. 22, 2005). Attachments to this document included Memorandum re: Legal Brief on Proposed Counter-Resistance Strategies, from Lieutenant Colonel Diane E. Beaver, Staff Judge Advocate, U.S. Army, to Commander, Joint Task Force 170 (Oct. 11, 2002) [hereinafter Beaver Memorandum], and Memorandum re: Request for Approval of Counter-Resistance Strategies, from Lieutenant Colonel Jerald Phifer, Director, J2, U.S. Army, to Commander, Joint Task Force 170 (Oct. 11, 2002) [hereinafter Phifer Memorandum]. Allegations that they had endured at Guantánamo harsh techniques that violated U.S. and international law formed the basis of a lawsuit brought by four former detainees. Complaint at 5-8 (filed Oct. 27, 2004), *Rasul v. Rumsfeld* (D.D.C. 2004) (No. 1:04CV01804), available at [http://www.nimj.com/documents/Complaint\\_Rasul\\_v.\\_Rumsfeld.pdf](http://www.nimj.com/documents/Complaint_Rasul_v._Rumsfeld.pdf) (last visited Mar. 22, 2005).

<sup>33</sup> Phifer Memorandum, *supra* note 32, at 1-3. Later the Pentagon released a chart indicating that in the first six weeks after authorization, nearly all the techniques were employed at Guantánamo, with the notable exceptions of physical contact and use of dogs. GTMO Interrogation Techniques (June 22, 2004), available at <http://www.washingtonpost.com/wp-srv/nation/documents/062204GTMOslide.pdf> (last visited Mar. 22, 2005).

<sup>34</sup> Beaver Memorandum, *supra* note 32, at 5.

<sup>35</sup> Action Memorandum, *supra* note 32, at 1 (use of capitals as in original).

D. *Judicial Decision*

Days after the Pentagon released what some were calling “the torture memos,” the Supreme Court issued a trilogy of decisions that cast a judicial tether around the detention policy. Ruling in *Rasul* for two Australian and twelve Kuwaiti detainees, six Justices rejected the position of the Executive and held that U.S. courts have jurisdiction to consider the lawfulness of protracted detention at Guantánamo.<sup>36</sup> Justice Stevens’s opinion for five members situated such review within a common law tradition of habeas corpus that predated the founding of the American Republic.<sup>37</sup> The statute Congress passed in service of this tradition gives U.S. courts power to hear habeas petitions “by any person who claims to be held ‘in custody in violation of the Constitution or laws or treaties of the United States,’” the Court wrote.<sup>38</sup> The Court further held that its own precedent imposed no such limit, particularly at Guantánamo, where, on account of a lease executed in 1903, the United States enjoyed “complete jurisdiction and control.”<sup>39</sup>

Having declined to establish the procedures for reviewing detention in *Rasul*,<sup>40</sup> the Court avoided making any substantive decisions in *Padilla* by ruling that the habeas petition at issue had not been filed according to proper procedures.<sup>41</sup> But the Court’s decision in *Hamdi*, the other citizen-enemy combatant case, outlined a framework within which courts might review executive detention.

Unable in *Hamdi* to raise extraterritoriality as a bar to judicial oversight, the Executive had contended that, as Commander-in-Chief, the President enjoyed absolute prerogative to detain during time of

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<sup>36</sup> *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004) (Stevens, J., joined by O’Connor, Souter, Ginsburg & Breyer, JJ.); *id.* (Kennedy, J., concurring).

<sup>37</sup> *Id.* at 2692 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-219 (1953) (Jackson, J., dissenting)).

<sup>38</sup> *Id.* at 2692, 2696 (quoting 28 U.S.C. §§ 2241(a), (c)(3) (2000)).

<sup>39</sup> *Id.* at 2693-99 (quoting *Lease of Lands for Coaling and Naval Stations*, Feb. 16-23, 1903, U.S.-Cuba, art. III, T.S. No. 418). The Court distinguished *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950), a case arising out of World War II, which stated that to benefit from “the privilege of litigation,” aliens in military custody must be present in a “territory over which the United States is sovereign.” *Rasul*, 124 S. Ct. at 2693.

<sup>40</sup> *Rasul*, 124 S. Ct. at 2699.

<sup>41</sup> See *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2727 (2004) (Rehnquist, C.J., joined by O’Connor, Scalia, Kennedy & Thomas, JJ.) (ordering dismissal of the habeas petition filed in New York, but permitting petitioner to refile in South Carolina).

war.<sup>42</sup> The Court unanimously rebuked this position. All nine Justices agreed that a modicum of judicial review of the lawfulness of detention was in order; consensus splintered, however, on the nature and scope of that review. At one extreme, the dissent of Justices Antonin Scalia and John Paul Stevens called upon ancient common law sources and the text of the U.S. Constitution in support of their argument that, unless Congress suspends the writ of habeas corpus, the only way that the Executive may detain a U.S. citizen is “to prosecute him in federal court for treason or some other crime.”<sup>43</sup> At the other extreme, Justice Clarence Thomas’s dissent argued that a one-sentence congressional resolution adopted a week after September 11 gave the President almost plenary power to decide whom to detain and under what conditions.<sup>44</sup> In between was the opinion of Justice Sandra Day O’Connor, joined by Chief Justice William H. Rehnquist and Justices Anthony Kennedy and Stephen Breyer. This plurality agreed that the congressional authorization to “use all necessary and appropriate force” gave the Executive power to detain, but maintained that due process “unquestionably” guaranteed the petitioner “the right to access to counsel” and “a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”<sup>45</sup> The plurality suggested that on remand there should be a balancing of individual and governmental interests along the lines of the Court’s prescription for review of administrative decisions, but stated that, given the “ongoing military conflict,” the government’s interests deserved added ballast.<sup>46</sup> It added that “an appropriately authorized and properly constituted military tribunal” might suffice.<sup>47</sup> The last points drew criticism from the remaining Justices, David Souter and Ruth Bader Ginsburg. These two insisted that Congress had not authorized executive detention, and that in any event, due process likely would not

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<sup>42</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004).

<sup>43</sup> *Id.* at 2660 (Scalia, J., dissenting) (relying on the Due Process Clause, U.S. CONST. amend. V, and the Suspension Clause, *id.* art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”)).

<sup>44</sup> See *Hamdi*, 124 S. Ct. at 2679 (Thomas, J., dissenting) (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001) [hereinafter AUMF], which authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” the September 11 attacks).

<sup>45</sup> *Id.* at 2635, 2652 (O’Connor, J., plurality opinion) (quoting AUMF, *supra* note 44, at 224).

<sup>46</sup> *Id.* at 2645-50 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

<sup>47</sup> *Id.* at 2651.

condone giving excess weight to the government's interests or allowing a military tribunal to act as sole arbiter of a challenge to detention.<sup>48</sup>

### E. *Aftermath*

Although not all ramifications of the Court's trilogy were clear, its holding was: in a democracy founded on the separation of powers, the judicial branch is obliged, even in wartime, to discharge its role as a coequal branch entitled to review acts of the Executive. In the months after *Rasul*, *Hamdi*, and *Padilla* issued, several federal judges appeared determined to fulfill that duty. "The President is not a tribunal," one judge declared as he called to an abrupt halt a detainee's trial before a special military commission established by presidential order.<sup>49</sup> Another judge ruled unconstitutional the means by which detainees were being held at Guantánamo, even as her colleague ruled that no law permitted him to reach that question.<sup>50</sup> Rulings by another judge resulted in the release of thousands of pages of documents regarding detention policy and practice.<sup>51</sup>

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<sup>48</sup> *Id.* at 2652-60 (Souter, J., concurring in part, dissenting in part, and concurring in judgment). The two nonetheless joined aspects of Justice O'Connor's opinion in order "to give practical effect to the conclusions of eight members of the Court rejecting the Government's position." *Id.* at 2660.

<sup>49</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162, 165 (D.D.C.) (Robertson, J.) (stating that detainee trials must conform to Geneva Conventions), *motion to expedite cert. denied*, 125 S. Ct. 680 (2004); *see also* Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) (giving the President authority to determine whether an individual is a member of Al Qaeda and to detain the individual subject to penalties under applicable laws). The military commissions proposed for trial of detainees already had faced controversy. *See, e.g.*, John Hendren, *Guantanamo Tribunal Loses 3 Members Due to Possible Conflicts*, L.A. TIMES, Oct. 22, 2004, at A29 (describing how three officers were removed from the tribunal panel, leaving only three remaining members); Neil A. Lewis, *Guantánamo Prisoners Getting Their Day, but Hardly in Court*, N.Y. TIMES, Nov. 8, 2004, at A1 (describing criticisms of hearings based on the lack of protections afforded detainees); Neil A. Lewis, *Guantánamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, § 1, at 29 (describing changes to be made to the tribunal process); *see also* Amann, *supra* note 7, at 268-69, 329-35 (discussing the creation of the military tribunals and the requirements that international law places on them).

<sup>50</sup> *Compare In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (Green, J.) (denying government's motion to dismiss challenges to detention), *with* *Khalid v. Bush*, 355 F. Supp. 2d 311, 330 (D.D.C. 2005) (Leon, J.) (granting similar motion).

<sup>51</sup> *See* Richard A. Serrano & Greg Miller, *Documents Provide More Details on Prisoner Abuse Allegations*, L.A. TIMES, Oct. 22, 2004, at A4 (discussing documents available at American Civil Liberties Union, *Records Released in Response to Torture FOIA Request*, at <http://www.aclu.org/torturefoia/released/> (last visited Mar. 22, 2005)). As part of

In response, the Executive altered some practices. Hamdi was returned to Saudi Arabia on the condition that he renounce U.S. citizenship,<sup>52</sup> amid speculation that Padilla might be returned to the ordinary federal criminal courts to face prosecution.<sup>53</sup> Releases at Guantánamo stepped up, so that the population dropped to 540.<sup>54</sup> Detainees who remained were permitted to plead for release, albeit under conditions that one federal judge deemed unconstitutional, before three-member Combatant Status Review Tribunals established by the military after issuance of the Court's detention trilogy.<sup>55</sup> The Justice Department released a memorandum expressly disagreeing with its memorandum of August 2002, which had limited "torture" to acts

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this litigation, in February 2005 the judge rejected a bid by the CIA to withhold detention records in its possession. *ACLU v. Dep't of Defense*, 351 F. Supp. 2d 265, 278 (S.D.N.Y. 2005) (Hellerstein, J.).

<sup>52</sup> Settlement Agreement, Hamdi (No. 03-0696) (Sept. 17, 2004), *available at* <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmt.html>; Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantánamo*, N.Y. TIMES, Oct. 16, 2004, at A4 (describing Hamdi's release).

<sup>53</sup> *See generally* Emma Schwartz, *Terror Indictments May Be Linked to Padilla*, L.A. TIMES, Sept. 17, 2004, at A16 (reporting on the indictments of two men connected to Padilla). Padilla had been arrested at Chicago's O'Hare Airport and was designated an enemy combatant only after spending a month in federal custody pursuant to a material witness warrant issued in New York. *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715-16 (2004).

<sup>54</sup> David Johnston, *Judge Limits the Transfer of 13 from Guantánamo*, N.Y. TIMES, Mar. 30, 2005, at A14 (reporting that 540 persons were in custody at Guantánamo, and that 214 detained there in the antiterrorism campaign had left). Additional releases faced obstacles, however. A federal judge ruled that thirteen Yemenis could not be transferred without an opportunity to seek a hearing on conditions in the destination country, and other detainees had filed similar challenges. *Id.*; *see also* *Abdah v. Bush*, No. Civ.A. 04-1254(HHK), 2005 WL 711814, at \*1 (D.D.C. Mar. 29, 2005) (Kennedy, J.) (ordering government to give thirty days' notice of removal to petitioners, who asserted that they might be sent "to the custody of foreign nations to be further detained and possibly tortured").

<sup>55</sup> The tribunals were established in July 2004. Memorandum re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba, from Gordon England, Secretary of the Navy (July 29, 2004) (describing the review process established by the Secretary of Defense), *available at* <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf>. Six months later, a judge found some procedures fundamentally unfair. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 468-72 (Green, J.) (ruling that complaints stated claim for violation of due process on account of tribunal's reliance on classified information and denial of assistance of counsel). *But cf.* *Khalid*, 355 F. Supp. 2d at 329-30 (Leon, J.) (concluding that neither domestic nor international law provided a basis by which a federal court could review conditions of detainees captured and held outside U.S. borders). In all, the status review tribunals reviewed 558 cases and determined that thirty-eight detainees "were no longer enemy combatants and could be eligible for release." Johnston, *supra* note 54.



that caused “‘excruciating and agonizing’ pain,” or “pain ‘equivalent in intensity to pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’”<sup>56</sup> Yet Executive officials resisted efforts to extend the President’s ban on inhumane treatment to employees of the CIA.<sup>57</sup> Notwithstanding these developments, the Executive persisted in its argument that nothing required it to submit to judicial oversight.<sup>58</sup>

Outside the judicial arena, attention paid to detention was less consistent. Various inquiries, including two by military investigators and one by a special panel that Secretary Rumsfeld had appointed, confirmed sundry abuses at various detention sites but found no policy of abuse.<sup>59</sup> Throughout the year there were disclosures of addi-

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<sup>56</sup> Memorandum re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, from Daniel Levin, Acting Assistant Attorney General, to James B. Comey, Deputy Attorney General 2 (Dec. 30, 2004) [hereinafter Levin Memorandum] (quoting Bybee Interrogation Memorandum, *supra* note 27, at 1, 19), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (last visited Mar. 22, 2005).

<sup>57</sup> See Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1 (reporting on letter of opposition sent to Congress by then-National Security Adviser Condoleezza Rice); Eric Lichtblau, *Gonzales Says Humane-Policy Order Doesn’t Bind C.I.A.*, N.Y. TIMES, Jan. 19, 2005, at A17 (stating that, in written responses to questions related to his confirmation hearings, Gonzales said that CIA was bound by prohibition against torture, but not against inhumane treatment). CIA practices at issue included concealment of detainees, harsh interrogation measures, and transfer of captives to countries where security forces were believed to use torture during interrogations. See, e.g., Douglas Jehl, *C.I.A. Says Approved Methods of Questioning Are All Legal*, N.Y. TIMES, Mar. 19, 2005, at A7 (reporting on CIA statement that its interrogation methods “are lawful and do not constitute torture”); Douglas Jehl, *Rule Change Lets C.I.A. Freely Send Suspects Abroad*, N.Y. TIMES, Mar. 6, 2005, § 1, at 1 (writing that post-September 11 presidential directive allowed increase in renditions to other countries); Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14 & 21, 2005, at 106 (detailing history of CIA practice of rendering suspects); Josh White, *Army Documents Shed Light on CIA ‘Ghosting.’* WASH. POST, Mar. 24, 2005, at A15 (reporting on extent of concealment efforts).

<sup>58</sup> See *Evidence from Torture Is Usable, U.S. Asserts*, L.A. TIMES, Dec. 3, 2004, at A6; Carol D. Leonnig, *Judge Questions Sweep of Bush’s War on Terrorism*, WASH. POST, Dec. 2, 2004, at A4. During confirmation hearings, Gonzales “reiterated his view that a president could theoretically decide that a U.S. law—such as the prohibition against torture—is unconstitutional.” Dan Eggen & Charles Babington, *Torture by U.S. Personnel Illegal, Gonzales Tells Senate*, WASH. POST, Jan. 19, 2005, at A4. The Justice Department memorandum that superseded the Bybee Interrogation Memorandum, *supra* note 27, sidestepped the question as “unnecessary” and “inconsistent with the President’s unequivocal directive that United States personnel not engage in torture.” Levin Memorandum, *supra* note 56, at 2.

<sup>59</sup> INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS, FINAL REPORT 5 (2004), at <http://news.findlaw.com/cnn/docs/dod/abughraibrpt.pdf> [hereinafter SCHLESINGER REPORT]; DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 7 (prepared

tional instances of abuse, some fatal, and also of efforts to prevent reporting of abuse.<sup>60</sup> What one FBI agent called “extreme interrogation techniques” were revealed to have been in use as early as May 2002.<sup>61</sup> Even after the Abu Ghraib scandal broke, there were reports that Guantánamo detainees were enduring coercion “tantamount to torture,”<sup>62</sup> and that other detainees had been ghosted out of Iraq, in

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by Lieutenant General Anthony R. Jones and Major General George R. Fay) (Aug. 23, 2004), available at <http://www4.army.mil/ocpa/reports/ar15-6/ar15-6.pdf> (last visited May 3, 2005), and available at [http://www.washingtonpost.com/wp-srv/nation/documents/fay\\_report\\_8-25-04.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf) (last visited Mar. 22, 2005); Unclassified Executive Summary Regarding Department of Defense Interrogation Operations (prepared by Vice Admiral Albert T. Church III, Naval Inspector General) (n.d., release noted on March 10, 2005 by Jim Garamone, *Admiral Issues Report: 'No Policy Condoned Torture, Abuse,'* AM. FORCES INFO. SERVICE, [http://www.defenselink.mil/news/Mar2005/20050310\\_143.html](http://www.defenselink.mil/news/Mar2005/20050310_143.html)) [hereinafter Church Executive Summary], available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (last visited Apr. 6, 2005).

<sup>60</sup> See, e.g., Memorandum re: Alleged Detainee Abuse by TF 62-6 Personnel, from Vice Admiral L.E. Jacoby, U.S. Navy Director, Defense Intelligence Agency, to Under-Secretary of Defense for Intelligence (June 25, 2004) (on file with author) (reporting that DIA employees who observed prisoner abuse at Baghdad detention center were threatened, confined to the compound, and ordered “not to talk to anyone in the US”); see also Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A1 (listing several reported incidents, including prolonged shackling of detainees into fetal position); John Hendren, *Pentagon Confirms Detainee Deaths After Disclosure*, L.A. TIMES, Dec. 14, 2004, at A3 (disclosing the deaths of detainees in Afghanistan); Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators*, WASH. POST, Feb. 10, 2005, at A1 (reporting that Pentagon inquiry would credit allegations that women “used sexually suggestive tactics to try to humiliate and pry information from devout Muslim men” at Guantánamo); Thomas E. Ricks, *Detainee Abuse by Marines Is Detailed*, WASH. POST, Dec. 15, 2004, at A1 (describing investigation of abuse in Iraq, contained in documents released pursuant to Freedom of Information Act request); R. Jeffrey Smith, *General Cites Problems at U.S. Jails in Afghanistan*, WASH. POST, Dec. 3, 2004, at A1 (noting shortcomings in military interrogation practices and the possibility that this may have led to detainee abuse); R. Jeffrey Smith & Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, WASH. POST, Dec. 22, 2004, at A1 (describing Army probes into multiple cases of detainee abuse); Josh White, *Detainees Abused in N. Iraq, Army Papers Suggest*, WASH. POST, Mar. 26, 2005, at A11 (citing allegations that detainees were tortured at U.S. Army facility).

<sup>61</sup> Internal FBI E-mail (July 9, 2004) at <http://www.aclu.org/torturefoia/released/t3449.pdf>.

<sup>62</sup> See Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1 (quoting confidential report by Red Cross team that visited Guantánamo in June 2004). But see Richard A. Serrano, *Pentagon Denies Abuse Charges at Guantanamo*, L.A. TIMES, Dec. 1, 2004, at A21 (reporting that Pentagon officials denied torture allegations and found “no credible instances of detainee abuse”); Press Release, International Committee of the Red Cross, *The ICRC’s Work at Guantanamo Bay* (Nov. 30, 2004), available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/678FK8> (last visited Mar. 22, 2004) (refusing to confirm or deny allegations made in Lewis, *supra*).

keeping with a legal memorandum holding that this did not violate the Fourth Geneva Convention.<sup>63</sup> Notwithstanding, Rumsfeld deflected scattered calls that he resign on account of the abuse scandal.<sup>64</sup> Seven Abu Ghraib guards were charged; most cases were disposed of by guilty pleas and minimal sentences.<sup>65</sup> No senior officer had been charged,<sup>66</sup> and few expected such charges to be tendered.<sup>67</sup> President

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<sup>63</sup> See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1 (discussing, inter alia, Draft Memorandum re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq, from Jack Goldsmith, Assistant Attorney General, Office of Legal Counsel, to William H. Taft IV, General Counsel, Department of State et al. (Mar. 19, 2004) [hereinafter Goldsmith Memorandum], available at [http://www.washingtonpost.com/wp-srv/nation/documents/doj\\_memo031904.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/doj_memo031904.pdf)).

<sup>64</sup> President Bush reportedly refused Rumsfeld’s tenders of resignation. *Rumsfeld Twice Offered to Resign*, L.A. TIMES, Feb. 4, 2005, at A18. German authorities rejected a private complaint brought against Rumsfeld. Daryl Lindsey, *German Prosecutor Won’t Pursue Rumsfeld Case*, SPIEGEL ONLINE, Feb. 10, 2005, at <http://www.spiegel.de/international/0,1518,341131,00.html> (explaining reasons prosecutors declined to pursue allegations). See generally Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld Under the German Code of Crime Against International Law*, 6 GERMAN L.J. 689 (2005). Weeks later, eight former detainees sued Rumsfeld in federal court in Chicago, alleging that he was responsible for abuse they suffered while held in Iraq and Afghanistan. See R. Jeffrey Smith, *Suit Says Rumsfeld Knew About Abuse of Detainees*, WASH. POST, Mar. 2, 2005, at A15 (describing complaint in *Ali v. Rumsfeld*, draft of which is available at [http://humanrightsfirst.org/us\\_law/etn/lawsuit/PDF/rums-complaint-022805.pdf](http://humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf) (last visited Apr. 2, 2005)).

<sup>65</sup> *Abu Ghraib Prison Guard Seeks Leniency in Sentencing*, L.A. TIMES, Feb. 4, 2005, at A29 (referring to status of other six cases, including two that remained pending); Associated Press, *6 Months in Prison for Abu Ghraib Guard*, L.A. TIMES, Feb. 5, 2005, at A23 (reporting on sentence levied against sergeant who had pleaded guilty to abuse charges); Josh White, *Abu Ghraib Prison MP Pleads Guilty to Reduced Charge*, WASH. POST, Nov. 3, 2004, at A12 (writing that third case ended without prison sentence, and that longest sentence imposed before then had been eight years in prison); Kate Zernike, *Ringleader in Iraqi Prisoner Abuse Is Sentenced to 10 Years*, N.Y. TIMES, Jan. 16, 2005, § 1, at 12 (reporting on sentencing of “ringleader of the abuse,” only accused person who had, to date, taken case to trial). Scattered cases were brought regarding other incidents, including one against a civilian contractor. See, e.g., Douglas Jehl, *Pentagon Will Not Try 17 G.I.’s Implicated in Prisoners’ Deaths*, N.Y. TIMES, Mar. 26, 2005, at A1 (writing that “[t]o date, the military has taken steps toward prosecuting some three dozen soldiers in connection with a total of 28 confirmed or suspected homicides of detainees” in Iraq and Afghanistan, but that it had declined to charge seventeen soldiers with regard to three detainees’ deaths); Louise Roug, *Soldier Faces Court-Martial in Killing of Bound Man*, L.A. TIMES, Jan. 19, 2005, at A7 (reporting on case involving shooting by U.S. soldier); Scott Shane, *C.I.A. Interrogator’s Defense to Cite Bush at Brutality Trial*, N.Y. TIMES, Feb. 11, 2005, at A11 (reporting on case brought in federal court in North Carolina against former soldier “hired by the C.I.A. in 2003 to capture fighters from the Taliban and Al Qaeda and question them”).

<sup>66</sup> The Guantánamo general with whose recommendations about detainee treatment Major General Taguba had disagreed was sent to Iraq to run U.S. military prisons there, then given a “senior staff job” at the Pentagon. See Associated Press, *General Who*

Bush declared his reelection “an accountability moment” by which voters endorsed his conduct of war in Iraq.<sup>68</sup> In early 2004 the Senate approved the appointments to higher office of aides who had helped devise antiterrorism policies—including Gonzales, who became Attorney General of the United States.<sup>69</sup> A few members of Congress continued to express concern about detention policies; however, it seemed unlikely that a majority would agree to legislate significant changes.<sup>70</sup> The once-unforgettable image of the hooded detainee

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*Led Prisons Is Reassigned*, WASH. POST, Nov. 25, 2004, at A15 (reporting that the general would become the Army’s assistant chief of staff for installation management). The general in charge of supervising interrogators at Abu Ghraib became the head of the Army’s intelligence school. See Eric Schmitt, *Former Intelligence Officer Cleared in Iraq Abuse*, N.Y. TIMES, Mar. 12, 2005, at A7 (quoting Vice Admiral Albert T. Church III’s statement to reporters upon release of the Church Executive Summary, *supra* note 59, that this general “really was not particularly engaged in the interrogation techniques”). And it was reported that the general in charge of military operations in Iraq at the time of the documented abuse might be promoted. See John Hendren, *4-Star Plans After Abu Ghraib*, L.A. TIMES, Oct. 15, 2004, at A1 (noting that senior Pentagon officials were “determined to pin a fourth star on Sanchez”).

<sup>67</sup> The independent panel, for instance, had found no legal culpability on the part of senior officers. SCHLESINGER REPORT, *supra* note 59, at 5, 79-83. But see Kate Zernike, *High-Ranking Officers May Face Prosecution in Iraqi Prisoner Abuse, Military Officials Say*, N.Y. TIMES, Jan. 17, 2005, at A8 (reporting on status of various investigations into prisoner abuse, and view of persons outside government that charges might yet be brought).

<sup>68</sup> *Excerpts from Bush Interview*, WASH. POST, Jan. 16, 2005, at A16. An author of legal memoranda regarding detention and interrogation echoed this statement, with specific reference to the abuse scandal. See Mayer, *supra* note 57, at 114 (quoting former Justice Department lawyer John Yoo as “suggest[ing] that President Bush’s victory in the 2004 election, along with the relatively mild challenge to Gonzales mounted by the Democrats in Congress, was ‘proof that the debate is over’” and that “[t]he public has had its referendum”).

<sup>69</sup> See Eric Lichtblau, *Gonzales Is Confirmed in a Closer Vote than Expected*, N.Y. TIMES, Feb. 4, 2005, at A13 (reporting that, despite complaints raised by a few Senators, the Senate voted 60-36 to confirm Gonzales’s nomination); Sheryl Gay Stolberg, *Rice Is Sworn in as Secretary After Senate Vote of 85 to 13*, N.Y. TIMES, Jan. 27, 2005, at A3 (reporting on elevation of Condoleezza Rice, formerly Bush’s National Security Adviser, to position of Secretary of State); Sheryl Gay Stolberg, *Senate Unanimously Confirms Chertoff as Homeland Security Chief*, N.Y. TIMES, Feb. 16, 2005, at A16 (stating that federal judge Michael Chertoff, a top official in the Department of Justice on September 11, was approved to run the Department of Homeland Security).

<sup>70</sup> Senators from either side of the aisle did call for “comprehensive review of our interrogation techniques,” Lindsey Graham & Jane Harman, *Clearing the Fog On Interrogations*, WASH. POST, Feb. 19, 2005, at A31. Yet most members of Congress proved reluctant to press the matter. See Editorial, *More Excuses*, WASH. POST, Mar. 13, 2005, at B6 (detailing manifestations of congressional hesitation with regard to abuse issue); see also Tom Curry, *Why Torture Issue Hasn’t Had Political Traction*, MSNBC.COM, Feb. 15, 2005, <http://www.msnbc.msn.com/id/6970081/> (positing reasons for Congress’s hesitation).

seemed destined soon to slip into the recesses of America's collective conscience.<sup>71</sup>

## II. RAISING CONFLICTS CONSCIOUSNESS

What happened at Abu Ghraib, and Bagram, and Guantánamo, was wrong. The evil of the abuse is apparent even to the six-year-old who spots a tattered poster of the hooded detainee. Policymakers dared not complain of the breaches of confidentiality that led to publication of certain documents; they knew that the evil of the abuses detailed in those documents precluded any such complaint. Most of those who committed abuse likewise must have known that their conduct was wrong. Yet reports indicated that detainee abuse began just months after September 11, and recurred throughout the first years of what the U.S. military came to call GWOT, or Global War on Terror. Detainee abuse was, to quote the investigative panel appointed by Rumsfeld, "entirely predictable," a failure of planning and training.<sup>72</sup> It was, as well, a failure of law.

"Law" includes "hard" law—positive enactments clearly subject to domestic enforcement. It also encompasses "soft" law—the moral and ethical values that undergird such enactments, and also external norm systems and legal regimes whose internal enforceability is in dispute. From the outset, the Executive's detention policy provoked questions regarding law thus understood: Which applied? Which was to be followed? Might a body of law be ignored? How were applicable constraints to be enforced? Different actors sought answers in different sources. Many in the United States looked only to U.S. law. International law was a preferred source for foreign actors, such as a British judge asked to rule on the validity of U.S. detention at Guantánamo,<sup>73</sup> and for transnational actors, such as the Red Cross and other human rights organizations.<sup>74</sup> In some instances an actor seemed to have

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<sup>71</sup> In truth, oblivion had set in much earlier. The Democratic presidential candidate said little about detention, even at Abu Ghraib, a fact that one postelection commentator attributed to lack of public concern. See Katha Pollitt, *Mourn*, NATION, Nov. 22, 2004, at 10 (noting absence of markers of outrage; that is, "the demonstrations, the sit-ins, the teach-ins, the lying down in traffic . . . to force the Bush Administration to account for this outrageous crime against humanity").

<sup>72</sup> SCHLESINGER REPORT, *supra* note 59, app. G, at 1; see also TAGUBA REPORT, *supra* note 21, at 10, 19-20, 34 (also citing poor training).

<sup>73</sup> See *The Queen (Abbasi & Another) v. Sec'y of State for Foreign and Commonwealth Affairs*, 2002 Q.B. 1598, ¶¶ 63-64 (Eng. C.A. 2002), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2002/1598.html> (last visited Mar. 22, 2005).

<sup>74</sup> See Red Cross, *Overview*, *supra* note 12 (noting that the ICRC asked U.S. authori-

gravitated to one body of law without full consideration of the potential relevance of others. Disclosures in the wake of the Abu Ghraib scandal underscored confusion—confusion that well may have thwarted prevention and punishment of abuse—about the existence and interrelation of various sources of law. Law failed to the extent that existing systems did not enable key actors to see, to comprehend, and to accommodate these sources of constraint.

The field of conflict of laws would seem to have offered a means to avoid such failure. Conflicts rests on an essential premise: in many instances more than one law, and quite often more than one legal forum, pertain. Laws bump into, vie with, and lay over one another. Landmark U.S. conflicts opinions arose out of civil suits that invoked tort, contract, or property law to resolve disagreement between private individuals, human or corporate.<sup>75</sup> The relevance of multiple legal regimes was taken as a given; the cases focused on resolving conflict as a necessary step to ending the dispute. This sharing of premises, procedures, and goals has parallels in the quotidian compromise of the private sphere. There, law is not a static thing of nature. It is, rather, but one component of each day's dynamics. Business practice may shape law as much as law shapes practice, and law that resists reshaping is as likely to be ignored as obeyed. When governmental mechanisms do not suit, individuals increasingly are wont to turn to private arbitration systems, which resolve settlements according to internal agreement rather than external norms. Amid such volatility, both conflicts' premise of competing laws and its processes for resolving competition operate with relative ease. Conflicts is devoted to reconciling this competition, by application of certain methodologies to doctrines of choice of law, jurisdiction, and judgment recognition.<sup>76</sup> Its insights thus might have aided in the determination of laws governing executive detention; nonetheless, those who made, reviewed, and

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ties to treat Guantánamo detainees in accordance with international humanitarian law); Press Release, Human Rights Watch, U.S.: Geneva Conventions Apply to Guantánamo Detainees (Jan. 11, 2002) (urging the United States to abide by requirements of Geneva framework at Guantánamo), *available at* <http://hrw.org/english/docs/2002/01/11/usdom3461.htm> (last visited Dec. 9, 2004).

<sup>75</sup> See, e.g., *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (reversing order sustaining daughter's request that father pay child support); *Linn v. Employers Reinsurance Corp.*, 139 A.2d 638, 640 (Pa. 1958) (resolving conflicts question in contract action brought by insurance brokers against insurance company).

<sup>76</sup> Such topics are the foci of leading U.S. casebooks in the field, including LEA BRILMAYER & JACK GOLDSMITH, *CONFLICT OF LAWS: CASES AND MATERIALS* (5th ed. 2002) and SYMEON C. SYMEONIDES ET AL., *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* (2d ed. 2003).

implemented detention policy seldom consulted conflicts doctrine. That fact points to deficiencies in the field of conflict of laws, and also in public international law, the field to which conflicts tends to delegate international disputes.

A. *Law and Conflict in the United States*

Executive detention has a decidedly transnational character. Confinement began in the course of multilateral military action prompted by the cross-border attacks that killed nearly 3,000 persons, citizens of nearly forty countries, on September 11.<sup>77</sup> Persons captured in counterattacks were held in U.S. custody, but nearly all remained outside U.S. territory. Detainees were caught in and hailed from dozens of countries.<sup>78</sup> Their governments lobbied through diplomatic channels for fair treatment and final release, even as nongovernmental organizations made similar and far more public demands. Revelations that detainees at Abu Ghraib had endured treatment that was anything but fair touched off a new round of outrage across the globe. Debate about detention policy and practice thus may be seen as a transnational dispute, respecting public, not private, law.

Like private laws, public laws also rub up against each other. Yet public-sphere friction, particularly in cases with transnational attributes, tends to be addressed without recourse to conflict of laws.<sup>79</sup> This absence of conflicts analysis may be due in part to phenomena that pervade public law in the United States but are largely lacking in private law; that is, to hierarchical entrenchments of national law seen as natural law.

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<sup>77</sup> See September 11, 2001 Victims, Victims by Country and Citizenship, at [http://www.september11victims.com/september11victims/COUNTRY\\_CITIZENSHIP.htm](http://www.september11victims.com/september11victims/COUNTRY_CITIZENSHIP.htm) (last visited Mar. 22, 2005).

<sup>78</sup> See Amann, *supra* note 7, at 267 n.7 (citing report that nearly a third of Guantánamo detainees “were seized not in Afghanistan but rather in Europe or Africa”); Megan K. Stack, *Case Allegedly Shows U.S. Practice of Secret Arrests*, L.A. TIMES, Mar. 30, 2005, at A1 (reporting allegations that Yemeni businessman was abducted in Cairo, then transferred, first to Bagram and eventually to Guantánamo).

<sup>79</sup> See generally BRILMAYER & GOLDSMITH, *supra* note 76; SYMEONIDES ET AL., *supra* note 76.

### 1. National Law as Natural Law

Law signifies a body of norms that demarks a range of permissible behavior and allows sanctions for deviation from that range. In the United States, law's rule—the rule of law—draws strength from even-handed and predictable enforcement of standards that enjoy broad societal consensus. To assure ready recognition and so to encourage continued consensus, law fixes positive labels on deviation and on deviants. The taking of, say, a bicycle is not some vague wrong, but rather the “crime” of “theft”; the taker, not just a wrongdoer, but a “thief,” someone who society agrees deserves a preordained punishment. Labels are seen to adjust gradually, via the deliberative processes that the political branches, which are accountable to voters, and the judiciary, which follows a tradition of *stare decisis*, prefer. Each increment of change appears to occur well within a margin of choices about which reasonable minds may differ. This evolutionary pace fosters treatment of law as a set of consensus-driven commands, the precepts of which brook neither dissent nor disobedience. Seen to fall within an accepted, stable, and neutral framework, law, even positive law, thus comes to be perceived as natural.

Legal thinkers long have challenged this perception. In 1881, Oliver Wendell Holmes, Jr. warned against “supposing, because an idea seems very familiar and natural to us, that it has always been so. Many things which we take for granted have had to be laboriously fought out or thought out in past times.”<sup>80</sup> Exploration of how law came to be made was central to the legal realism and critical legal studies movements that emerged in Holmes's wake.<sup>81</sup> Today, theorists probe not just isolated statutes or decisions, but rather the founda-

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<sup>80</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2 (1881). Just before this passage, Holmes famously declared:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

*Id.* at 1.

<sup>81</sup> See Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* 50-51, 64-65 (Martin P. Golding & William A. Edmundson eds., 2005) (explaining the development of legal theory from Holmes to the Realist school and the Critical Legal Studies movement); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. REV.* 875, 950 (2003) (finding roots of debate about courts' role in “divin[ing] the true meaning of ambiguous legal texts” in the Civil War era and in the work of Holmes, legal realists, and critical theorists).



tional premises of a complex of laws. A salient example concerns race or other group status. A half-century ago scientists had rejected the notion that genetic heritage determines race, stating that “for all practical social purposes ‘race’ is not so much a biological phenomenon as a social myth.”<sup>82</sup> Scholars later deployed this social construction insight to attack the presumed neutrality of laws that treated persons differently on account of race.<sup>83</sup> At the same moment, international judges, faced with positive laws that withheld protection unless a person possessed a specific “national, ethnical, racial or religious” identity, interpreted those same laws inclusively, to encompass a great many victims of massacres in Rwanda and wars in the Balkans.<sup>84</sup> Skeptical inquiry into law’s basis now spans the ideological spectrum,<sup>85</sup> and

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<sup>82</sup> UNESCO *Statement by Experts on Race Problems*, ¶ 14 (July 18, 1950), reprinted in ASHLEY MONTAGU, *STATEMENT ON RACE* 15-16 (1951) (explaining that its description of social construction theory resulted from consultation among anthropologists, sociologists, geneticists, biologists, psychologists, and economists); see also CLAUDE LÉVI-STRAUSS, *RACE AND HISTORY* (1958) (U.N. Economic, Social, and Cultural Organization pamphlet in which noted social scientist posits social basis of race). The view still holds among most scientists. See, e.g., STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 391-412 (2d ed. 1981) (debunking myths of racial homogeneity).

<sup>83</sup> See IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 1-3 (1996) (examining early twentieth-century cases that sought to define “who was white enough to naturalize as a citizen”); see also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1980S*, at 64-86 (1986) (explaining the “racialization” of American society as an “ideological process, an historically specific one”).

<sup>84</sup> See Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 102-13, 131-42 (2002) (analyzing judgments of the International Criminal Tribunals for the former Yugoslavia and for Rwanda that construed the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277). See generally Diane Marie Amann, *Under Deconstruction: International Law in a Postmodern World*, 3 GREEN BAG 2D 369, 369-72 (2000) (discussing application of Genocide Convention, as well as the Yugoslavia tribunal’s treatment of the victim-nationality requirement of the Fourth Geneva Convention, *supra* note 5, art. 4(1)).

<sup>85</sup> See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., rev. ed. 1990) (collecting essays analyzing the place of law within other sectors of society); Dorf, *supra* note 81, at 950 (noting that movements identifying “a form of politics” in judicial interpretation include “even, ironically, contemporary forms of ‘textualism,’ which begin with the public choice theorist’s assumption that legislative enactments have no deeper meaning beyond the compromise among interest groups and end in a narrow formalism of their own”). A symposium, *The Constitution in Exile*, 51 DUKE L.J. 1 (2001), provided commentary spurred by argument in Douglas H. Ginsburg, *Delegation Running Riot*, 1 REGULATION 83, 84 (1995), that the New Deal had “banished . . . the Constitution of liberty.” By 2004 that concept had surfaced in the mass media. Adam Cohen, *What’s New in the Legal World? A Growing Campaign to Undo the New Deal*, N.Y. TIMES, Dec. 14, 2004, at A32 (evaluating the concept in relation to Supreme Court’s Commerce Clause doctrines).

extends beyond questions of status to expose as constructs a host of legal frameworks and institutions often treated as natural.<sup>86</sup> Even the nation-state, the superstructure within which much law operates, endures examination suffused with what the late sociologist Pierre Bourdieu called “*doute radical*,” or “deep-seated doubt.”<sup>87</sup>

In contrast with academia, practical political discourse seldom considers the artifice by which law is produced. Actors within the government’s three branches prefer to act according to law that has been codified by positive enactment and thus appears to be the product of consensus. Seldom in this arena is the veneer of naturalness stripped from law’s frame. What exceptions there are tend to pertain, as might be expected in America, to questions of race. To cite one example: for decades U.S. actors acceded to measures taken in pursuit of what the Executive had labeled a “war on drugs.” Yet some gave pause upon learning that defendants caught with crack cocaine—drug of choice among poor and black persons—suffered punishments a hundred times harsher than those of defendants caught with powder cocaine—drug of choice for the rich and white.<sup>88</sup> The

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<sup>86</sup> See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1303, 1306 (1995) (analyzing discrepancies in drug-case sentencing by highlighting “[d]octrinal acuity”; that is, “[w]hat the [l]aw [s]ees” and “[w]hat the [l]aw [m]isses”).

<sup>87</sup> PIERRE BOURDIEU, *Esprits d’État. Genèse et structure du champ bureaucratique, in RAISONS PRATIQUES: SUR LA THÉORIE DE L’ACTION* 99, 104 (1994); see also *id.* at 102 (“One can never harbor too much doubt in matters concerning the State.”); *id.* at 115-16 (arguing that “very perverse forms of imperialism and of an internationalist nationalism” lay hidden beneath France’s claims to a “universal” culture (translation by author)). Bourdieu’s argument corresponds with constructivist theories of international law. See Diane Marie Amann, *The International Criminal Court and the Sovereign State*, in GOVERNANCE AND INTERNATIONAL LEGAL THEORY 185, 201-04 (Ige F. Dekker & Wouter G. Werner eds., 2004) (citing, for example, Phillip A. Karber, “Constructivism” as a Method in International Law, 94 AM. SOC’Y INT’L L. PROC. 189 (2000); Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992)).

<sup>88</sup> See, e.g., *Double Standard on Cocaine*, CHI. TRIB., Jan. 23, 2002, § 1, at 16 (calling for reduction of 100-to-1 sentencing disparity, and stating that Congress had resisted alteration, even though the ratio “has been a target of criticism from drug reform activists, civil rights groups, and even presidents”); Robert L. Jackson, *Panel Urges More Parity in Cocaine Sentences*, L.A. TIMES, Apr. 30, 1997, at A9 (reporting on recommendation of U.S. Sentencing Commission to bring penalties for crack and powdered cocaine “more in line”); Bill Rankin, *Drug Sentences: AMA Criticizes Cocaine, Crack Inequity*, ATLANTA J. & CONST., Nov. 20, 1996, at A1 (reporting on medical journal’s criticism of crack sentencing as “excessive” as compared to powder cocaine sentences); William Raspberry, *Crack: The Alligator in the Swamp*, WASH. POST, Sept. 5, 1997, at A23 (arguing that discrepancy was not “racist,” while stressing that “users and sellers of ‘crack’—overwhelmingly black—are far more likely to go to prison and serve longer (mandatory) terms than are users and sellers of cocaine in its powder form—a group far likelier to com-

politics underlying this law became sufficiently visible that for a number of years in the 1990s questions persisted regarding the law's neutrality. Even this sustained unmasking did not prompt executive, legislative, or judicial change, however;<sup>89</sup> that fact illustrates the degree to which law enjoys acceptance for the simple reason that it is the law.

## 2. Hierarchical Entrenchments

Traditional structures of public law disputes reinforce acceptance of U.S. law as law. In the private lawsuit each party is an individual, a private actor. In a particular private case, it is true, one side may have more economic power; however, in no case is either party a part of the government in whose courtroom the dispute is to be decided. Public law litigation, in contrast, is always lopsided, setting an individual David against a governmental Goliath. The court is a part of the latter; the private litigant cannot evade state jurisdiction by resort to private dispute settlement. The government, moreover, invariably wields more power than its private opponent, power that extends to freedom to use force when a private individual may not. And yet the power differential may not give solace to the sovereign. A public law dispute invites conflict between branches of government and so injects an unwelcome dynamic into the stasis on which the sovereign's authority rests. Disputes that implicate laws, norms, or regimes external to the United States are even less welcome. With regard to all public law disputes, the sovereign looks to bolster the status quo by use of hierarchy; that is, by enforcement of a legal caste system through doctrines, such as federal preemption and constitutional supremacy, that render improper the accommodation of superior to inferior law.<sup>90</sup> In transnational cases, the sovereign likely will seek to buttress this hierarchy by resort to public international law.

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prise whites"). For an account of the developments that led to this 100-to-1 ratio, as well as a harsh critique of judgments that declined to apply stringent equal protection analysis, see Sklansky, *supra* note 86.

<sup>89</sup> See *Edwards v. United States*, 523 U.S. 511, 516 (1998) (affirming convictions in drug case without addressing constitutional challenges to crack sentencing scheme); James D. Zirin, *One-Size-Fits-All Sentences in a Judicial Muddle*, L.A. TIMES, Sept. 19, 2004, at M5 (referring to continued existence of crack-versus-powder sentencing discrepancy).

<sup>90</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003) (applying preemption doctrine to invalidate state statute that required disclosures by insurance companies that had conducted business in Europe during Holocaust).

Descendant of what was called the “law of nations,” public international law traditionally has been the domain of sovereign nation-states. It is thus not surprising that this brand of public law privileges the state. Like its domestic complement, public international law assigns hierarchical rank to its various sources. Preference is given to laws derived from treaties and from customs arising out of general practices that states have undertaken pursuant to legal duty.<sup>91</sup> At times a single source is declared *lex specialis*, law that controls to the exclusion of all others; thus is international humanitarian law said to govern during armed conflict.<sup>92</sup> Choices among potentially applicable laws are considered questions of comity, and not, as in private conflicts cases, matters of obligation.<sup>93</sup> Public international law does admit the possibility

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<sup>91</sup> See Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060 (setting forth as first sources of law to be applied by World Court “international conventions . . . establishing rules expressly recognized by the contesting states” and “international custom, as evidence of a general practice accepted as law”); accord RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (defining “rule of international law” as “one that has been accepted as such by the international community of states,” and listing the first two sources of international law as customary international law, which “results from a general and consistent practice of states followed by them from a sense of legal obligation,” and “international agreement”).

<sup>92</sup> The International Court of Justice recently reinforced this view in *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 240, para. 25 (July 8), and an article by a Red Cross legal adviser reaffirmed that international humanitarian law is *lex specialis* “in times of armed conflict.” Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27 FLETCHER F. WORLD AFF. 55, 55 n.1 (2003) (rejecting, however, view that this body of law “displaces legal regimes that apply in peacetime”). Others have questioned this position. See *Coard v. United States*, Case 10.951, Inter-Am. C.H.R. 1283, OEA/ser. L/V/II.106, doc. 6 rev. (1999) (applying American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948) [hereinafter *American Declaration of Rights*], reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 665 (Ian Brownlie & Guy S. Goodwin-Gill eds., 4th ed. 2002), to case involving detention during armed conflict, and furthermore interpreting terms of that declaration by reference to international humanitarian law); Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT’L L. & POL’Y 171, 196, 209, 225-27 (2004) (calling for rethinking of *lex specialis* rule so as not to exclude consideration of international human rights law during armed conflict); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 680 (2004) (criticizing “rigid and traditional reading of the law of armed conflict when it comes to the war on terror”).

<sup>93</sup> See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 259 (1992). It bears noting that U.S. conflict of laws also was based on comity—in Professor Riles’s words, a “quasi-legal, quasi-diplomatic, quasi-policy-oriented concept”—until that theory was displaced by one of vested rights at the end of the nineteenth century. Annelise Riles, *Taking on Technology: A New Agenda for the Cultural Study of Law* 127 & n.68 (unpublished

of supranational norms, enforceable against a recalcitrant state by a body other than the state; however, it conditions enforcement of such norms on the state's prior consent.<sup>94</sup> It also tolerates the use of buffers, such as reservation and nonself-execution, by which a nation-state assumes an international obligation yet precludes its own judges from giving internal effect to that obligation.<sup>95</sup> Public international law depends on states for its enforcement; little can be done should national courts choose not to enforce its dictates.

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manuscript) (discussing rejection in 1 JOSEPH BEALE, TREATISE ON THE CONFLICT OF LAWS 3 (1935), of comity theory in JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 35, at 34 (1834)), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=558605](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=558605) (last visited May 2, 2005).

<sup>94</sup> See Vienna Convention on the Law of Treaties, May 23, 1969, arts. 34-38, 1155 U.N.T.S. 331, 331 (providing that a state is not bound without its consent). An exception to this principle may be found in the nonconsensual jurisdiction provision that is at the heart of U.S. opposition to the International Criminal Court. See Amann, *supra* note 87, at 189-90 (discussing debate surrounding ICC Statute, *supra* note 27, art. 12(2)).

<sup>95</sup> On attachment of reservations when a treaty is ratified, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); William A. Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOK. J. INT'L L. 277, 280-82 (1995). The U.S. doctrine that deems certain treaty provisions nonself-executing—unenforceable without implementing legislation—derives from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Chief Justice John Marshall wrote in *Foster* that a treaty provision applies directly “whenever it operates of itself without the aid of any legislative provision,” but that “when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department; and the Legislature must execute the contract before it can become a rule for the court.” See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (creating exception for “non-self executing” agreement). Both techniques appeared in *U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781-84 (1992); one declaration in that list of conditions states that no ICCPR right is self-executing in U.S. courts.

### B. *Legal Pluralism as Vision of Conflict*

Other ways of seeing law call into question uncritical acceptance of any one set of constraints as either natural or superior. Scholars such as Harold Koh and Marc Galanter have challenged the very premise that disputes are primarily legal matters to be settled in legal fora.<sup>96</sup> To the contrary, disputes may be processed at nonlegal sites, by actors with no legal training, and by methods that bear little resemblance to the application of legal doctrine.<sup>97</sup> Linkage between these nonlegal mechanisms and official fora may occur, or they may not. Even within a legal system, nonlegal, or less legal, mechanisms may overlay and, on occasion, control resolution of a dispute. Galanter, for instance, pointed to a onetime system on the Indian subcontinent in which rulers had power to supervise all tribunals, yet did not systematically impose a general law; thus local custom and usage often were permitted to prevail.<sup>98</sup> The plural play of custom and state-prescribed law within colonial and postcolonial societies likewise has been the subject of much study.<sup>99</sup> Some constitutions look to preserve such interplay within the states they constitute.<sup>100</sup>

Notable for its blending of law is Europe. Nation-states have been engaged in a decades-long project of integration—at first of economic

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<sup>96</sup> See Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 1 (1981) (labeling this assumption “legal centralism”); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 194-99 (1996) (discussing instances in which question of U.S. compliance with international agreements was settled outside of judicial proceedings).

<sup>97</sup> See Galanter, *supra* note 96, at 2; Koh, *supra* note 96, at 199.

<sup>98</sup> See Galanter, *supra* note 96, at 28-29.

<sup>99</sup> See, e.g., Mattias Åhrén, *Indigenous Peoples’ Culture, Customs, and Traditions and Customary Law—The Saami People’s Perspective*, 21 ARIZ. J. INT’L & COMP. L. 63, 64 (2004) (arguing, with regard to customary law and statutory law, that neither type of law ought to be subordinate to the other); Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 477-88 (2002) (asserting the relevance of customary African law to modern nation-building); Sally Engle Merry, *From Law and Colonialism to Law and Globalization*, 28 LAW & SOC. INQUIRY 569 (2003) (reviewing Martin Chanock, *LAW, CUSTOM, AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* (Heinemann 1998)); A.A. Oba, *Islamic Law As Customary Law: The Changing Perspective in Nigeria*, 51 INT’L & COMP. L.Q. 817 (2002) (assessing the present status of Islamic law in Nigeria); Robert Terris & Vera Inoue-Terris, *A Case Study of Third World Jurisprudence—Palestine: Conflict Resolution and Customary Law in a Neopatrimonial Society*, 20 BERKELEY J. INT’L L. 462, 483-92 (2002) (describing the role of informal conflict resolution in Palestinian culture).

<sup>100</sup> See, e.g., AFG. CONST., art. 131 (requiring courts to apply Shia law in personal matters involving followers of Shia sect); S. AFR. CONST., ch. 12 (providing place for customary law and traditional leadership within constitutional structure).

affairs alone, but more recently of a host of social and political matters—that has remapped the continent. This is certainly true as a matter of geography: “Europe” now reaches east as well as west, south as well as north, to comprehend states as diverse as Poland and Portugal, Austria and Azerbaijan.<sup>101</sup> It is also true as a matter of politics: nation-states remain, yet at times yield to other spheres of influence, which operate at transnational, international, and supranational levels. European jurists grapple in theory and in practice with the challenges that integration places on once-discrete municipal laws. In 1997, experts invoked the *jus commune* of the Holy Roman Empire as they blended civil and common law traditions in drafting a penal law to be enforced by a mix of national and regional actors against anyone suspected of economic crime against the European Union.<sup>102</sup> Since that time, a group based in Paris has explored the establishment of *un droit commun*, a shared and pluralist law that would recognize, respect, and incorporate conflicting legal systems and regimes.<sup>103</sup> Leaders have signed a constitution that is now open for ratification throughout the European Union.<sup>104</sup> Even in euroskeptic Britain, legislation, judgments, and academic writings acknowledge integration as a reality.<sup>105</sup>

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<sup>101</sup> See *The Council of Europe’s Member States*, Council of Eur. (Oct. 2004), at [http://www.coe.int/T/E/Com/About\\_Coe/Member\\_states/default.asp](http://www.coe.int/T/E/Com/About_Coe/Member_states/default.asp) (last visited Mar. 22, 2005) (listing forty-six member states of the Council of Europe, an intergovernmental organization established after World War II through which Europe’s human rights system operates). Though smaller, the newly enlarged European Union spans twenty-five states, from Iceland to Cyprus, Spain to Slovakia. *The European Union at a Glance*, at [http://europa.eu.int/abc/index\\_en.htm](http://europa.eu.int/abc/index_en.htm) (last visited Mar. 22, 2005).

<sup>102</sup> CORPUS JURIS (Mireille Delmas-Marty ed., 1997); see also Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 836 (2000) (discussing *Corpus Juris* project).

<sup>103</sup> See, e.g., 7 CRIMINALITÉ ÉCONOMIQUE ET ATTEINTES À LA DIGNITÉ DE LA PERSONNE (Mireille Delmas-Marty ed., 2001) (seventh volume in a series entitled “Processes of Internationalization”); VARIATIONS AUTOUR D’UN DROIT COMMUN (Mireille Delmas-Marty et al. eds., 2001) [hereinafter VARIATIONS] (compiling articles on matters ranging from the jurisprudence of international criminal tribunals to the operation of the global marketplace, presented at first symposium of Unité Mixte de Recherche de droit comparé de Paris, an interdisciplinary research unit). Among the leaders of this effort is Professor Mireille Delmas-Marty of the Collège de France, whose works include LE RELATIF ET L’UNIVERSEL (2004) and POUR UN DROIT COMMUN (1994), translated in TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (Naomi Norberg trans., 2002).

<sup>104</sup> See Maria De Cristofaro & Tracy Wilkinson, *Nations of EU Sign Its First Constitution*, L.A. TIMES, Oct. 30, 2004, at A3 (reporting on the new European Union Constitution); see also Draft Treaty Establishing a Constitution for Europe, July 18, 2003, O.J. (C 169) 1, available at <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (last visited Mar. 22, 2005).

<sup>105</sup> See, e.g., *A(FC) v. Sec’y of State for Home Dep’t*, [2004] UKHL 56 (ruling that

Law in Europe thus may be depicted as a map on which ever-less-distinct national boundaries are layered over by multiple norm systems.<sup>106</sup> Seeing the legal terrain thus, decisionmakers work to resolve conflict among legal regimes.

### 1. Conflict Within Conflicts

Conflict of laws seems an apt site for the study of legal pluralism within the United States. By its very name conflicts calls into question undue deference to any law. Naming legal realism among its foreparents, it endeavors to reconcile clashes between competing legal regimes.<sup>107</sup> The give-and-take by which it resolves this interplay—no less than its expectation that more than one law will obtain—necessarily undercuts any claim that law is inevitable or natural. The field thus would seem a boon to challengers in public law disputes, and particularly in challenges to public laws whose effects exceed national frontiers. Nonetheless, conflicts of laws has played little role in such matters. Early rules derived from a doctrine of vested rights, one that preferred territory as a determinant of choice of law.<sup>108</sup> Interest analy-

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indefinite detention without charge would violate European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention], part of national law by dint of Human Rights Act, 1998, c. 42 (Eng.), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf> (last visited Mar. 22, 2005); *Jones v. The Ministry of Interior Saudi Arabia*, [2004] EWCA (Civ) 1394 (permitting lawsuit alleging systematic torture, filed in English court by British and Canadian complainants, to go forward against Saudi Arabia, in part on ground that contrary ruling would undermine same convention); Andrew Evans, *UK Devolution and EU Law*, 28 EUR. L. REV. 475, 487 (2003) (discussing the overlapping roles of the United Kingdom's Parliament and the European Union's Ministries); Chris Hilson, *What's in a Right? The Relationship Between Community, Fundamental and Citizenship Rights in EU Law*, 29 EUR. L. REV. 636, 636 (2004) (analyzing the promotion of local community rights to fundamental rights in the European Union).

<sup>106</sup> To similar effect, this author wrote in a French-language article that in Europe: [O]ne has the vision of a postcolonial map encumbered by national spheres. The borders used to shift but now are stable. Today other spheres—transnational, international and supranational—compete to win a place. To establish a supranational European identity, for example, a European space must be cut out of a map that is already full. One envisions the creation of a space where no space exists.

Diane Marie Amann, *Dialogue entre chercheurs de différentes traditions juridiques: Une perspective américaine*, in VARIATIONS, *supra* note 103, at 367.

<sup>107</sup> See Riles, *supra* note 93, at 111-12, 128-31.

<sup>108</sup> See, e.g., Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 890-91 (2002) (citing BEALE, *supra* note 93, and RESTATEMENT OF THE LAW OF CONFLICT OF LAWS (1934), for which Beale was the reporter); Riles, *supra* note 93, at 127-28 (same); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and*



sis later challenged, but did not fully supplant, the territorial preference.<sup>109</sup> Furthermore, in its classic form the field has tended to defer to state-based rules; as Professor Kermit Roosevelt III put it, “Conflicts analysis is conventionally understood as a means of deciding which of a number of different sovereigns has authority to regulate a transaction.”<sup>110</sup> Transnational conflict between a state and a private individual had little place in this scheme.

That said, there is conflict within conflicts. Professor Annelise Riles has written of “a sense among Conflicts scholars that the potentially rich questions raised by Conflicts cases—questions of cultural relativism, of individual rights, of the limits of state power or the character of justice, for example—have been reduced to arid technicalities.”<sup>111</sup> This, she stressed, need not be so. Choice-of-law principles may help determine damages for victims of international human rights violations; jurisdictional principles may help decide where a person suspected of cross-border crime will face trial.<sup>112</sup> What Professor Mathias Reimann has called the “transboundary dimensions” of cyberspace may alter state-centered understandings of conflict of laws.<sup>113</sup> In Riles’s words, there may be a way for “humanistic legal scholars” to take into account “the agency of the technocratic legal form.”<sup>114</sup> Charting an accurate map of law in the United States is a step toward this goal.

*Beyond*, 153 U. PA. L. REV. 2017, 2030-41, 2044-46 (discussing conflicts’ traditional territorial preference).

<sup>109</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (setting forth seven interest-analysis factors “relevant to the choice of the applicable rule of law” absent “statutory directive”); Guzman, *supra* note 108, at 891-94; Riles, *supra* note 93, at 128-32; Roosevelt, *supra* note 108, at 2062-63.

<sup>110</sup> Roosevelt, *supra* note 108, at 2059 (examining detainees’ rights from interest-analysis perspective).

<sup>111</sup> Riles, *supra* note 93, at 115.

<sup>112</sup> See BRILMAYER & GOLDSMITH, *supra* note 76, 765-806 (including as principal conflicts cases, inter alia, *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 864-65 (E.D.N.Y. 1984) (analyzing which country’s damages laws govern in suit under Alien Tort Claims Act, 28 U.S.C. § 1350 (2002)); *United States v. Yunis*, 681 F. Supp. 896, 899-903 (D.D.C. 1988) (citing public international law on jurisdiction to prescribe denial of motion to dismiss brought by non-American defendant seized outside United States to stand trial for offense occurring outside United States)).

<sup>113</sup> Mathias Reimann, *Introduction: The Yahoo! Case and Conflict of Laws in the Cyberage*, 24 MICH. J. INT’L L. 663, 666 (2003). *But cf.* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1200 (1998) (challenging view that nation-states cannot regulate cyberspace).

<sup>114</sup> Riles, *supra* note 93, at 120; *see also* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485 (2005) (calling for a rhetoric of “jurispersuasion” by which assertion of jurisdiction, decoupled from enforcement, be-

## 2. Seeing Law in the United States

Acknowledgment that a legal landscape is a complex terrain, a field on which competing sources of law do battle, carries with it certain needs. There comes an immediate need to find ways to think and talk about now-seen complexity; a need for means to resolve competing claims of legal authority soon follows. In Europe complexity is a given, with regard to public as well as private laws, and surely with regard to the interaction of national with extranational regimes. In turn, recognition of complexity has made way for an analytical vocabulary, rife with terms like “harmonization” and “hybridization,” that is familiar to the conflicts scholar. This is not the case in the United States. Disputes that in Europe would be seen at once to implicate extranational norms and regimes tend to be treated as wholly domestic, resolvable by resort to legal hierarchy. Judges, and government lawyers, are products of an academy that posits the national law as “law.” Those few who studied public international law learned the buffer doctrines that, as Professor Thomas Franck put it, “have made Swiss cheese of the notion that international law is part of the law of the United States.”<sup>115</sup> To employ the language of social construction theories, the margin of choices about which reasonable minds may differ has been fashioned narrowly to give recognition only to national laws; that is, to the laws that seem to come naturally. Exceptionalism, pervasive in U.S. legal-political culture, reinforces this notion. These considerations foster a tendency not to see—more precisely, not to see a need to see—other norms and regimes. Conflict among external and internal sources of law is obscured, as is any need for resort to methods of resolving conflict.

Clear vision reveals, however, that the United States also operates in a crowded legal landscape. Dominant, of course, is national law, itself an intricate arrangement of federal and state statutes and case law, executive decrees, and administrative regulations. But it is not the only law that belongs on the map. Room must be made for the legal promises the United States has made at the international level; that is, U.S. endorsements of a host of aspirational statements, among them the Universal Declaration of Human Rights, as well as obligations undertaken in innumerable bilateral and multilateral treaties and

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comes “simply a mechanism that opens space for articulation of a norm”).

<sup>115</sup> Thomas M. Franck, *Dr. Pangloss Meets the Grinch: A Pessimistic Comment on Harold Koh's Optimism*, 35 HOUS. L. REV. 683, 688 (1998); see also *supra* note 95 and accompanying text.

agreements, on matters ranging from transfer of fugitives to regulation of trade.<sup>116</sup> Indeed the Constitution deems treaties part of national law, and a legal tradition now under attack accords similar status to customary international law.<sup>117</sup> International agreements seek to promote compliance by means that range from the simple submission of reports to a monitoring committee to the far more complex arbitration before an international body.<sup>118</sup> The activities of any such panel have the potential to challenge and even, in some cases, to compel changes in internal laws; accordingly, an accurate map of the United States's legal landscape would depict these enforcement mechanisms. Also pertinent is the United States's avowed desire to influence the global arena—an arena in which its policies, its officials, and even its private citizens loom omnipresent. Execution of that desire requires interdependent behavior: one cannot exert an influence that one does not enjoy, and in the global arena, influence is built more often by diplomacy and by behavior that exemplifies one's stated values than by force. Thus even if the founding instrument of, say, the North Atlantic Treaty Organization or the Organization of American States is silent on a particular issue, the United States may find that it must acknowledge fellow members' views on that issue in order to remain in good stead within those organizations. The same may be true with respect to transnational actors that hold

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<sup>116</sup> UDHR, *supra* note 27. The United States is party to more than a hundred treaties on the matter of extradition alone. IGOR I. KAVASS, A GUIDE TO THE U.S. TREATIES IN FORCE 474-83 (2001).

<sup>117</sup> See U.S. CONST. art. VI (providing that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) (declaring "[i]nternational law is part of our law"). Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (refuting tradition that customary international law is enforceable in U.S. courts), and Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) (same), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending traditional view).

<sup>118</sup> Compare International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 49, 999 U.N.T.S. 171, 185 [hereinafter ICCPR] (establishing periodic reporting as states parties' least onerous compliance burden), with Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, *Legal Instruments—Results of the Uruguay Round*, vol. 31, 33 I.L.M. 1226 (1994) (providing for state submission of trade disputes to an international dispute-settlement body with the authority to declare state measures as violative of WTO obligations and to authorize retaliation if the measures are not corrected), reprinted in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 353, 354 (1999).

no government portfolio yet at times work with the United States toward shared goals.<sup>119</sup>

Correctly drawn, therefore, the U.S. legal map depicts a dynamic of norm systems and legal regimes that interact at different times, at different levels, and with different effects. Recognition of other laws may bring to the fore other responses to similar problems and thus reveal national law, though still most familiar, as a choice that is by no means either natural or unavoidable. Indeed, it is conflict that now appears inevitable. Competition among systems must be accounted for and resolved, and insights from the field of conflict of laws, which long has addressed competition in private-law areas, would aid eyes-open legal analysis of U.S. initiatives that stir international concern. No such analysis was employed in the first years of the United States's executive detention policy, and the results were tragic.

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<sup>119</sup> As one example, the American Bar Association, which operates across borders via its Central European and Eurasian Law Initiative, aids U.S.-led efforts to reconstruct Iraq's judicial system. See Am. Bar Ass'n, *Iraq Employment and Volunteer Opportunities*, at <http://www.abanet.org/iraq/jobs.html> (last visited Mar. 22, 2005) (listing job openings for ABA legal assistance in Iraq). On the other hand, the ABA has condemned U.S. treatment of Iraqi detainees, and its president has called for the establishment of "an independent, bipartisan commission" to investigate abuse allegations. Letter from Robert J. Grey, Jr., President of the American Bar Association, to George W. Bush, President of the United States (Feb. 1, 2005), available at <http://www.abanet.org/leadership/letters/president.pdf> (last visited Mar. 22, 2005); see also Am. Bar Ass'n. et al., Report to the House of Delegates (adopted by voice vote Aug. 9, 2004) (setting forth a resolution and report that "condemns any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents," and further urging the United States "to comply fully" with international law proscribing such treatment), available at <http://www.abanet.org/media/docs/torturereport10b.pdf> (last visited Mar. 22, 2005). On the roles that transnational actors play, see, for example, Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996); Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041 (2003).

## III. UNSEEN LAW AND DETENTION

Understood as a web of norms and regimes that constrain behavior, “law” interweaves with “policy.”<sup>120</sup> Evaluation of law thus calls for scrutiny of actions taken at legal fora and at other sites, not only by lawmakers and law interpreters, but also by law implementers. With respect to detention, it is thus appropriate to examine the actions not only of the civilian executive and judicial officers who set and reviewed policy, but also of the military and other personnel who carried it out.<sup>121</sup> Each such actor had a constitutional duty to follow the law. How each discharged that duty depended on what laws the actor “saw”; that is, on what constraints each acknowledged, understood, and believed worth honoring.

There was no dearth of laws when the counterattack in Afghanistan began to yield thousands of captives. To the contrary, there existed a complex map of norms and doctrines, enforcement regimes, and compliance mechanisms, each touching on the proper nature and scope of executive detention in time of conflict or other crisis. There was, of course, national law. Potentially relevant in the U.S. Constitution were provisions that allocate power to the three branches of government, that describe procedures for suspension of habeas corpus and punishment for treason, and that protect the accused and other individuals against undue governmental intrusions.<sup>122</sup> Also relevant were federal statutes, as well as judicial interpretations of statutes and the Constitution.<sup>123</sup> Federal regulations, particularly those of the military, came into play.<sup>124</sup> Rules regarding detention could be found

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<sup>120</sup> See *supra* text accompanying notes 72-74, 95-99.

<sup>121</sup> Lamentably, Congress paid virtually no public heed to executive detention until disclosure of abuses at Abu Ghraib. See Amann, *supra* note 7, at 292-95. Congressional hearings were held as a consequence of that disclosure; however, by the end of the first quarter of 2005 no other legislative action had been taken with regard to the conditions or the fact of detention, in Iraq or elsewhere. See *supra* notes 69-70 and accompanying text.

<sup>122</sup> U.S. CONST. arts. I-II, VI, amends. IV-VI, VIII.

<sup>123</sup> Potentially relevant laws included the habeas corpus statute, 28 U.S.C. § 2241 (2002), the Alien Tort Claims Act, 28 U.S.C. § 1350 (2002), and 18 U.S.C. §§ 2340-2340A (Supp. 2003), which implemented the Convention Against Torture, *supra* note 16. Jurisprudence touching on issues at hand encompassed *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Quirin*, 317 U.S. 1 (1942); and *Brown v. Mississippi*, 297 U.S. 278 (1936). See generally Amann, *supra* note 7, at 285-99 (discussing these and other relevant Supreme Court opinions).

<sup>124</sup> Among the most important is Military Police: Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1 (effective Nov. 1, 1997) [hereinafter

in customary international law<sup>125</sup> and in treaties to which the United States is a party, such as the Geneva Conventions on the laws of war, the Convention Against Torture, and the International Covenant on Civil and Political Rights.<sup>126</sup> Beyond these sources lay softer guideposts for behavior, both national and extranational. The historical and ethical underpinnings of U.S. law could be placed in this category.<sup>127</sup> So too could provisions in the half-century-old Universal and Inter-American Declarations of Human Rights, as well as international bodies' interpretations of such provisions.<sup>128</sup> Also at issue were the views of individuals, governments, and organizations with which the United States shares bedrock values and contemporary policy goals.<sup>129</sup>

According to these sources,<sup>130</sup> each person has certain basic rights that no state may infringe without adequate justification. To place

AR 190-8], available at [http://www.nimj.com/documents/POW\\_AR\\_190-8.pdf](http://www.nimj.com/documents/POW_AR_190-8.pdf) (last visited Mar. 22, 2005).

<sup>125</sup> A state is said to violate customary international law "if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987), quoted in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768-69 (2004) (indicating that a violation entails more than "relatively brief detention in excess of positive authority"). Among the customary rules that regulate detention conditions is the ban on torture, a *jus cogens* norm from which no derogation is permitted. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[O]fficial torture is prohibited by universally accepted norms of international law . . ." (emphasis omitted)); *Ex parte Pinochet Uguarte* (No. 3) [2000] 1 A.C. 147, 198 (H.L. 1999) (Eng.) ("The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture whenever committed.").

<sup>126</sup> See Convention Against Torture, *supra* note 16, arts. 1-3; ICCPR, *supra* note 118, arts. 2, 4, 6, 7, 9, 10, 14-16; Third Geneva Convention, *supra* note 5, arts. 2-5, 8-13, 17, 20, 23, 46, 63, 65, 69, 71-72, 99-118, 130; Fourth Geneva Convention, *supra* note 5, arts. 2, 3, 5, 27, 41-43, 64-79, 147; see also Amann, *supra* note 7, at 276-77, 303, 313, 322, 325, 327-29, 331-37 (discussing pertinence of each of these sources).

<sup>127</sup> See Amann, *supra* note 7, at 310 (citing THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) as exemplar of United States's fundamental rights tradition).

<sup>128</sup> American Declaration of Rights, *supra* note 92, arts. I, XVII, XVIII, XXV; UDHR, *supra* note 27, arts. 5, 10, 11; see also Amann, *supra* note 7, at 311-16, 319-22, 327-29, 331-33, 335-36 (discussing relevant opinions of international human rights bodies).

<sup>129</sup> See Diane Marie Amann, "Raise the Flag and Let It Talk": *On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597 (2004) [hereinafter Amann, *Norms*] (positing shared tradition of fundamental rights and shared experience as threshold criteria for national courts' consultation of international norms); see also Amann, *supra* note 7, at 270-73 (citing criticism from International Committee for the Red Cross, United Nations High Commissioner for Human Rights, British Law Lord, Spanish Foreign Minister, and Nobel Peace Prize winner).

<sup>130</sup> National and extranational authorities establishing the contours described in

someone in state custody constitutes a serious deprivation of individual liberty, to be undertaken only within certain limits. The state therefore must have due cause for confinement. Within a reasonable period of time, the state must plead its cause to a competent and neutral arbiter who, after hearing from the detainee, decides whether custody may continue. Trial of a detainee must adhere to fair process norms. Detention typically must end as soon as the reason for it dissipates. Detainees have the right to be free from torture and to be treated humanely—rights that apply to interrogation no less than to other aspects of detention. In short, despite disparate origins, these varied sources evinced considerable agreement about the permissible contours of confinement. That is not to say that all these laws should, or could, be applied to every one of the more than 50,000 persons who fell into U.S. hands in the first years of its campaign against terrorism.<sup>131</sup> Certain sources were applicable only to certain situations. Furthermore, some sources overlapped, so that different rules, or different enforcement mechanisms, purported to govern the same situation. Key actors proved unable to see or, alternatively, unwilling to accommodate these discrepancies.

#### A. *The Executive: “Curious Legalism”*

The U.S. Executive flatly refused to give post-September 11 detainees access to counsel or to the courts. It unapologetically accorded detainees something less than fundamental fairness. President Bush declared, “Either you are with us, or you are with the terrorists.”<sup>132</sup> The latter, Vice President Dick Cheney said, “‘don’t deserve

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this paragraph are detailed in Amann, *supra* note 7, at 301-04, 310-19 (discussing fundamental rights and due process); *id.* at 319-23 (outlining requirement of review of the lawfulness of detention); *id.* at 335-44 (setting forth requirement of due cause and temporal limitations); *id.* at 325-29 (discussing ban on torture); *id.* at 323-35 (stating guarantees of humane treatment).

<sup>131</sup> In August 2004, an independent panel wrote, with regard to sites in Iraq, in Afghanistan, and at Guantánamo: “A cumulative total of 50,000 detainees have been in the custody of the U.S. forces since November 2001, with a peak population of 11,000 in the month of March 2004.” SCHLESINGER REPORT, *supra* note 59, at 11. The number of Iraqi detainees remained high at the end of the first quarter of 2005. See Matt Kelley, *Number of Prisoners Held by U.S. in Iraq Doubled in Five Months*, AP WORLDSTREAM NEWSWIRE, Mar. 30, 2005, Westlaw, APWORLD database (reporting that the United States was holding approximately 10,500 persons in Iraq, 100 of whom were younger than 18).

<sup>132</sup> President George W. Bush, Speech to Joint Session of Congress (Sept. 20, 2001), *transcript available at* <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Mar. 22, 2005).

the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.”<sup>133</sup> The Executive professed to have forbidden torture, but on its own terms: it rebuffed claims that national or international law cabined its policy. It maintained that war had broken out on September 11, a new and perhaps endless war, in which the President enjoys plenary power of combat. In support of this proposition, its public pronouncements relied on the Constitution’s Commander-in-Chief clauses and a few World War II-era precedents, and implied that no other law mattered.<sup>134</sup>

The torrent of documents leaked in the course of the Abu Ghraib scandal revealed that, in point of fact, government lawyers had been well aware of the intricate legal terrain that the executive detention policy was traversing. Confidential legal memoranda concluded, among other things, that offshore detainees had no right of access to U.S. courts; that certain cruel, inhuman, or degrading acts would not violate U.S. laws against torture; and that ghosting persons out of the country of detention would not transgress a Geneva Convention prohibition on forcible transfers.<sup>135</sup> They did so not by reiterating the *ipse dixit*s that had characterized public statements, but by interposing what Professor Kim Lane Scheppele aptly called a “curious legalism around the spaces” on law’s map.<sup>136</sup> Initial focus on domestic law soon made room for lengthy discussions of jurisprudence in countries like Israel, of treaty regimes to which the United States belongs, and of one regime, that created by Europe’s human rights treaty, to which it does not.<sup>137</sup>

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<sup>133</sup> Peter Slevin & George Lardner, Jr., *Bush Plan for Terrorism Trials Defended*, WASH. POST, Nov. 15, 2001, at A28 (quoting Vice President Cheney).

<sup>134</sup> U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Ex parte Quirin*, 317 U.S. 1 (1942). For a recitation of the government’s oft-stated position see, for example, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (plurality opinion) (declining to reach the government’s contention “that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution”).

<sup>135</sup> See Bybee Interrogation Memorandum, *supra* note 27; Goldsmith Memorandum, *supra* note 63; Gonzales Memorandum, *supra* note 9; Philbin/Yoo Memorandum, *supra* note 26.

<sup>136</sup> Discussion with Kim Lane Scheppele, John J. O’Brien Professor of Comparative Law and Sociology, University of Pennsylvania Law School, at the University of Pennsylvania Law Review Symposium (Nov. 12, 2004).

<sup>137</sup> See Bybee Interrogation Memorandum, *supra* note 27, at 14-15, 27-31 (analyzing jurisprudence in Israel, under Convention Against Torture, *supra* note 16, and pursu-



In form, the memoranda seemed to pay heed to conflict of laws. But in substance, they constituted efforts to avoid genuine conflicts analysis, to dodge consequences that might flow if full recognition were given to disparate legal regimes. An example is the memorandum that approved the practice of ghosting non-Iraqi detainees out of Iraq so that they might endure interrogation at some other location. Written by the author of a leading conflicts casebook, the memorandum treated the matter as a question of choice of law, and concluded that Geneva law would not forbid transfers of “illegal aliens from occupied territory pursuant to local immigration law.”<sup>138</sup> The memorandum made no mention of a contextual point that deserved consideration; that is, the shambled state of the Iraqi legal system in the year after invasion.

Other legal memoranda, particularly those that established legal sanction for the Executive’s detention and interrogation policies, relied on a legal opinion that the Constitution gives the “President alone” power to determine “any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response,” in order to deflect treaty language that might have circumscribed executive action.<sup>139</sup> In this they were aided by law. The last century had taught that ready obedience to positive enactment could wreak grave injustices.<sup>140</sup> In reaction came international human

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ant to European Convention, *supra* note 105, art. 5(1)); *supra* note 27 (describing varied legal sources cited in other memoranda).

<sup>138</sup> Goldsmith Memorandum, *supra* note 63, at 4; *see also* BRILMAYER & GOLDSMITH *supra* note 76. The memorandum reached this conclusion notwithstanding that Geneva law proscribes “[i]ndividual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country . . . regardless of their motive.” Fourth Geneva Convention, *supra* note 5, art. 49, *quoted in* Goldsmith Memorandum, *supra* note 63, at 1 n.1. It further concluded that even Iraqis might be removed “to facilitate interrogation, for a brief but not indefinite period, so long as adjudicative proceedings have not been initiated against them.” Goldsmith Memorandum, *supra* note 63, at 2.

<sup>139</sup> The quoted language is from Memorandum re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, from John C. Yoo, Deputy Assistant Attorney General, to Timothy Flannigan, Deputy Counsel to the President (Sept. 25, 2001), *available at* <http://www.usdoj.gov/olc/warpowers925.htm> (last visited Mar. 22, 2005), a memorandum on which later analyses of treaty obligations relied. Bybee Interrogation Memorandum, *supra* note 27, at 32; Working Group Report, *supra* note 27, at 20-24; Yoo/Delahunty Memorandum, *supra* note 26, at 11 & n.22.

<sup>140</sup> Among the many studies of how the legal profession behaved within authoritarian regimes are DAVID DYZENHAUS, *TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998); INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991); RICHARD H. WEISBERG, *VICHY LAW*

rights law, which reflects the universalist tendencies of ancient natural law yet is codified in positive instruments of law.<sup>141</sup> Yet the internal enforceability of those instruments remained subject to the buffer mechanisms that public international law condones.<sup>142</sup> It was on these mechanisms that government lawyers relied in order to insulate the United States from the effect of international obligations assumed when it became a state party to certain treaties. The Geneva framework was dismissed as inapplicable to the instant “war on terror,” either by its terms<sup>143</sup> or as customary international law.<sup>144</sup> As for the Convention Against Torture, memoranda pointed to the two reservations, five understandings, and one declaration that the United States had attached to ratification. According to one such condition, the Convention requires the United States to refrain only from acts that its own Constitution also prohibits; according to another, the Convention is unenforceable in U.S. courts except by passage of implementing legislation.<sup>145</sup> Congress had enacted such a statute, but one con-

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AND THE HOLOCAUST IN FRANCE (1996); Detlev F. Vagts, *International Law in the Third Reich*, 84 AM. J. INT’L L. 661 (1990). The authority of positive law was the subject of the noted Hart-Fuller debate. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958) (defending “the Positivist School of jurisprudence”); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (responding to Professor Hart’s argument).

<sup>141</sup> On the “natural-positive” nature of human rights law, see Amann, *supra* note 87, at 196-97 (discussing Antonio Cassese, *Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?*, in CRIMES INTERNATIONAUX ET JURIDICTIONS INTERNATIONALES 20 (Antonio Cassese & Mireille Delmas-Marty eds., 2002)).

<sup>142</sup> See *supra* note 95 and accompanying text.

<sup>143</sup> See Memorandum re: Application of Treaties and Laws to Al Qaeda and Taliban Detainees, from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense 9-25 (Jan. 22, 2002) [hereinafter Bybee Treaties Memorandum] (rejecting applicability of Geneva law, and further stating that the President can “suspend” any U.S. obligations under such law), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> (last visited Mar. 22, 2005). See generally Yoo/Delahanty Memorandum, *supra* note 26 (making similar arguments); Working Group Report, *supra* note 27, at 4 (rejecting the applicability of Geneva Conventions).

<sup>144</sup> See Bybee Treaties Memorandum, *supra* note 143, at 32 (explicitly rejecting “many” jurists’ contrary view to declare that “[c]ustomary international law . . . cannot bind the executive branch under the Constitution because it is not federal law”), relied on in Working Group Report, *supra* note 27, at 6.

<sup>145</sup> U.S. Reservations, Understandings, and Declarations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment §§ I(1), III(1), 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) [hereinafter *Torture Reservations*]; see also Working Group Report, *supra* note 27, at 6; Bybee Interrogation Memorandum, *supra* note 27, at 2-22. Similar arguments were made to limit the effect of the

taining qualifiers<sup>146</sup> that afforded the memoranda a fig leaf of legal, though not moral, defensibility.<sup>147</sup>

The disclosed memoranda provided rare and troubling evidence of the deliberate construction of a framework that appeared to be ruled by law, but was not. The framework might better be termed “legalist” rather than “legal”; within it, the only laws recognized were those allowing free rein for presidential prerogative dressed in the guise of legal constraints.<sup>148</sup> For more than two years, laws that the Executive chose neither to acknowledge nor to accommodate seemed not to operate as law at all.

### B. *The Court: Blinded Justice*

The period within which the Executive enjoyed unfettered discretion to detain and interrogate persons it considered enemies ended with the Supreme Court’s issuance of the *Rasul-Hamdi-Padilla* trilogy. That the Court had affirmed its power of judicial review was clear. Its rationale for that decision was anything but: in the ten separate opin-

ICCPR, *see supra* note 118 and accompanying text, in Working Group Report, *supra* note 27, at 6.

<sup>146</sup> *See Torture Reservations, supra* note 145, § II(1), (2) (containing same qualifiers). Compare Convention Against Torture, *supra* note 16, art. 1 (defining “torture” as involving “severe pain or suffering”), with 18 U.S.C. § 2340(1), (2) (reciting this definition, then further defining “severe pain or suffering” to mean “prolonged mental harm” arising in four specific scenarios).

<sup>147</sup> Sanford Levinson, *Cruel But No Longer Unusual*, L.A. TIMES BOOK REV., Nov. 21, 2004, at R4 (stating, in review of MARK DANNER, TORTURE AND TRUTH (2004), that these qualifiers rendered the memoranda “legally defensible, if morally repulsive,” so that “Congress may deserve a full measure of blame” for the memoranda’s “extreme” definitions of torture); *see also* Bybee Interrogation Memorandum, *supra* note 27, at 1; Working Group Report, *supra* note 27, at 7-16. Referring to these qualifiers, a self-described drafter of the Bybee Interrogation Memorandum, *supra* note 27, later defended the memorandum thusly: “While the definition of torture in the August 2002 memo is narrow, that was Congress’ choice.” John Yoo, *Behind the ‘Torture Memos,’* SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1.

<sup>148</sup> *See* Amann, *supra* note 7, at 285-87 (describing Executive’s construction). Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 694-95 (2004) (questioning effect and advisability of memoranda, which “raise even profounder issues regarding the government lawyers’ commitment to principles of ordinary morality and decency, as well as the rule of law—particularly in the context of an ongoing ‘war on terror’”); George C. Harris, *The Rule of Law and the War on Terrorism: The Professional Responsibilities of Executive Branch Lawyers in the Wake of 9/11*, 1 J. NAT’L SECURITY L. & POL’Y (forthcoming 2005) (analyzing “perfect storm” of factors that were present when memoranda were written and “resulted in a narrowly considered and extreme view of executive authority”).

ions that made up the trilogy, different groupings of Justices gravitated toward different sources of law.

The three cases bore many transnational characteristics. Detainees had traveled, or had been transported, across national borders. All but one held citizenship in a country other than the United States, and the pleadings of each cited international treaties and custom as well as U.S. law. The circumstances of detention had given rise to international outcry and, eventually, briefs cataloguing international legal norms at odds with the Executive's policy.<sup>149</sup> In recent years, moreover, a majority of the Court had looked to international law in the course of deciding that execution of mentally retarded persons constitutes cruel and unusual punishment, and that criminal prosecution of same-sex intimacy violates due process.<sup>150</sup> Although these considerations militated in favor of consulting external norms,<sup>151</sup> the Court's detention trilogy approached such norms with delicacy.

In large part, the trilogy eschewed extranational law in favor of domestic sources; yet even as to the latter there was considerable dis-

<sup>149</sup> See, e.g., Brief of Amicus Curiae Global Rights in Support of Petitioners at 1, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (arguing that the Executive violated its obligations under international law); Brief of Amici Curiae International Law Professors Listed Herein in Support of Petitioners at 3-5, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696) (stating that international law should be an "essential element" of the decision and that human rights instruments of other countries indicate the right to meaningful judicial review); Brief of Amici Curiae Practitioners and Specialists in the International Law of War in Support of Respondents at 3, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) (contending that the laws of war do not support Executive's policy); Brief for the National Institute of Military Justice as Amicus Curiae in Support of Petitioners at 2, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) ("[B]oth domestic military law and the international law of war have advanced, increasing the role of the judiciary . . ."). But see, e.g., Brief Amicus Curiae of Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and Other International Law Specialists in Support of Respondents at 14-29, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334, 03-343) (arguing that international legal sources supported Executive's policy at Guantánamo).

<sup>150</sup> *Lawrence v. Texas*, 539 U.S. 558, 572-77 (2003) (discussing English law and jurisprudence of European Court of Human Rights in holding sodomy law unconstitutional); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting opposition of "world community" to "imposition of the death penalty for crimes committed by mentally retarded offenders"); accord *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (finding an "overwhelming" world opinion against executing juvenile offenders, "respected and significant confirmation for our own conclusions," in case decided after issuance of detention trilogy, that the practice violates the Constitution).

<sup>151</sup> See Amann, *Norms*, *supra* note 129, at 604 (discussing detention and consultation of external norms).

agreement regarding what internal law mattered. Justice Stevens's opinion for the Court in *Rasul* focused on federal statutory law, buttressed by the common law tradition of habeas corpus.<sup>152</sup> The embodiment of that tradition in the Constitution's Suspension Clause seemed all that mattered to Stevens, and Scalia, in *Hamdi*.<sup>153</sup> In that same case other Justices granted the Executive much leeway by dint of a terse congressional resolution, passed a week after September 11, which said not a word about detention.<sup>154</sup> Opinions that centered on one source, moreover, tended not to explicate their disregard of sources that other opinions deemed controlling.

Some Justices appeared to agree with the Executive's assertion that the United States was in "a state of war."<sup>155</sup> From this determination flowed the Court's decision in *Hamdi* to permit continued detention. In time of war, wrote the plurality, the Executive may hold "enemy combatants" without charge if Congress so authorizes—for the reason that such detention is "a fundamental incident of waging war."<sup>156</sup> The plurality cited the Third Geneva Convention as support for the rule permitting detention of combatants.<sup>157</sup> That Convention

<sup>152</sup> See *Rasul*, 124 S. Ct. at 2692-99.

<sup>153</sup> See *Hamdi*, 124 S. Ct. at 2660-61 (Scalia, J., dissenting) ("Absent Suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge . . . [and] [n]o one contends that the congressional [statute] . . . is an implementation of the Suspension Clause.")

<sup>154</sup> See *id.* at 2639-40 (O'Connor, J., plurality opinion) (holding that the Authorization for the Use of Military Force is an "explicit congressional authorization for the detention of individuals"); see also *id.* at 2679 (Thomas, J., dissenting) (arguing that Congress has authorized the President to detain "those arranged against our troops").

<sup>155</sup> See *id.* at 2649-50 (O'Connor, J., plurality opinion) (presupposing that the Executive is currently waging war); see also *id.* at 2639 (accepting with regard to Afghanistan that the United States was participating in an armed conflict); *id.* at 2674 (Thomas, J., dissenting) ("This detention falls squarely within the Federal Government's war powers . . ."); cf. *id.* at 2652-53 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (stating, more circumspectly, simply that the allegation that Hamdi had been "seized on the field of battle in Afghanistan" was "undisputed," and later stating that the "Government's stated factual justification for incommunicado detention is a war on terrorism"); *id.* at 2660 (Scalia, J., dissenting) (referring simply to the "allegation" that Hamdi is an "enemy combatant"). The assertion that the United States is in a state of war has been the subject of much debate. See, e.g., Amann, *supra* note 7, at 288 (describing how the "war" the United States is waging "bears little resemblance" to the traditional model of war); Brooks, *supra* note 92, at 711-43 (discussing blurring of boundaries between war and other contexts subject to legal regulation).

<sup>156</sup> *Hamdi*, 124 S. Ct. at 2641 (O'Connor, J., plurality opinion).

<sup>157</sup> See *id.* at 2641 (O'Connor, J., plurality opinion) (citing Third Geneva Convention, *supra* note 5, art. 118, for the proposition that "prisoners of war shall be released

also inspired the plurality's suggestion that challenges to detention could be handled by military panels, as opposed to civilian judges.<sup>158</sup> At several junctures, therefore, the plurality indicated that it was honoring international, and not just internal, laws of war. On this it was wrong, and its error cost Hamdi his liberty and, eventually, his U.S. citizenship.

The Geneva framework applies only to "armed conflict," and not all of the U.S. "war on terror" qualifies.<sup>159</sup> Even if the framework did apply, it was not followed: as Justices Souter and Ginsburg pointed out, the conditions of Hamdi's detention did not adhere to the requirements of the Third Geneva Convention.<sup>160</sup> The precedent for detaining citizens whom the Executive has labeled enemy combatants is not the Third Convention, but rather *Ex parte Quirin*, a U.S. opinion that predates it.<sup>161</sup> *Quirin* does not obtain internationally; to the contrary, by their terms, the 1949 Geneva Conventions do not protect citizens of the detaining country.<sup>162</sup> The only law that controlled, there-

and repatriated without delay after the cessation of active hostilities").

<sup>158</sup> See *id.* at 2651 (citing AR 190-8, *supra* note 124, § 1-6, at 2, which incorporates as U.S. military law the Third Geneva Convention, *supra* note 5, art. 5, and stating that military tribunals are allowed to determine the status of enemy detainees).

<sup>159</sup> Third Geneva Convention, *supra* note 5, common art. 2; see also Rona, *supra* note 92, at 64-68 (describing "misguided assertions" about the "War on Terror").

<sup>160</sup> *Hamdi*, 124 S. Ct. at 2658 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment). Among other things, the Third Geneva Convention, *supra* note 5, art. 5, requires the detaining power to treat an individual as a prisoner of war unless a tribunal convened under Article 5 finds otherwise. In that event, the person ordinarily would fall under the aegis of the Fourth Geneva Convention, *supra* note 5, art. 4, a treaty that the Court's trilogy never mentioned. Both conventions require a degree of access to the outside world, with which incommunicado detention does not comport.

<sup>161</sup> 317 U.S. 1 (1942). The plurality admitted as much, citing *Quirin* as sole support for the proposition that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant." *Hamdi*, 124 S. Ct. at 2640 (O'Connor, J., plurality opinion).

<sup>162</sup> On the relation of *Quirin* and the U.S. war on terror to contemporary international humanitarian law, see, for example, Knut Dörmann, *The Legal Situation of "Unlawful/Unprivileged Combatants,"* 85 INT'L REV. RED CROSS 45, 48 (2003). Cf. Rona, *supra* note 92 (discussing the U.S. war on terror in light of international humanitarian law). On the inapplicability of the Conventions to nationals of the detaining power, see Dörmann, *supra*, at 48-49 (discussing the Fourth Geneva Convention, *supra* note 5, art. 4(1), which describes as protected those persons who "find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals"). See also Third Geneva Convention, *supra* note 5, art. 87 (implying its nonapplicability to a detaining power's nationals by stating that "[w]hen fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance"); Amann, *supra*

fore, was U.S. law. In the view of at least four Justices, U.S. law standing alone afforded Hamdi considerable protection: at the least, the guarantee of evenhanded review of detention by a competent judiciary; at the most, disposition according to the strictures of U.S. criminal procedure.<sup>163</sup> The failure to see this interplay between international and domestic law resulted in a judgment that invoked international law not to assure just treatment of an individual, but rather to justify the denial of protection that he might have been afforded upon careful consideration of his own country's law.

In contrast with its effects in *Hamdi*, international law may have had a salutary, albeit sub silentio, effect in *Rasul*. In the 1990s, the Court had declined to extend the Fourth Amendment to a noncitizen defendant subjected to a warrantless search in Mexico;<sup>164</sup> permitted U.S. prosecution of a noncitizen kidnapped abroad;<sup>165</sup> and withheld the Fifth Amendment privilege against self-incrimination from a witness who feared that his compelled testimony would be used against him in a foreign prosecution.<sup>166</sup> A judgment in *Rasul* that persons held beyond U.S. borders had no hope of redress from U.S. courts would have been in keeping with these precedents. Instead, the decision in *Rasul* departed from this path. It held that overseas detainees indeed may seek relief in U.S. courts—not only writs of habeas corpus for violations of U.S. law and treaties, but also civil damages for violations of international law.<sup>167</sup> No precedent, it wrote, “categorically excludes aliens detained in military custody outside the United States from the “the privilege of litigation” in U.S. courts.”<sup>168</sup> This phrasing implied an assertion of jurisdiction more consistent with the jurispru-

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note 7, at 276 (“It may have no application to a U.S. citizen . . .”).

<sup>163</sup> See *Hamdi*, 124 S. Ct. at 2660 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (affording Hamdi “a fair chance . . . before a neutral decision maker”); *id.* (Scalia, J., joined by Stevens, J., dissenting) (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court . . .”).

<sup>164</sup> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990).

<sup>165</sup> *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

<sup>166</sup> *United States v. Balsys*, 524 U.S. 666, 669 (1998).

<sup>167</sup> *Rasul*, 124 S. Ct. at 2698-99 (citing as avenues for relief the habeas statute, 28 U.S.C. § 2241 (2000), the federal question statute, 28 U.S.C. § 1331 (2000), and the Alien Tort Statute, 28 U.S.C. § 1350 (2000)); *cf.* *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765 (2004) (affirming, in a judgment issued the day after *Rasul*, that non-Americans who suffer violations of international norms considered universal might be able to seek compensation in U.S. courts via the Alien Tort Statute).

<sup>168</sup> *Rasul*, 124 S. Ct. at 2698 (quoting *Al Odah v. United States*, 321 F.3d 1134, 1139 (2003) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777-78 (1950))).

dence of the inter-American, European, and U.N. human rights systems<sup>169</sup> than with the Court's own recent jurisprudence. The decision in *Rasul* omitted any citation to such external law even as it opened a path toward the exercise of U.S. judicial review of the plight of persons held well beyond the island of Cuba, perhaps as far away as Afghanistan and Iraq.

The latter two countries remained foremost in Americans' minds the entire time that the Court had *Rasul*, *Hamdi*, and *Padilla* under advisement. Horrific evidence of detainee abuse had become public just hours after oral arguments ended, and the evidence mounted as the Justices wrote. No opinion made explicit mention of this abuse. Yet four Justices spoke of torture—an issue central to the Abu Ghraib scandal but not raised in the cases at bar—in the course of condemning *Padilla*'s indefinite, incommunicado detention. “At stake in this case,” they wrote, “is nothing less than the essence of a free society. . . . Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.”<sup>170</sup> Having raised the specter of that loathed and secret tool by which old English monarchs extracted information, the four observed, “There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.”<sup>171</sup>

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<sup>169</sup> See Amann, *supra* note 7, at 311-19 (discussing relaxation of extraterritoriality limits in, for example, *Bankovic v. Belgium*, App. No. 52207/99, Eur. Ct. H.R. (2001) (providing decision as to the admissibility of Application No. 52207/99), available at <http://www.echr.coe.int/Eng/Judgments.htm> (last visited Mar. 22, 2005); Case 10.951, Inter-Am. C.H.R. 109/99, OEA/ser.L/V/II.106, doc. 6 rev. (1999); *Saldias de Lopez v. Uruguay*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Annex XIX, at 176, U.N. Doc. A/36/40 (1981)).

<sup>170</sup> *Padilla*, 124 S. Ct. at 2735 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). For an account by a British judge of interrogation practices during the heyday of the Star Chamber, see David Hope, *Torture*, 53 INT'L & COMP. L.Q. 807, 809-10 (2004).

<sup>171</sup> *Padilla*, 124 S. Ct. at 2735 n.10 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949) (Frankfurter, J., plurality opinion)). The comment suggested a reluctance on the part of the Court to abandon a tradition of circumscribing methods of interrogation, even in service of the Executive's antiterrorism campaign. Indicative of this treatment is *Rogers v. Richmond*, 365 U.S. 534 (1961), which cited *Watts* and other authorities in support of the statement that the ban on coerced confessions exists not because:

[S]uch confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of



C. *The Military: Matter of Perspective*

The Court's message—that U.S. judges stood ready to review the lawfulness of executive detention and of methods of interrogation—arrived too late to affect how military personnel treated captives in the first years of the campaign against terrorism. Detention centers were in essence lands without law. At these sites a number of risk factors converged, so that abuse came to be tolerated, even encouraged.

Individuals within a given milieu may come to form discrete populations. Group cohesion necessarily entails emphasis on similarities among members. But it also entails emphasis of difference; that is, delineation of group traits, appearances, and attitudes that are unlike those held by others in the environment. Group cohesion thus depends in part on identification of an other. Police officers, for example, may come to view their work through the lens of an “Us versus Them’ mentality,” suspicious not only of those believed to be doing wrong, but also of the law-abiding public at large.<sup>172</sup> When otherization takes the form of dehumanization—when an other group is seen as less human, less deserving of dignity, less capable of goodness—otherwise moral and passive individuals may come to act with aggressive abandon.<sup>173</sup> In short, division carries with it a risk that either population will engage in abuse against the other.<sup>174</sup>

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his own mouth.

*Id.* at 540-41.

<sup>172</sup> The quoted phrase appeared in the report of a panel charged with examining problems in New York City's police force. MILTON MOLLEN ET AL., CITY OF NEW YORK, ANATOMY OF A FAILURE: A PATH FOR SUCCESS 1 (1994) (attributing problems in part to “hostility and alienation between the police and community . . . which breeds an ‘Us versus Them’ mentality”), available at <http://www.parc.info/reports/pdf/mollenreport.pdf> (last visited Mar. 22, 2005), quoted in Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 501 (2004). Criminologists likewise have attributed to police officers the “working personality” of the “street cop,” typically described as suspicious, isolated socially from anyone but other officers, and living in an environment marked by the constant threat of danger and the authority that comes with the badge. Armacost, *supra*, at 512-14 (discussing inter alia ELIZABETH REUSS-IANNI, TWO CULTURES OF POLICE: STREET COPS AND MANAGEMENT COPS 1-16, 121-26 (1983); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 42-58 (2d ed. 1975)).

<sup>173</sup> For interdisciplinary literature explaining these phenomena, see Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 606-17 (2002).

<sup>174</sup> See *id.* at 607 n.118 (surveying social psychological studies that explain crowd misbehavior, with emphasis on “dehumanization and lessening of personal responsibility” as factors that lead individuals to shed inhibitions (citing inter alia Albert Bandura

Such distinction is endemic to prison. Firearms, jail bars, and uniforms set inmates irrevocably apart from guards. Often there is overcrowding of inmates, some of whom suffer from mental illness.<sup>175</sup> The lines of race, color, or culture that divide a society typically divide its prisons as well.<sup>176</sup> Prison is further marked by imbalance of power. The guard holds the keys, not only to an inmate's freedom of movement, but also, during the frequent periods when no outside authority is looking, to the inmate's freedom from harm. The risks of abuse proved overwhelming in a well-known simulation in which college students were assigned to be guards or inmates. Researchers ended the study prematurely, citing the "negative, hostile, affrontive and dehumanising" encounters among subjects who rapidly had absorbed the passive or aggressive mentalities of their roles.<sup>177</sup>

Aggression is, of course, part of the military role. Members of the armed forces are trained to defend themselves, their loved ones, and their allies by killing those whom their country names the enemy. Acts of defense occur in frenzied snapshots of time, during which actors are scarcely able to ponder proper behavior toward a combatant already seen as an other. The risk of abuse is, again, inherent. Expe-

et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 J. RES. PERSONALITY 253 (1975)).

<sup>175</sup> See, e.g., RONALD BLACKBURN, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* 277-78 (1993) (citing evidence of mental illness in British prisons); GARVIN MCCAIN ET AL., U.S. DEP'T OF JUSTICE, *THE EFFECT OF PRISON CROWDING ON INMATE BEHAVIOR*, at iv-vii (1980) (linking prison problems such as illness complaints and disciplinary infractions to overcrowding); Craig Haney, *Infamous Punishment: The Psychological Consequences of Isolation*, in *CORRECTIONAL PERSPECTIVES* 161, 166-67 (Leanne Fiftal Alarid & Paul F. Cromwell eds., 2002) (reporting on psychoses in California's highest security prison); Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 543 (1997) (referring to the "large literature on the consequences of overcrowding," which "has documented a range of specific adverse effects" on inmates).

<sup>176</sup> A salient example may be found in California, where the state's Department of Corrections long has used race as a factor for determining assignment of inmates to double cells. The U.S. Supreme Court, expressing concern that "racial classifications threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility," ordered a lower court on remand to apply the highest level of scrutiny when determining whether the California practice violates the constitutional guarantee of equal protection. *Johnson v. California*, 125 S. Ct. 1141, 1147 (2005) (internal quotation marks and citation omitted) (emphasis supplied by Court); see also Paige Austin, *Guards; State Lied to Justices*, PRESS-ENTERPRISE (Riverside, Cal.), Jan. 19, 2005, at A1 (quoting correctional officers' allegations that racial segregation is permanent, contrary to assertion that state's lawyers made to Court).

<sup>177</sup> Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 80 (1973), quoted in SCHLESINGER REPORT, *supra* note 59, app. G at 1-3; Fletcher & Weinstein, *supra* note 173, at 609.

diency may result in deviation even from unequivocal rules, a fact that traditionally has counseled the establishment of firm and clear laws.<sup>178</sup> Responsible militaries endeavor to prevent abuse—to channel the violence that is essential to success—by disallowance of individual discretion. Service members learn to obey orders delivered within a rigid chain of command. The system depends on a structure of preexisting constraints; that is, on the promulgation of a framework of laws within which the military is to operate. President Abraham Lincoln recognized this when he commissioned the first codification of the modern laws governing the conduct of war.<sup>179</sup>

Today's military is trained to follow successors to that code; in particular, regulations adopted in accordance with the 1949 Geneva Conventions. This body of law is ample. Found among the 143 principal articles and five annexes of the Third Geneva Convention, for instance, is the requirement that prisoners of war be permitted to receive personal parcels containing "scientific equipment" or "sports outfits."<sup>180</sup> The depth of detail is indicative of the view that limiting discretion also limits opportunity for abuse of discretion.

Risk factors for abuse converged inside the centers of detention that the military established in the course of the campaign against terror. Many guards were reservists unexpectedly called to active duty, transported to foreign lands. There, with little corrections training, they were expected to control often hostile inmates within the con-

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<sup>178</sup> Cf. Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278, 322 (2003) (rejecting proposal for authorization of warrants allowing torture, arguing that resulting torture would exceed both bounds of warrant and "level of informal abuse under the current regime").

<sup>179</sup> See L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 29 (2d ed. 2000) (describing genesis of Instructions for the Government of Armies of the United States in the Field, General Orders No. 100 (Lieber Code) (Apr. 24, 1863), promulgated during the War Between the States).

<sup>180</sup> Article 72 of the Third Geneva Convention, *supra* note 5, states in relevant part: Prisoners of war shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.

As they do with much of the Convention, U.S. military regulations incorporate this requirement. See AR 190-8, *supra* note 124, § 3-5(k), at 8 (stating that internees "may receive" packages of "[f]oodstuffs," "[c]lothing," "[m]edical supplies," and "[a]rticles of a religious, educational, or recreational nature").

finer of overcrowded jails devoid of a strict chain of command and subject to daily attack.<sup>181</sup> Some were asked to take part in extraction of information; in Taguba's words, to "set favorable conditions" for interrogation.<sup>182</sup> They went along with the request, in accordance with a group mentality that had divided all into either "good guys" or "the enemy."<sup>183</sup> Early on, no less a figure than the President had defined the post-September 11 campaign as one of "us" versus "the terrorists," and the Vice President had elaborated that the latter were less deserving than Americans of fundamental rights.<sup>184</sup> Executive officials later sought to distinguish Iraqis from others captured during the campaign, but that distinction did not prevent abuses. In Iraq, in Afghanistan, and at Guantánamo, inmates who looked, spoke, and worshiped differently came to be seen and treated as others. The "good guys" versus "enemy" mindset aided toleration of things like forced nudity—a widespread practice that an independent panel suggested may have so dehumanized detainees that guards' "moral and cultural barriers" failed to operate to "preclude the abusive treatment of others."<sup>185</sup> The researchers who conducted the prison simulation have written that emphasis on external viewpoints—on rules that embody values of an outside world untested by the immediate chaos—can

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<sup>181</sup> See SCHLESINGER REPORT, *supra* note 59, at 43-56; *id.* app. G, at 7; TAGUBA REPORT, *supra* note 21, at 10, 18, 21-33, 36-38; see also *Abu Ghraib Called Filthy and Volatile at Army Hearing*, L.A. TIMES, Feb. 3, 2005, at A25 (describing witness's testimony that Abu Ghraib "was filthy, with rodents, rats, wild dogs and trash and an overpopulation of prisoners").

<sup>182</sup> See TAGUBA REPORT, *supra* note 21, at 11.

<sup>183</sup> See SCHLESINGER REPORT, *supra* note 59, app. G, at 5 (discussing effects of phenomena of "groupthink" and "enemy image").

<sup>184</sup> See *supra* text accompanying notes 132-133 (quoting President George W. Bush and Vice President Dick Cheney). Others in the administration echoed these sentiments, among them then-Attorney General John Ashcroft, who stated in prepared testimony before Congress that new measures were "carefully drawn to target a narrow class of individuals—terrorists." *Excerpts from Attorney General's Testimony Before Senate Judiciary Committee*, N.Y. TIMES, Dec. 7, 2001, at B6. Calling for "honest, reasoned debate" on the permissible extent of such measures, he continued:

To those who pit Americans against immigrants and citizens against noncitizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

*Id.*

<sup>185</sup> See SCHLESINGER REPORT, *supra* note 59, app. G, at 7. A retired FBI agent echoed this observation regarding the effect of dehumanization on those who perpetrate it when he told a reporter, "Brutalization doesn't work. We know that. Besides, you lose your soul." Mayer, *supra* note 57, at 106.

counterbalance what may seem to insiders like a standing invitation to abuse.<sup>186</sup> Post-September 11 detention thus should have proceeded according to a pre-established law, seen, understood, and obeyed by all. That is not what happened.

Until the decision in *Rasul*, all that appeared to constrain military action was the word of the Executive that was waging the new “war” against terror. During the conflict in Vietnam, the United States had applied the Geneva framework despite perceived shortcomings.<sup>187</sup> This time, on arrival of the first captives at Guantánamo, the Executive disavowed the Geneva Conventions. Then-presidential counsel Gonzales saw Geneva’s details, such as the requirement that personal parcels must be delivered, not as components of the military’s own code, not as elements of the internal and international structure on which legal conduct of military action depends, but rather as “quaint . . . provisions” easily disregarded.<sup>188</sup>

The President’s decision not to adhere to Geneva law unmoored the military. Leaked memoranda revealed that for the first year at Guantánamo, interrogators operated without the benefit of any guidelines. These interrogators had been “trained to apply the Geneva Conventions,” and so balked at doing “anything that could be considered ‘controversial.’”<sup>189</sup> Their hesitation prompted clarification—in the form of Rumsfeld’s authorization for harsh interrogation measures.<sup>190</sup> Ostensibly intended only for Guantánamo, the techniques found their way to Afghanistan and, eventually, to Iraq.<sup>191</sup> The Executive said that it would honor the Geneva Conventions in Iraq; how-

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<sup>186</sup> See Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709, 721 (1998), discussed in SCHLESINGER REPORT, *supra* note 59, app. G, at 3.

<sup>187</sup> See VERNON E. DAVIS, THE LONG ROAD HOME: U.S. PRISONER OF WAR POLICY AND PLANNING IN SOUTHEAST ASIA 94-95 (2000) (giving an example of U.S. military action conforming with the Geneva Conventions); TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 132 (1970) (lauding the U.S. government for refraining from making claim that the Geneva Conventions did not apply because Vietnam conflict was not an official war); Daryl Mundis, *The United States of America and International Justice: Has Lady Liberty Lost Her Way?*, 2 J. INT’L CRIM. JUST. 2, 6 n.16 (2004) (noting that the United States routinely used tribunals during the Vietnam conflict in order to ensure compliance with the Geneva Conventions).

<sup>188</sup> Gonzales Memorandum, *supra* note 9, at 2 (referring to Article 75 of Third Geneva Convention, *supra* note 5).

<sup>189</sup> Beaver Memorandum, *supra* note 32, at 1.

<sup>190</sup> Action Memorandum, *supra* note 32, discussed *supra* text accompanying notes 32-34.

<sup>191</sup> SCHLESINGER REPORT, *supra* note 59, at 9, 68; see also TAGUBA REPORT, *supra* note 21, at 8-9.

ever, it failed to give guards sufficient training in or copies of those treaties.<sup>192</sup> Executive action created a legal void, one filled by official statements and on-the-ground practices that condoned some harshness and so risked inviting more. Generals freed from the restraint of Geneva reportedly turned aside an FBI agent's questions about interrogation methods at Guantánamo with the explanation that they took "their marching orders" from Rumsfeld.<sup>193</sup> An Abu Ghraib guard said, in a sworn statement:

I witnessed prisoners in the MI hold section, Wing 1A being made to do various things that I would question morally. In wing 1A we were told that they had different rules and different SOP for treatment. I never saw a set of rules or SOP for that section just word of mouth.<sup>194</sup>

Asked why he said nothing to authorities about abuses, he replied, "Because I assumed that if they were doing things out of the ordinary or outside the guidelines, someone would have said something."<sup>195</sup>

Some who had served in the military in fact had objected, both to the withholding of Geneva protections and to the definitions of "torture" that seemed to allow mistreatment. They included Secretary of State Colin L. Powell, who had served as Chairman of the Joint Chiefs of Staff during the 1991 Persian Gulf War, and a number of military lawyers.<sup>196</sup> But their objections drew little notice until after the Abu

<sup>192</sup> See TAGUBA REPORT, *supra* note 21, at 32, 43 (citing absence of copies at Iraq prison sites); *supra* note 72 and accompanying text (discussing lack of training); see also Peter Baker, *U.S. Authorizes Detention of Iraqi Civilians*, WASH. POST, Apr. 2, 2003, at A23 (reporting U.S. position on applicable law in Iraq); John Mintz, *Options on Handling of Iraqi POWs Considered*, WASH. POST, Apr. 19, 2003, at A20 (same).

<sup>193</sup> The phrase appeared in e-mail correspondence; verbatim, it stated in part: We (BAU and ITOS1) had also met with General's Dunlevey & Miller explaining our position (Law Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of doing business and DoD has their marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they had a job to accomplish.

E-mail from [redacted], Div13, FBI, to T J. Harrington, Div13, FBI (May 10, 2004, 12:26 PM), available at [www.aclu.org/torturefoia/released/t3131\\_3133.pdf](http://www.aclu.org/torturefoia/released/t3131_3133.pdf) (last visited Mar. 22, 2005).

<sup>194</sup> TAGUBA REPORT, *supra* note 21, at 18.

<sup>195</sup> *Id.* at 19.

<sup>196</sup> See, e.g., Neil A. Lewis, *Ex-Military Lawyers Object to Bush Cabinet Nominee*, N.Y. TIMES, Dec. 16, 2004, at A36 (reporting that civilian executive officials ignored military lawyers' objections to memoranda); Government Press Release, Statement of Senator Carl Levin Regarding the Nomination of Alberto Gonzales (Feb. 3, 2005) (citing opposition to detention and interrogation practices by "top military lawyers, including the Legal Adviser to the Chairman of the Joint Chiefs of Staff and the Army's Judge Advo-

Ghraib scandal broke. Thus at critical junctures relevant actors—not only guards, but also military officers and FBI agents—were unsure of what law applied and what were the contours of that law.<sup>197</sup>

Taguba's report on abuse represented a return to the rule of military law. The report was remarkable for its factual depth and candor. Its recitations of law, however, reflected a military perspective. The report limited its focus to two sources of law, the Army's own regulations and the 1949 Geneva Conventions.<sup>198</sup> No mention was made, for example, of the Convention Against Torture. Also limited was the inquiry of the independent panel, which concluded that high-ranking officers bore "institutional and personal responsibility," but no legal culpability.<sup>199</sup> The panel further made note of its agreement with key components of the Executive's detention policy. Expressly citing the opinion of the plurality in *Hamdi*, it embraced the notion that the country is at "war" and that at times, perhaps according to rules not within any existing legal framework, the Executive may detain persons seen as "enemy combatants."<sup>200</sup>

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cate General"), available at 2005 WLNR 2772043; Memorandum re: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, from Colin L. Powell, Secretary of State, to Counsel to the President, and Assistant to the President for National Security Affairs (Jan. 26, 2002) (contending that decision to withhold protection would "reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the laws of war for our troops"), available at <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (last visited Mar. 22, 2005), and available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf> (last visited Mar. 22, 2005).

<sup>197</sup> See Josh White, *U.S. Generals in Iraq Were Told of Abuse Early, Inquiry Finds*, WASH. POST, Dec. 1, 2004, at A1 (describing undisclosed internal Army report which "concluded that some U.S. arrest and detention practices at the time could 'technically' be illegal"); E-Mail from [redacted], DL, FBI, to M C Briese (May 22, 2004, 2:08 PM) (stating that some FBI personnel had observed, at Abu Ghraib, military use of "techniques beyond the bounds of FBI practice" but within the parameters of what author believed were military's orders, and seeking guidance on "the question of what constitutes 'abuse'" that FBI agents must report), available at [http://www.aclu.org/torturefoia/released/FBI.121504.4940\\_4941.pdf](http://www.aclu.org/torturefoia/released/FBI.121504.4940_4941.pdf) (last visited Mar. 22, 2005).

<sup>198</sup> TAGUBA REPORT, *supra* note 21, at 3-5. One leaked Army document, a brief regarding proposed counter-resistance techniques of interrogation, did mention external sources such as the ICCPR, *supra* note 118, and Convention Against Torture, *supra* note 16, but stressed that as a result of the existence of buffer mechanisms, "no international body of law directly applies." Beaver Memorandum, *supra* note 32, at 1-2.

<sup>199</sup> SCHLESINGER REPORT, *supra* note 59, at 5, 79-83. The panel mentioned but did not analyze the Convention Against Torture, *supra* note 16. *Id.* at 94, 97.

<sup>200</sup> See *id.* at 18, 27, 64, 81-82. A similar willingness to rewrite Geneva law to comport with perceived needs of the war on terror may be found in THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 379-80 (W.W. Norton & Co. authorized ed. 2004).

## CONCLUSION

In time of war, wrote Telford Taylor, a lead U.S. prosecutor at Nuremberg, laws:

[A]re necessary to diminish the corrosive effect of mortal combat on the participants. War does not confer a license to kill for personal reasons—to gratify perverse impulses, or to put out of the way anyone who appears obnoxious, or to whose welfare the soldier is indifferent. War is not a license at all, but an obligation to kill for reasons of state; it does not countenance the infliction of suffering for its own sake or for revenge.<sup>201</sup>

Though focused on killing, the passage applies equally to the treatment of captured combatants. To declare “war”—whether a traditional struggle between nation-states or the current campaign against terrorism—is to name an enemy. Naming stirs resentment of that identified other; resentment mounts in the heat of combat. The desire to inflict suffering, to win revenge, may become great. When an enemy falls into custody the desire is likely to be satisfied unless a clear structure of constraints reinforces moral qualms about doing harm. U.S. armed forces long have operated within such a structure, made up of internal regulations based on the 1949 Geneva Conventions on the laws of war. Overlaying that framework today are other bodies of law, other norm systems, that affect the civilian officials and judicial officers who set and review detention policy no less than the military personnel who implement it. This legal landscape includes law set forth in the Constitution, congressional enactments, and treaties that the United States has ratified. It includes other guideposts for behavior as well, among them: the history and values on which U.S. law is founded; provisions in international declarations that the United States has endorsed; and the views of governments and other entities with which the United States shares a tradition of fundamental rights and contemporary experience of fighting terrorism. Taken together, these sources comprise a complex map of laws respecting conditions of detention and methods of interrogation.

In the first years after the attacks of September 11, 2001, key actors did not see—did not acknowledge or accommodate—this lush landscape of law. The Executive singled out the Constitution’s Commander-in-Chief Clauses as sufficient basis for its assertion that the President enjoyed plenary power to combat terrorism as he saw fit. The Supreme Court eventually rejected this position; however, the va-

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<sup>201</sup> TAYLOR, *supra* note 187, at 40-41.



riety of rationales on which Justices relied evinced no consensus on what sources of law mattered. In any event, the Court's affirmation of its obligation to scrutinize the fact and conditions of detention came too late to regulate treatment of the tens of thousands who had fallen into military custody. Within the zones of detention no law obtained. The Executive's declaration that Geneva law did not apply at Guantánamo left the military unsure whether any rules applied. Harsh methods of interrogation—authorized, leaked documents later revealed, by the Secretary of Defense—came into use. Soon the techniques found their way to Afghanistan and even to Iraq, despite executive assurances that it would apply Geneva law to Iraqi detainees. The abuses that followed were, to quote one investigation, “entirely predictable.”<sup>202</sup> Photographs at Abu Ghraib exposed inflictions of suffering, perversions like those to which Taylor's passage referred. Subsequent revelations, in documents prepared by the armed forces, in FBI memos, and in statements from detainees, demonstrated that abuses had been widespread, and continued even after the Abu Ghraib scandal broke.

The abuses pointed to failures of many sorts, in particular, failures of planning and training. There was also a failure of law: the failure to acknowledge and accommodate potentially relevant laws opened space within which abuse recurred. Conflict of laws, a field devoted to recognition and reconciliation of disparate legal regimes, would seem to provide a way of seeing and adjusting behavior to pertinent laws. This has not proved to be so. Traditionally conflicts has ceded transnational disputes to public international law. Public international law tolerates mechanisms like reservation and non-self-execution—on which the Executive drew to support its detention and interrogation policies—by which states cushion themselves against enforcement of international obligations. Even if conflicts doctrines were consulted, they might not prove useful. Challenges to detention are inherently public disputes, and conflicts has tended to focus on private-law matters. The field is, moreover, in flux; thus has Professor Gerald L. Neuman observed that “conflict of laws is more in need of methodology than itself a source of methodology.”<sup>203</sup> Yet the very fact that there is conflict within conflicts—as, indeed, there is within the discipline of public international law—suggests the very real possibility for reformation of the way laws are seen within the United States. The charting of

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<sup>202</sup> SCHLESINGER REPORT, *supra* note 59, app. G, at 1.

<sup>203</sup> Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2083 (2005).

an accurate map of America's legal landscape constitutes a step in that direction. So too would further study of plural law in action, in societies as diverse as India and Europe. Eventually, perhaps, the hooded detainee may stand not as the icon of an unspeakable present but rather as a relic of an awful past.