

# SEEING TORTURE ANEW: A TRANSNATIONAL RECONCEPTUALIZATION OF STATE TORTURE AND VISUAL EVIDENCE

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*This Article puts forward two interdependent conceptual reforms at the intersection of state torture, visibility, and law. First, to qualify as good evidence—legally and socially—torture images are usually required to be “accurate” and “transparent,” to successfully suppress all traces of the mediation and representation at work. However, this Article suggests that this prevalent visual-evidentiary paradigm unwittingly serves state attempts to downplay, decontextualize, deny, and disregard torture allegations. In this light, drawing on the interdisciplinary field of visual studies, this Article re-envisages the limitations as well as the critical potential of torture images.*

*Second, international and domestic law tend to conceptualize state torture in exclusively physical and mental terms. Challenging this tendency, this Article argues that the extreme gravity of the physical and mental violence of torture ought not obscure, and in fact warrants closer attention to two other, interrelated forms of violence through which state torture operates, acquires its meaning, is experienced, and is made possible: (a) the violence of state mechanisms of (in)visibility—representational violence—which includes state efforts to control by whom and to what degree state torture can be seen; and (b) the violence of law—legal violence—which manifests itself in the contribution of legal institutions, lawyers, and legal rhetoric to enabling, legitimating, and keeping state torture out of public sight.*

*The perspective of this Article is transnational, focusing on three cases of state torture: detainees in U.S. custody overseas; Palestinian detainees in Israeli custody; and opposition group members detained in Syria. Legal examples and visual materials from these three cases provide a contextualized basis for exploring what new light the proposed conceptual reforms can shed on the socio-political complexities and consequences of state torture.*

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## INTRODUCTION

### *A. The Dominant Visual-Evidentiary Regime and Its Pitfalls: Lessons from Abu Ghraib*

The evidentiary status of visual images has been described as a matter of legal and social ambivalence. On the one hand, a common belief is that “a picture is worth a thousand words,” that visual images are the closest available substitute for seeing the “real” thing. On the other hand, countervailing concerns abound about the potential deceptiveness and manipulability of visual materials.<sup>1</sup> These concerns are especially heightened when it comes to law (where reliability is paramount)<sup>2</sup> and torture (which, like other traumatic experiences, is often considered unrepresentable).<sup>3</sup>

<sup>1</sup> RICHARD K. SHERWIN, *VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE: ARABESQUES & ENTANGLEMENTS* 5, 31–32, 36–37 (2011); Christopher J. Buccafusco, *Gaining/Losing Perspective on the Law, or Keeping Visual Evidence in Perspective*, 58 U. MIAMI L. REV. 609, 616–22 (2004); Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 1–3, 14–43 (1998); see also Louise Amoore, *Vigilant Visualities: The Watchful Politics of the War on Terror*, 38 SECURITY DIALOGUE 215, 217–18 (2007) (arguing that visibility is commonly regarded as the “sovereign” and most reliable of the senses). Though the Syrian case will be examined later in this Article, it is worth noting here the particularly strong misgivings surrounding photographs and videos that have recently emerged from Syria. Apart from the anonymity of the sources of these images, the Syrian government and the opposition—which produce many of these images—have been suspected of intentionally disseminating disinformation. See DAVID W. LESCH, *SYRIA: THE FALL OF THE HOUSE OF ASSAD* 94, 97, 120–21 (2012).

<sup>2</sup> JUDITH BUTLER, *FRAMES OF WAR: WHEN IS LIFE GRIEVABLE?* 81 (2009); ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 10 (1985); Shoshana Felman, *In an Era of Testimony: Claude Lanzmann’s Shoah*, 79 YALE FRENCH STUD. 39, 39 (1991).

<sup>3</sup> SCARRY, *supra* note 2, at 4, 6–7, 13, 54, 56; SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* 83 (2002); see also RUTH LEYS, *TRAUMA: A GENEALOGY* 6–9 (2000) (characterizing trauma theory as “simultaneously attracted to and

There is little if any ambivalence, however, as to how images are to be judged, for better or worse. Normally, visual images are labeled as “good evidence” if they successfully suppress all traces of the mediation (and representation) at work and, accordingly, appear to be “accurate,” “transparent,” and “neutral.”<sup>4</sup> In the spirit of naïve realism,<sup>5</sup> photographs or videos of torture are thus assumed to possess the power of “capturing” torture incidents and, in so doing, providing their viewers with access to “the truth,” to what “really” happened. Given this belief in the self-evidence of the visual truth of state torture, no need arises to see—let alone render visible and scrutinize—the mechanisms and forces involved in the production of such visual images.<sup>6</sup>

This prevalent visual-evidentiary paradigm has some acute failings, among which is its blindness to what, in naïve realism, is not patently visible in photographs or videos of state torture—such as the broader social, legal, and political context that gave rise to the incidents these images “capture.” A testament to this peril, and also a well-known exception to the paucity of photographic or video evidence of state torture, are the photographs and videos showing detainees abused and tortured in U.S. custody at Abu Ghraib prison in Iraq. When they became public in 2004, the Abu Ghraib pictures rapidly spread across the globe, attracting widespread attention, inciting public outrage and a demand that those responsible be held accountable for their actions. Ultimately, there were some official inquiries, which resulted, in a few cases, in reprimands, disciplinary action, and, for enlisted soldiers, courts-martial.<sup>7</sup>

Yet, aside from being a mere fraction of all the pictures documenting abuse and torture at Abu Ghraib,<sup>8</sup> the photographs that were published in 2004 also

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repelled by the mimetic-suggestive” understanding of trauma as represented by words and images).

<sup>4</sup> JOHN TAGG, *A Means of Surveillance: The Photograph as Evidence in Law*, in *THE BURDEN OF REPRESENTATION: ESSAYS ON PHOTOGRAPHIES AND HISTORIES* 66, 95–98 (1988); Buccafusco, *supra* note 1, at 629–30. However, the invisibility of the mechanisms of mediation and representation is likely to be denounced when it jeopardizes, rather than enhances, the desired neutrality of an image. For example, the Associated Press recently announced it was severing its ties with a Pulitzer Prize-winning photographer who had altered a digital photograph of the conflict in Syria by removing a colleague’s video camera from the frame. See Heather Saul, *Pulitzer Prize-Winning Photographer Narciso Contreras Sacked for Altering Syria Picture*, INDEP. (Jan. 23, 2014), <http://www.independent.co.uk/news/media/pulitzer-prizewinning-photographer-narciso-contreras-sacked-for-altering-syria-picture-9079504.html>.

<sup>5</sup> “Naïve realism” can be generally associated with, among other things, the notion that photographs are privileged visual information free from representational constraints. See, e.g., JENNIFER GREEN-LEWIS, *FRAMING THE VICTORIANS: PHOTOGRAPHY AND THE CULTURE OF REALISM* 23 (1996).

<sup>6</sup> SHERWIN, *supra* note 1, at 39; TAGG, *supra* note 4, at 99–100; Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 173–74 (1999).

<sup>7</sup> SUSIE LINFIELD, *THE CRUEL RADIANCE: PHOTOGRAPHY AND POLITICAL VIOLENCE* 151–62 (2012); Derek Gregory, *Vanishing Points: Law, Violence, and Exception in the Global War Prison, in TERROR AND THE POSTCOLONIAL* 55, 58, 61, 79–81 (Elleke Boehmer & Stephen Morton eds., 2010); Nicholas Mirzoeff, *Invisible Empire: Visual Culture, Embodied Spectacle, and Abu Ghraib*, 95 RADICAL HIST. REV. 21 (2006). On artistic reactions to these images, see, for example, W. J. T. MITCHELL, *CLONING TERROR: THE WAR OF IMAGES, 9/11 TO THE PRESENT* 4–5, 99–111, 137–59 (2011); Eliana Herrera-Vega, *The Politics of Torture in Antagonistic Politics, and its Displacement by the Regime of the Arts: Abu Ghraib, Colombian Paramilitaries and Fernando Botero*, 59 CURRENT SOC. 675 (2011); Philip Metres, *Remaking/Unmaking: Abu Ghraib and Poetry*, 123.5 PMLA 1596 (2008); Abigail Solomon-Godeau, *Torture and Representation: The Art of Détournement, in SPEAKING ABOUT TORTURE* 115, 126 (Julie A. Carlson & Elisabeth Weber eds., 2012).

<sup>8</sup> Most of the 144 photographs submitted to U.S. army investigators were shown only to members of Congress despite a suit by the ACLU. Mirzoeff, *supra* note 7. Only in 2006 and again in 2009 were

decontextualized that torture, isolating it from its institutional setting. In Derek Gregory's words, these pictures rendered Abu Ghraib a space of both "constructed and *constricted* visibility":

What happened at Abu Ghraib was glossed as unacceptable but un-American, appalling but an aberration, inexcusable but an exception. . . . [T]he photographs eventually came to stand in the way of an adequate understanding of what happened. The public gaze was directed toward the images, not the process and policy behind them. Critical attention was focused on acts isolated as a series of stills and frames rather than on the apparatus that produced them.<sup>9</sup>

By detaching individual incidents from their broader context, pictures like these might thus end up implicated in keeping the systematic nature of state torture invisible. Responsibility in such cases might consequently be placed, if at all, on low-level state agents while senior figures remain unaccountable. Indeed, such has been the case with the Abu Ghraib incidents<sup>10</sup> and also in Israel.<sup>11</sup>

Apart from sustaining impunity for state torture, the sort of visual materials that are likely to be considered good evidence are also susceptible to incorporation into state denial of torture allegations.<sup>12</sup> If certain visual materials, such as photographs, videos or visible physical injuries,<sup>13</sup> enjoy a privileged evidentiary

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many additional photographs and videos published by the media. See Matthew Moore, *The Photos America Doesn't Want Seen*, SYDNEY MORNING HERALD (Feb. 15, 2006), <http://www.smh.com.au/news/world/the-photos-america-doesnt-want-seen/2006/02/14/1139890737099.html>; *Concern at 'Prisoner Abuse' Photographs as Barack Obama Prepares to Block Publication*, TELEGRAPH (May 15, 2009), <http://www.telegraph.co.uk/news/worldnews/barackobama/5325444/Prisoner-abuse-photographs-surface-as-Barack-Obama-prepares-to-block-publication.html>; *Introduction: The Abu Ghraib Files*, SALON (Mar. 14, 2006), [http://www.salon.com/2006/03/14/introduction\\_2](http://www.salon.com/2006/03/14/introduction_2).

<sup>9</sup> Gregory, *supra* note 7, at 58, 61; see also Jared Del Rosso, *The Textual Mediation of Denial: Congress, Abu Ghraib, and the Construction of an Isolated Incident*, 58 SOC. PROBS. 165 (2011); Jasbir K. Puar, *Abu Ghraib: Arguing Against Exceptionalism*, 30 FEMINIST STUD. 522, 522–24, 531 (2004); Mark Danner, *Abu Ghraib: The Hidden Story*, N.Y. REV. BOOKS (Oct. 7, 2004), <http://www.nybooks.com/articles/archives/2004/oct/07/abu-ghraib-the-hidden-story>.

<sup>10</sup> On unaccountability for torture at Abu Ghraib, see generally ALFRED W. MCCOY, *Psychological Torture and Public Forgetting*, in TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION (2012); Nathan Gorelick, *Imagining Extraordinary Renditions: Terror, Torture and the Possibility of Excessive Ethics in Literature*, 11 THEORY & EVENT (2008); Danner, *supra* note 9; Mirzoeff, *supra* note 7; Philip Gourevitch, *The Abu Ghraib We Cannot See*, N.Y. TIMES (May 24, 2009), <http://www.nytimes.com/2009/05/24/opinion/24gourevitch.html>.

<sup>11</sup> On Israeli unaccountability for torture of Palestinians, see generally PUB. COMM. AGAINST TORTURE IN ISR., ACCOUNTABILITY DENIED: THE ABSENCE OF INVESTIGATION AND PUNISHMENT OF TORTURE IN ISRAEL (2009), available at [http://www.stoptorture.org.il/files/Accountability\\_Denied\\_Eng.pdf](http://www.stoptorture.org.il/files/Accountability_Denied_Eng.pdf).

<sup>12</sup> See STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 168–95 (2001) (arguing that images of human rights violations might work to further denial strategies among state and non-state actors).

<sup>13</sup> On Palestinians' and NGOs' "use" of visible bodily traces of abuse by the Israeli authorities to demonstrate suffering to these authorities and international observers, see Lori A. Allen, *Martyr Bodies in the Media: Human Rights, Aesthetics, and the Politics of Immediation in the Palestinian Intifada*, 36 AM. ETHNOLOGIST 161, 163, 167–68, 170–71 (2009). On Israeli law's use of Palestinian child defendants' physical appearance as a source of evidence, see Hedi Viterbo, *The Age of Conflict: Rethinking Childhood, Law, and Age Through the Israeli-Palestinian Case*, in LAW AND CHILDHOOD STUDIES—CURRENT LEGAL ISSUES VOL. 14, at 133, 144–47 (Michael Freeman ed., 2012).

status,<sup>14</sup> then their absence might facilitate the dismissal—in the form of either disregard or denial—of (verbal) torture testimonies.<sup>15</sup> This problem too was evidenced by the 2004 Abu Ghraib pictures, or more specifically by the scant public attention given to NGO warnings and Iraqi testimonies about abuse at Abu Ghraib prior to the release of these pictures.<sup>16</sup>

Thus, the Abu Ghraib case demonstrates the troubling, if unwitting, contribution of torture images to the downplaying, disregard, or denial of important aspects or evidence of that torture. Viewed in this light, supposedly good visual evidence of this sort not only counters torture, but also, in more ways than one, plays into the hands of state attempts to control its (in)visibility. Therefore, beyond asking what elements of state torture are prevented from being publicly visible, an equally important question is what and how visibility itself conceals, how seeing more can mean seeing less.<sup>17</sup> Calls for more photographic and video evidence of state torture, as important as they may be, will not do<sup>18</sup>—at least not without also bringing into question the dominant representational regime of state torture.

### B. *The Conceptualization of Torture in Physical and Mental Terms*

Alongside the dominant evidentiary-visual regime discussed so far, another conventional view needs rethinking: the clear tendency, in both international and

<sup>14</sup> KATHERINE BIBER, *CAPTIVE IMAGES: RACE, CRIME, PHOTOGRAPHY* 5 (2007); SUSAN SONTAG, *ON PHOTOGRAPHY* 5 (1979); Didier Fassin, *The Humanitarian Politics of Testimony: Subjectification Through Trauma in the Israeli-Palestinian Conflict*, 23 *CULTURAL ANTHROPOLOGY* 531, 553 (2008).

<sup>15</sup> Cf. LINFIELD, *supra* note 7, at 160 (“The Abu Ghraib images . . . have strengthened . . . the status of photographs as documents of the real. No written account of the tortures could have made such an impact.”); MITCHELL, *supra* note 7, at 117 (“Verbal reports [of abuse at Abu Ghraib], no matter how detailed or credible, would never have had the impact of . . . [the Abu Ghraib] photographs.”); EYAL WEIZMAN, *THE LEAST OF ALL POSSIBLE EVILS: HUMANITARIAN VIOLENCE FROM ARENDT TO GAZA* 103–08 (2011) (describing a social “shift of emphasis from human testimony towards objects of material evidence”).

<sup>16</sup> Gregory, *supra* note 7, at 79–81; Charles J. Hanley, *Early Accounts of Extensive Iraq Abuse Met U.S. Silence*, *SOUTHEAST MISSOURIAN* (May 9, 2004), <http://www.semissourian.com/story/137193.html>; Mirzoeff, *supra* note 7, at 24.

<sup>17</sup> See LAURA KURGAN, *CLOSE UP AT A DISTANCE: MAPPING, TECHNOLOGY, AND POLITICS* 16–17 (2013) (arguing that imaging technologies “let us see too much, and hence blind us to what we cannot see, imposing a quiet tyranny of orientation that erases the possibility of disoriented discovery”). Furthermore, photographs and videos like those depicting torture at Abu Ghraib risk reiterating either the sensationalism or the spectacle-like aspect of torture. See, e.g., Solomon-Godeau, *supra* note 7, at 126 (arguing that refraining from using figurative imagery of torture avoids this risk). But see LINFIELD, *supra* note 7 (arguing that photographs depicting political violence can illuminate the modern history of violence and the human capacity for cruelty).

<sup>18</sup> Some have gone even further by questioning how much of an impact such visual evidence actually has. See STEPHEN F. EISENMAN, *THE ABU GHRAIB EFFECT* (2010) (arguing that U.S. citizens mostly discounted the Abu Ghraib photographs due to these photographs’ depiction of the torture victims as taking pleasure in their own extreme pain). A more recent example is the 55,000 photos of corpses of executed (and in some cases apparently tortured) Syrians. Taken by a Syrian police photographer, authenticated by forensic experts, and examined by British lawyers, these photos—to which David Luban referred when talking about “what could be the best-documented crimes against humanity in two decades”—nonetheless failed to attract substantial attention from either the Obama administration or the U.S. press. See David Luban, *Syrian Torture: What the U.S. Must Do*, N.Y. REV. BOOKS (Feb. 3, 2014), <http://www.nybooks.com/blogs/nyrblog/2014/feb/03/syrian-torture-what-us-must-do>.

domestic law, to conceptualize state torture as exclusively physical and mental.<sup>19</sup> The U.N. Convention Against Torture epitomizes this tendency when defining torture, for its purposes, as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>20</sup>

While such legal definitions have rightly been criticized for failing to delineate what torture is and how it operates,<sup>21</sup> the prevailing understanding of torture as exclusively physical and mental has remained largely unchallenged.

Yet, the violence through which state torture operates, is experienced, and is made possible is not solely physical and mental.<sup>22</sup> There are also the violence of state mechanisms of (in)visibility—representational violence—which includes state attempts to control the (in)visibility of torture; and the violence of legal rhetoric, institutions and professionals—legal violence—which consists of law’s complicity in legitimating, bringing about, and concealing state torture. As will gradually become apparent, the dominant visual-evidentiary paradigm, whose pitfalls were

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<sup>19</sup> For a survey of the definition(s) of torture in international and domestic law, see David Weissbrodt & Cheryl Heilman, *Defining Torture and Cruel, Inhuman, and Degrading Treatment*, 29 L. & INEQ. 343 (2011). On the history and language of prohibitions on torture in international law, see Nigel S. Rodley, *The Definition(s) of Torture in International Law*, 55 C.L.P. 467 (2002).

<sup>20</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>21</sup> John T. Parry, *What is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237, 246–49 (2003). For the counter-argument that the legal definition of “torture” should not be broadened, see, for example, Sanford Levinson, *In Quest of a “Common Conscience”: Reflections on the Current Debate About Torture*, 1 J. NAT’L SEC. L. & POL’Y 231, 238, 242 (2005); Marcy Strauss, *Torture*, 48 N.Y.U. L. REV. 201, 215 (2004).

<sup>22</sup> The longstanding scholarly debate over the meaning of violence exceeds the scope of this Article. Suffice it to note that while some have advocated circumscribing this concept to interpersonal physical or psychological harm, others have extended it beyond these boundaries. For the former position, see C. A. J. Coody, *The Idea of Violence*, 3 J. APPLIED PHIL. 3 (1986); RAYMOND WILLIAMS, *Violence*, in KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY 329, 331 (2d ed. 1983). For the latter, see PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER (1991); Johan Galtung, *Cultural Violence*, 27 J. PEACE RES. 291 (1990); Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RES. 167 (1969); see also Berta Esperanza Hernández-Truyol, *Sex, Culture, and Rights: A Re/Conceptualization of Violence for the Twenty-First Century*, 60 ALB. L. REV. 607 (1997) (formulating a jurisprudential version of the latter position: a gender-sensitive reconceptualization of violence as including male dominance and the subordination, marginalization, and subjugation of women). For further discussion of this debate, see Vittorio Bufacchi, *Two Concepts of Violence*, 3 POL. STUD. REV. 193 (2005); Willem de Haan, *Violence as an Essentially Contested Concept*, in VIOLENCE IN EUROPE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 27 (Sophie Body-Gendrot & Pieter Spierenburg eds., 2008). The similarity between this debate and that mentioned *supra* note 21 regarding how broadly to define “torture” is unsurprising given the strong (albeit often under-theorized) connection between torture and violence. It is worth noting that when considering the nature, effects, or legitimacy of violence in the context of this Article, one must bear in mind the specificity of the violence in question, namely state violence.

discussed above, is part and parcel of this representational and legal violence of state torture.

### C. *The Three Test Cases: The United States, Israel/Palestine, and Syria*

Before examining some central manifestations of the representational and legal violence of torture in the U.S., Israeli-Palestinian, and Syrian cases, a brief overview of each of these is in order. The United States has been criticized for torturing and abusing detainees overseas as part of its post-9/11 “war on terror” in Afghanistan, at the Guantánamo Bay detention facility, in Iraq—including the Abu Ghraib case discussed above—and elsewhere.<sup>23</sup> Since the Guantánamo facility was opened in 2002, the Department of Defense has held nearly 800 detainees there; at the time of writing, more than four years after President Obama’s deadline to close it, 155 detainees remain, of whom only a handful have been charged with any offense.<sup>24</sup>

In the Occupied Palestinian Territories, Israel has subjected Palestinians to its military law and tries them in its military courts.<sup>25</sup> Allegations of the abuse and torture of Palestinians in Israeli custody are rife, a decade after a Supreme Court ruling (discussed below) prohibited the routine use of “physical pressure” in interrogations. There have also been hundreds of accusations that Palestinian security services torture Palestinians in both the West Bank and the Gaza Strip.<sup>26</sup>

Syria has a long history of torture,<sup>27</sup> but the ongoing armed conflict<sup>28</sup> between the government and opposition has intensified global concerns about this issue. By April 2014, more than 150,000 Syrians, mostly civilians, were thought to have died, tens of thousands of others to have been arrested, and over two million

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<sup>23</sup> On the use of torture by the United States in this context, see generally ACLU, *ENDURING ABUSE: TORTURE AND CRUEL TREATMENT BY THE UNITED STATES AT HOME AND ABROAD* (2006), available at [http://www.aclu.org/files/safefree/torture/torture\\_report.pdf](http://www.aclu.org/files/safefree/torture/torture_report.pdf); INT’L COMM. OF THE RED CROSS, *REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE DETAINEES” IN CIA CUSTODY* (2007), available at [www.nybooks.com/icrc-report.pdf](http://www.nybooks.com/icrc-report.pdf); REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT (2013), available at <http://detaineetaskforce.org/read> [hereinafter CONSTITUTION PROJECT].

<sup>24</sup> *Guantánamo by the Numbers*, ACLU, <http://www.aclu.org/national-security/guantanamo-numbers> (last visited Jan. 22, 2014).

<sup>25</sup> On these military courts, see generally LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* (2005); Kathleen Cavanaugh, *The Israeli Military Court System in the West Bank and Gaza*, 12 J. CONFLICT & SEC. L. 197 (2007); Sharon Weill, *The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories*, 89 INT’L REV. RED CROSS 395 (2007).

<sup>26</sup> HUMAN RIGHTS WATCH, *ABUSIVE SYSTEM: FAILURES OF CRIMINAL JUSTICE IN GAZA* 18–20 (2012), available at [http://www.hrw.org/sites/default/files/reports/iopt1012ForUpload\\_0.pdf](http://www.hrw.org/sites/default/files/reports/iopt1012ForUpload_0.pdf); see also ADDAMEER, *STOLEN HOPE: POLITICAL DETENTION IN THE WEST BANK* 24–41 (2011), available at <http://addameer.org/userfiles/EN%20PA%20Violations%20Report%202009-2010.pdf> (examining individual cases of torture and other forms of cruel and inhumane treatment by Palestinian security services).

<sup>27</sup> Sune Haugbolle, *Imprisonment, Truth Telling and Historical Memory in Syria*, 13 MEDITERRANEAN POL. 261, 265–68 (2008); HUMAN RIGHTS WATCH, *SYRIA UNMASKED: THE SUPPRESSION OF HUMAN RIGHTS BY THE ASSAD REGIME* 54–77, 149–51 (1991).

<sup>28</sup> On the question of how to legally classify the current situation in Syria, see Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT’L L. 693 (2013).

people to have fled the country during this conflict.<sup>29</sup> According to testimonies of former detainees, as well as those of defectors from the Syrian military and intelligence forces, torture is commonly used in detention centers across the country, and in many cases has resulted in death.<sup>30</sup> Furthermore, some armed opposition groups in Syria have also been accused of capturing and torturing security force members, government supporters, and people identified as members of pro-government militias.<sup>31</sup>

There are obviously important differences between the United States, Israel/Palestine, and Syria, including those relating to torture. One is the level of visibility of state torture, and state violence generally, in each of these countries. Among the reasons for this particular disparity is that, according to NGO reports, media freedom is greater in the United States than in Israel<sup>32</sup> and is considerably greater in both these countries than in Syria.<sup>33</sup> In fact, Syria has been denounced as one of the world's most dangerous countries for the media.<sup>34</sup>

Such differences notwithstanding, as will be illustrated, the United States, Israel/Palestine, and Syria share comparable, if not common, features of torture. Moreover, in some circumstances, the very practice of torture transcends national borders. Thus, after 9/11, in addition to holding thousands of detainees overseas, the U.S. administration made increased use of so-called "extraordinary

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<sup>29</sup> AMNESTY INT'L, ANNUAL REPORT: SYRIA 2013 (2013), available at <http://www.amnestyusa.org/research/reports/annual-report-syria-2013>; *Syria Death Toll Over 150,000, Says Human Rights Body*, REUTERS (Apr. 1, 2014), <http://www.reuters.com/article/2014/04/01/us-syria-crisis-toll-idUSBREA300YX20140401>.

<sup>30</sup> HUMAN RIGHTS WATCH, TORTURE ARCHIPELAGO: ARBITRARY ARRESTS, TORTURE AND ENFORCED DISAPPEARANCES IN SYRIA'S UNDERGROUND PRISONS SINCE MARCH 2011, at 17–31 (2012), available at <http://www.hrw.org/sites/default/files/reports/syria0712webwcover.pdf>; *Syria: Visit Reveals Torture Chambers*, HUMAN RIGHTS WATCH (May 17, 2013), <http://hrw.org/news/2013/05/16/syria-visit-reveals-torture-chambers>.

<sup>31</sup> *Syria: Summary Killings and Other Abuses by Armed Opposition Groups*, AMNESTY INT'L (Mar. 14, 2013), [http://www2.amnesty.org.uk/sites/default/files/briefing\\_opposition\\_force\\_abuses.pdf](http://www2.amnesty.org.uk/sites/default/files/briefing_opposition_force_abuses.pdf); AMNESTY INT'L, *supra* note 29; *Syria: Armed Opposition Groups Committing Abuses*, HUMAN RIGHTS WATCH (Mar. 20, 2012), <http://www.hrw.org/news/2012/03/20/syria-armed-opposition-groups-committing-abuses>; Patrick Witty, *Witness to a Syrian Execution: "I Saw a Scene of Utter Cruelty"*, TIME (Sept. 12, 2013), <http://lightbox.time.com/2013/09/12/witness-to-a-syrian-execution-i-saw-a-scene-of-utter-cruelty>.

<sup>32</sup> Israeli journalists have generally been barred from the Occupied Palestinian Territories in recent years, and during the military offensive in the Gaza Strip from December 2008 to January 2009 Israeli authorities also banned foreign journalists from this territory. Furthermore, the Israeli military has been accused of numerous abuses against media workers in the occupied territories. REPORTERS WITHOUT BORDERS, ANNUAL REPORT 2012—ISRAEL (2012), available at <http://en.rsf.org/report-israel,154.html>.

<sup>33</sup> *10 Most Censored Countries*, COMM. TO PROTECT JOURNALISTS (May 2, 2012), <http://cpj.org/reports/2012/05/10-most-censored-countries.php>; FREEDOM HOUSE, FREEDOM OF THE PRESS 2013 (2013), available at <http://www.freedomhouse.org/report/freedom-press/freedom-press-2013>; *Press Freedom Index 2014*, REPORTERS WITHOUT BORDERS, <http://rsf.org/index2014/en-index2014.php> (last visited May 20, 2014).

<sup>34</sup> *IFJ Renews Call to UN and Governments to Halt Slaughter of Journalists After 121 Killings in Bloody 2012*, INT'L FED'N OF JOURNALISTS (Dec. 31, 2012), <http://africa.ifj.org/en/articles/ifj-renews-call-to-un-and-governments-to-halt-slaughter-of-journalists-after-121-killings-in-bloody-2012>; see also HUMAN RIGHTS WATCH, FALSE FREEDOM: ONLINE CENSORSHIP IN THE MIDDLE EAST AND NORTH AFRICA 66–90 (2005), available at <http://www.hrw.org/sites/default/files/reports/mena1105webwcover.pdf>; LESCH, *supra* note 1, at 92, 94, 118–21. Syria acquired some of its most sophisticated media surveillance systems from foreign software companies in the United States and elsewhere. See LESCH, *supra* note 1, at 118–19. This is a testament to the transnational character of state violence, which will be discussed shortly and throughout the rest of the Article.



renditions”—forcible and extrajudicial transfers of individuals for interrogation to countries with especially poor human rights records, including Syria.<sup>35</sup> A relatively well-known example is the case of Maher Arar, a Canadian-Syrian citizen whose rendition to Syria by the United States resulted in his torture in Syrian custody.<sup>36</sup> In spite of their central role in cases such as Maher Arar’s, the U.S. and Syrian governments alike have refused to participate in Canadian inquiries into the torture of Canadians abroad.<sup>37</sup>

There have also been cross-national links, material and symbolic, between the interrogation tactics of these different countries. According to written testimony and photographs, detainees in U.S. custody in Iraq were held in a high-stress position known as a “Palestinian hanging”,<sup>38</sup> though there is no evidence that this technique actually originated from Israel/Palestine, the use of this phrase outside Israel/Palestine attests, at the very least, to the transnational nature of counterterrorism discourses.<sup>39</sup> More broadly—beyond the context of torture—the United States and Israel have drawn on each other’s counterterrorism doctrines and policies extensively since 9/11.<sup>40</sup>

Alongside these cross-national ties, continuities, and similarities, another reason for framing this Article around the U.S., Israeli-Palestinian, and Syrian cases is the specific torture images examined in this Article. As suggested below, these

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<sup>35</sup> According to a recent report, Syria is among at least fifty-four foreign countries that participated in extraordinary rendition or secret detention with the United States. OPEN SOC’Y JUSTICE INITIATIVE, *GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION* 61–118 (2013), available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>. For further information, see *The Global Rendition System*, THE RENDITION PROJECT, <http://www.therenditionproject.org.uk/global-rendition/index.html> (last visited May 20, 2014) (mapping CIA rendition flights around the world). There have been no public allegations of torture as a result of extraordinary renditions during the Obama administration. CONSTITUTION PROJECT, *supra* note 23, at 321. However, the exact nature of extraordinary renditions under President Obama is unclear: First, the administration has not declared an end to this practice. OPEN SOC’Y JUSTICE INITIATIVE, *supra*, at 20. Second, in 2009, an unnamed official reportedly said that extraordinary renditions were still being used. KENT ROACH, *THE 9/11 EFFECT: COMPARATIVE COUNTER-TERRORISM* 225–26 (2011).

<sup>36</sup> Alan W. Clarke, *Rendition to Torture: A Critical Legal History*, 62 RUTGERS L. REV. 1, 52–63 (2009); Louis Fisher, *Extraordinary Rendition: The Price of Secrecy*, 57 AM. U. L. REV. 1405, 1436–42 (2008); Greg Laux, *Casenote: Arar with a Twist: Should a Bivens Remedy be Extended to a U.S. Citizen Subjected to Extraordinary Rendition? An Evaluation of Whether the Extension of Constitutional Tort Remedies Should be Based on Immigration Status*, 31 IMMIGR. & NAT’LITY L. REV. 1071, 1072–75, 1084–90 (2010); Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 28 REV. LITIG. 479, 482–86 (2008); Michael V. Sage, *Note: The Exploitation of Legal Loopholes in the Name of National Security: A Case Study on Extraordinary Rendition*, 37 CAL. W. INT’L L.J. 121, 121, 126–27 (2006); Mario Silva, *Extraordinary Rendition: A Challenge to Canadian and United States Legal Obligations Under the Convention Against Torture*, 39 CAL. W. INT’L L.J. 313, 336–43 (2009).

<sup>37</sup> ROACH, *supra* note 35, at 11–12.

<sup>38</sup> Gregory, *supra* note 7, at 87.

<sup>39</sup> Contrary to Derek Gregory’s claim that this technique “is known as a ‘Palestinian hanging’ from its use by the Israeli secret service in the occupied territories,” Gregory, *supra* note 7, at 87, Darius Rejali has argued that it is not actually an Israeli practice, and that the adjective “Palestinian” is instead meant to play on the fears Israeli torture evokes, DARIUS REJALI, *TORTURE AND DEMOCRACY* 355–56 (2007).

<sup>40</sup> On some similarities and links between Israeli and U.S. counterterrorism doctrines and policies, see generally Lisa Hajjar, *International Humanitarian Law and “Wars on Terror”*: A Comparative Analysis of Israeli and American Doctrines and Policies, 36 J. PALESTINE STUD. 21 (2006); Ersun N. Kurtulus, *The New Counterterrorism: Contemporary Counterterrorism Trends in the United States and Israel*, 35 STUD. CONFLICT & TERRORISM 37 (2012).

visual materials, which refer to these three particular cases, can serve as a resource for critically reimagining and engaging with the issue of state torture.

## I. REPRESENTATIONAL VIOLENCE

State torture is embedded in a certain representational economy—a web of forces and factors that determine, among other things, by whom and to what extent physical and mental torture can be seen before, during, and after its infliction. Violence is an ever-lurking effect of representation,<sup>41</sup> and in this particular context, representational state violence consists of the various practices and mechanisms state agents and institutions employ in their attempt to monopolize the representational economy of torture. Put differently, this representational violence involves state attempts to control the (in)visibility of torture—to determine what can be seen and said, and consequently what can be known in relation to state torture, what representations of torture can gain prominence, and what representations will be, or will at least seem to be, marginalized or excluded.

A somewhat crude spatio-temporal distinction can be drawn between two types of representational violence, denoted by the anatomical terms “proximal” and “distal.” Proximal representational violence manifests itself primarily at the particular time and place of physical or mental torture, such as the interrogation room or the detention facility. Examples of this type of representational violence include state agents’ use of cameras during interrogations or during physical and mental torture, and also practices such as blindfolding or hooding that are aimed at preventing detainees from seeing or obtaining information about their detention or torture. Distal representational violence, in comparison, extends beyond the enclosed space and time within which physical and mental torture operates. Examples of this type of representational violence are the secrecy that generally surrounds state torture, the destruction of audio-visual evidence of physical and mental torture, and the denial of such torture being used.

### A. Proximal Representational Violence

State torture often involves subjecting detainees to representational violence, including various practices designed to prevent them from seeing their place of detention or identifying state agents. Two such practices—the blindfolding and hooding of detainees—have been widespread in all three cases discussed here: the United States,<sup>42</sup> Israel/Palestine,<sup>43</sup> and Syria.<sup>44</sup>

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<sup>41</sup> On the violence of representation, see, for example, Elisabeth Bronfen, *Violence of Representation—Representation of Violence*, 1 LIT 303 (1990); Teresa de Lauretis, *The Violence of Rhetoric: Considerations on Representation and Gender*, in THE VIOLENCE OF REPRESENTATION: LITERATURE AND THE HISTORY OF VIOLENCE 239, 240 (Nancy Armstrong & Leonard Tennenhouse eds., 1989); see also FELMAN, *supra* note 3, at 85 (distinguishing between “a violence that harms or that seeks to hurt or kill and a violence that blinds or seeks to prohibit sight”); SLAVOJ ŽIŽEK, VIOLENCE: SIX SIDEWAYS REFLECTIONS 58–72 (2008) (discussing the violence of language); Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 921, 923, 937, 951, 957, 995 (1990) (discussing the violence of interpretation and of language); Galtung 1990, *supra* note 22, at 299–300 (discussing the violence of language and art).

<sup>42</sup> HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 2, 10–11, 20, 22, 25–26, 31, 34 (2004), available at <http://www.hrw.org/sites/default/files/reports/usa0604.pdf>; ACLU, *supra* note 23; INT’L

Other practices with similar purposes have also been in use. There have been reports, for instance, of CIA guards in interrogation sites overseas covering themselves in black from head to toe and communicating only by hand gestures.<sup>45</sup> Similarly, in 2000, during his trial for assaulting Palestinian children while transferring them to a detention facility, an Israeli Border Police soldier admitted to having presented himself to them under a false name. The soldier added that his colleagues had also called him by that name in front of the Palestinian detainees, and admitted this had been an accepted practice within his military company.<sup>46</sup> Although this Article focuses on visual aspects of representations and experiences of torture, these two last cases—and also torture techniques such as sound assault, isolation, and sleep deprivation—demonstrate that representational violence is sometimes auditory or involves other senses as well.

In some circumstances, while detainees are prevented from seeing certain sights and knowing certain details, they are rendered hyper-visible to state apparatuses and agents. The CIA, for example, recorded many of the interrogations it conducted at Guantánamo<sup>47</sup> and elsewhere overseas<sup>48</sup>—though the fate of these videotapes is a different matter, as explained below—and former detainees in CIA interrogation sites have recounted the presence of surveillance cameras in their cells.<sup>49</sup>

Another use of cameras is as a means for torturers to experience, perform, visualize, and, in a sense, potentially preserve their violence.<sup>50</sup> When thus brought into play, the camera can prompt, augment, and orchestrate physical and mental torture, and in this respect becomes both a witness to and complicit in it.<sup>51</sup> Thus photography and videography, whose unwitting contribution to state dismissal of torture allegations was discussed earlier, can also be part of the violence of torture.<sup>52</sup> In addition to the Abu Ghraib pictures discussed above, another (far less-

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COMM. OF THE RED CROSS, *supra* note 23.

<sup>43</sup> CATHERINE COOK, ADAM HANIEH & ADAH KAY (IN ASSOCIATION WITH DEFENCE FOR CHILDREN INT'L—PALESTINE), *STOLEN YOUTH: THE POLITICS OF ISRAEL'S DETENTION OF PALESTINIAN CHILDREN* (2004); B'TSELEM & HAMOKED, *KEPT IN THE DARK: TREATMENT OF PALESTINIAN DETAINEES IN THE PETAH TIKVA INTERROGATION FACILITY OF THE ISRAELI SECURITY AGENCY* 14–16, 41, 49–51, 59 (2010), available at [http://www.btselem.org/download/201010\\_kept\\_in\\_the\\_dark\\_eng.pdf](http://www.btselem.org/download/201010_kept_in_the_dark_eng.pdf).

<sup>44</sup> HUMAN RIGHTS WATCH, *supra* note 30.

<sup>45</sup> LALEH KHALILI, *TIME IN THE SHADOWS: CONFINEMENT IN COUNTERINSURGENCIES* 134–35 (2013).

<sup>46</sup> CrimC (Jer) 204/99 State of Israel v. Nakash, ¶¶ 4, 30, 34, 36–37, 42, 47 (Jan. 25, 2000), available at [http://www.nevo.co.il/psika\\_html/mechozi/k00020499p.htm](http://www.nevo.co.il/psika_html/mechozi/k00020499p.htm).

<sup>47</sup> Mark Danner, *The Twilight of Responsibility: Torture and the Higher Deniability*, 49 HOUS. L. REV. 71, 74 (2012); Mark Denbeaux et al., *Captured on Tape: Interrogating and Videotaping of Detainees at Guantánamo*, 41 SETON HALL L. REV. 1307, 1308–09 (2011).

<sup>48</sup> Douglas Cox, *Burn After Viewing: The CIA's Destruction of the Abu Zubaydah Tapes and the Law of Federal Records*, 5 J. NAT'L SECURITY L. 131, 134–39 (2011).

<sup>49</sup> KHALILI, *supra* note 45, at 128–35.

<sup>50</sup> For critical discussion of the phenomenon of soldiers photographing their abuse of detainees, see generally Noel Whitty, *Soldier Photography of Detainee Abuse in Iraq: Digital Technology, Human Rights and the Death of Baha Mousa*, 10 HUM. RTS. L. REV. 689 (2010).

<sup>51</sup> BUTLER, *supra* note 2, at 83–84.

<sup>52</sup> On another aspect of the potential involvement of photographs—real or imagined—in interrogations, see ARIELLA AZOULAY, *CIVIL IMAGINATION: A POLITICAL ONTOLOGY OF PHOTOGRAPHY* 23 (2010) (Louise Bethlehem trans., 2012) (adding that “[w]hen an interrogator . . . tells a detainee that he has a photograph showing the detainee in such or such a situation, the

known) case exemplifying this phenomenon will be examined shortly. This case concerns four Israeli Border Police soldiers who videotaped their physical abuse of Palestinians in the West Bank—abuse that led to the death of one Palestinian and the injury of at least three others.<sup>53</sup>

### B. Distal Representational Violence

Distal representational violence differs from proximal representational violence in its broader spatio-temporal scope: It begins long before the actual act of physical and mental torture, continues long after this act ends, and operates in substantial part outside the facility where this act takes place. Three important forms of distal representational violence, whose common objective is to conceal physical and mental torture, will now be examined: secrecy, denial, and destruction of audio-visual evidence.

Secrecy has come to be a defining feature of state torture. In modernity, torture has generally ceased to be a public spectacle of scarring or branding the body of the tortured to proclaim state power and deter others. Instead, the emphasis has shifted toward disciplining or intimidating the prisoner alone while hiding torture from the public.<sup>54</sup> This distinguishes state torture from some other types of state violence, such as state-sponsored political assassinations—now commonly termed “targeted killings”—which have transformed in recent years from a largely clandestine practice to one conducted more visibly.<sup>55</sup> Interrogational torture, in particular, owes much of its effectiveness and pervasiveness—in the United States,<sup>56</sup> Syria,<sup>57</sup> Israel,<sup>58</sup> and elsewhere—to usually taking place beyond public sight,<sup>59</sup> in “the dark . . . chamber,” as J. M. Coetzee has aptly called the

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interrogator does not necessarily reveal the photograph to the detainee—if it exists at all. . . . [Thus,] the mere possibility of the existence of a photograph of us taken without our knowledge might come to affect us with as much potency as if we had encountered the photograph itself”). On U.S. soldiers’ recording of their human rights abuses in Afghanistan beyond the torture context, see Graham Bowley & Matthew Rosenberg, *Video Inflames a Delicate Moment for U.S. in Afghanistan*, N.Y. TIMES (Jan. 12, 2012), <http://www.nytimes.com/2012/01/13/world/asia/video-said-to-show-marines-urinating-on-taliban-corpse.html>; Thom Shanker & Graham Bowley, *Images of G.I.’s and Remains Fuel Fears of Ebbing Discipline*, N.Y. TIMES (Apr. 18, 2012), <http://www.nytimes.com/2012/04/19/world/asia/us-condemns-photo-of-soldiers-posing-with-body-parts.html>.

<sup>53</sup> In 2003, these soldiers were convicted of manslaughter, aggravated assault, kidnapping for the purpose of battery, and other offenses. For the separate court decisions concerning these soldiers (due to their different roles in the abuse), see CrimC (Jer) 907/05 State of Israel v. Bassem (Sept. 22, 2005), available at [http://www.nevo.co.il/psika\\_html/mechozi/m05000907.htm](http://www.nevo.co.il/psika_html/mechozi/m05000907.htm); CrimC (Jer) 157/03 State of Israel v. Butvika (Sept. 2, 2008), available at [http://www.nevo.co.il/psika\\_html/mechozi/m03000157-324.htm](http://www.nevo.co.il/psika_html/mechozi/m03000157-324.htm); CrimC (Jer) 3172/07 State of Israel v. Lalza (Apr. 28, 2008), available at [http://www.nevo.co.il/psika\\_html/mechozi/m07003172-297.htm](http://www.nevo.co.il/psika_html/mechozi/m07003172-297.htm). For the Supreme Court’s decisions in appeals of the State and two of the defendants, see CrimA 10594/05 Bassem v. State of Israel (May 22, 2006), available at <http://elyon1.court.gov.il/files/05/940/105/O03/05105940.o03.pdf>; CrimA 5136/08 State of Israel v. Lalza (Mar. 31, 2009), available at <http://elyon1.court.gov.il/files/08/360/051/r05/08051360.r05.pdf>.

<sup>54</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3–31 (Alan Sheridan trans., 1995) (1975).

<sup>55</sup> Susanne Krasmann, *Targeted Killing and Its Law: On a Mutually Constitutive Relationship*, 25 LEIDEN J. INT’L L. 665, 668–70 (2012).

<sup>56</sup> Alan Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT’L L. REV. 1, 13–41 (2008).

<sup>57</sup> HUMAN RIGHTS WATCH, *supra* note 30, at 18.

<sup>58</sup> HAJJAR, *supra* note 25, at 67–75, 188–99.

<sup>59</sup> Gorelick, *supra* note 10.

interrogation room in another context.<sup>60</sup> It is for this reason that photos of torture, on the rare occasions that they are publicly available, usually depict events that occurred outside the interrogation room. Indeed, the incidents shown in the Abu Ghraib pictures did not take place in interrogation rooms, but rather were meant, among other things, to “soften up” detainees for interrogation.<sup>61</sup> While interrogations of suspected terrorists in U.S. custody have occasionally been videotaped, those of Palestinians in Israeli custody are generally not videotaped, nor apparently are those of anti-government activists in Syria.<sup>62</sup>

All three countries have sought increased control of detainees by drawing a veil of secrecy beyond the interrogation room over detention facilities at large. In 2009, President Obama tried to thwart the publication of additional photographs and videos of torture at Abu Ghraib.<sup>63</sup> A year later, journalists were expelled from Guantánamo for publishing the name of a witness testifying on interrogation techniques.<sup>64</sup> Most prison troops at Guantánamo, who until recently could decide for themselves whether to give reporters their names, are now under orders to withhold this information.<sup>65</sup> Syria, too, limits outside observers’ access to its detention centers, thereby hindering efforts to establish how many people have been detained since the beginning of the anti-government protests in 2011.<sup>66</sup> Moreover, in addition to specific details about detention facilities, the very existence of some facilities has also been hidden: The CIA has operated clandestine interrogation and detention sites at inaccessible U.S. military bases (or “black sites”),<sup>67</sup> and until 2002, Israel concealed the existence of Facility 1391, which was used for interrogation and detention purposes.<sup>68</sup>

Alongside secrecy, another form of representational violence is state denial of torture testimonies. The shift in modernity toward concealing state torture from

<sup>60</sup> J.M. Coetzee, *Into the Dark Chamber: The Novelist and South Africa*, N.Y. TIMES (Jan. 12, 1986), <http://www.nytimes.com/books/97/11/02/home/coetzee-chamber.html>.

<sup>61</sup> Johanna Bond, *A Decade After Abu Ghraib: Lessons in “Softening Up” the Enemy and Sex-Based Humiliation*, 31 LAW & INEQ. 1, 8–9 (2012). Another, earlier example is a photograph showing a U.S. soldier supervising the waterboarding of a captured North Vietnamese soldier that appeared on the front page of the Washington Post in 1968. The photograph, whose publication eventually led to a court-martial, was taken outdoors. Walter Pincus, *Waterboarding Historically Controversial*, WASH. POST (Oct. 5, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>; Eric Weiner, *Waterboarding: A Tortured History*, NPR (Nov. 3, 2007), <http://www.npr.org/2007/11/03/15886834/waterboarding-a-tortured-history>.

<sup>62</sup> See *supra* notes 47–48, *infra* notes 127–129, and accompanying text.

<sup>63</sup> CONSTITUTION PROJECT, *supra* note 23, at 316–17; *Concern at ‘Prisoner Abuse’ Photographs*, *supra* note 8.

<sup>64</sup> Jeremy W. Peters, *Pentagon Reinstates Banned Guantánamo Reporter*, N.Y. TIMES (July 9, 2010), <http://mediadecoder.blogs.nytimes.com/2010/07/09/pentagon-reinstates-banned-guantanamo-reporter/>.

<sup>65</sup> Carol Rosenberg, *‘Transparent’ detention at Guantánamo? Not anymore*, MIAMI HERALD (Jan. 4, 2014), [http://www.miamiherald.com/2014/01/04/3852565\\_transparent-detention-at-guantanamo.html](http://www.miamiherald.com/2014/01/04/3852565_transparent-detention-at-guantanamo.html).

<sup>66</sup> HUMAN RIGHTS WATCH, *supra* note 30, at 12.

<sup>67</sup> While an executive order Obama issued in 2009 ordered the closure of CIA “detention facilities,” this term excluded facilities for “short-term” detention before rendition to other countries. The Department of Defense has admitted that it continues to use such facilities. OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 35, at 20; CONSTITUTION PROJECT, *supra* note 23, at 329.

<sup>68</sup> KHALILI, *supra* note 45, at 128–33. According to the Israeli authorities, Facility 1391 has not been used since 2006, and it was only ever intended for the special cases of detainees from outside Israel/Palestine. *Id.* at 129–30.

the public, discussed above,<sup>69</sup> also gave rise to the deniability of that torture.<sup>70</sup> This categorical denial goes beyond the doubts concerning testimony reliability and accuracy intrinsic to legal discourses, potentially making the alleged torture invisible<sup>71</sup> to anyone other than the state<sup>72</sup> and sometimes the torture victim. The Israeli authorities, for example, tend to deny accusations of interrogational abuse or torture,<sup>73</sup> and Palestinians making such accusations have often faced mistrust from the Israeli (and to a large degree the U.S.) media and public.<sup>74</sup> In addition, Palestinians reporting abuse and torture in Israeli custody have occasionally been described as unreliable and even immoral by Israeli officials<sup>75</sup> and the alleged abusers. During the abovementioned trial of the Israeli Border Police soldier, the defendant accused his Palestinian victims of having coordinated their testimonies and added: “Arabs tend to exaggerate. And if they get a chance to knock over [i.e., to frame] anybody—they would do so in a big way.”<sup>76</sup>

Lastly, another noteworthy form of representational violence is the destruction of visual evidence of physical and mental torture. Torturers themselves sometimes produce such visual evidence, as in the previously mentioned case of the Israeli soldiers who videotaped their abuse of Palestinians in the West Bank.<sup>77</sup> But in that case, the abusive soldiers eventually decided to destroy the potentially incriminating videotape.<sup>78</sup> Potentially incriminating visual evidence can also be produced when interrogations are videotaped, as they were by the CIA.<sup>79</sup> But here too, in 2005, CIA officials destroyed (at least) two interrogation videotapes.<sup>80</sup> According to publicly available documents, the CIA’s initial instructions were to retain the videotapes, but by early 2003 it came to regard them as a security risk to the officers filmed in them and to the U.S. public in general.<sup>81</sup> Other interrogation videotapes, on which the charges against

<sup>69</sup> *Supra* note 54 and accompanying text.

<sup>70</sup> PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 2–3 (2008).

<sup>71</sup> SCARRY, *supra* note 2, at 9, 56.

<sup>72</sup> “The state,” however, is never a monolithic entity. *See, e.g.*, Thomas Blom Hansen & Finn Stepputat, *Introduction: States of Imagination*, in STATES OF IMAGINATION: ETHNOGRAPHIC EXPLORATIONS OF THE POSTCOLONIAL STATE 1, 14 (Thomas Blom Hansen & Finn Stepputat eds., 2001); Jeffrey W. Rubin, *The State as Subject*, 15 POL. POWER & SOC. THEORY 107, 108–11 (2002).

<sup>73</sup> There are a few notable exceptions to this tendency, such as the 1987 Landau Commission report commissioned by the Israeli government. For critical discussion of that report, see *Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, 23 ISR. L. REV. 141 (1989) (discussing the Landau Commission report through multiple contributions to a written academic symposium). Another exceptional example is a 1999 Israeli Supreme Court ruling on interrogational torture, some of whose problematic ramifications are mentioned *infra* notes 109–110, 113, and accompanying text.

<sup>74</sup> Allen, *supra* note 13, at 173.

<sup>75</sup> HAJJAR, *supra* note 25, at 67, 69.

<sup>76</sup> CrimC (Jer) 204/99, *supra* note 46, ¶ 42.

<sup>77</sup> *See supra* note 53 and accompanying text.

<sup>78</sup> The defendants also disposed of other potentially incriminating evidence, coordinated their stories to avoid suspicion, denied all accusations when a police investigation was opened, and threatened a colleague who testified against them in court. CrimC (Jer) 907/05, *supra* note 53; CrimC (Jer) 157/03, *supra* note 53; CrimC (Jer) 3172/07, *supra* note 53.

<sup>79</sup> *See supra* notes 47–48 and accompanying text.

<sup>80</sup> Denbeaux et al., *supra* note 47, at 1308–09.

<sup>81</sup> Cox, *supra* note 48, at 131, 134–42; Denbeaux et al., *supra* note 47, at 1307.

Guantánamo detainees were based, were said to have “disappeared.”<sup>82</sup> Once these tapes were destroyed or became unavailable, claims of torture in CIA interrogations became virtually impossible to prove—especially given the dominant visual-evidentiary paradigm that regards verbal torture testimonies as inferior to photographic or video evidence.<sup>83</sup>

### C. *The Bigger Picture: Domination through (In)visibility*

State torture comprises not only a subject’s corporeal encounter with the state or its extensions, but also the representational violence whereby the state seeks to determine to whom torture will be visible and from whom it should remain cloaked. As shown above, this representational state violence includes, among other things, restricting detainees’ view and knowledge of their physical and mental torture; keeping interrogation and detention sites invisible and unknown to the public; destroying potentially incriminating audio-visual evidence; and denying, often categorically, the use of torture. Such forms of representational violence call into question President Bush’s assertion, in his radio address to the American people four days after 9/11, that terrorists “believe they are invisible. Yet they are mistaken. They will be exposed . . .”<sup>84</sup> Visually speaking, counterterrorism, rather than fully exposing the nation’s alleged enemies, has in some respects shrouded them in a veil of invisibility. Thus, both non-state terrorism and state torture involve representational violence, but in different ways: Whereas non-state terrorism is designed primarily to produce traumatizing spectacles,<sup>85</sup> state torture involves the concealment of certain sights and images. And though some forms of representational violence—such as the use of cameras during interrogation or torture—are intended to make subjects, sights, and images of state violence hyper-visible, this hyper-visibility, as explained above, is meant to operate only on the state’s terms.

These various forms of representational violence are both immediate and mediate: They impact those subject to physical and mental torture, and also, in a far different manner, others—actual or potential witnesses to acts or representations of such torture. This amalgamation of immediate and mediate effects eludes the currently dominant conception of torture. For instance, the U.N. guidelines for documentation of torture and its consequences, known as the Istanbul Protocol, classify practices such as blindfolding or hooding as torture on account of their resulting “[d]eprivation of normal sensory stimulation . . .”<sup>86</sup> This conception, however, does not encompass all the mental suffering brought about by state torture: In addition to sensory deprivation, proximal representational violence of

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<sup>82</sup> Lisa Hajar, *An Army of Lawyers*, THE NATION (Dec. 7, 2005), <http://www.thenation.com/article/army-lawyers>.

<sup>83</sup> See *supra* text accompanying notes 12–16.

<sup>84</sup> J. Maggio, *The Presidential Rhetoric of Terror: The (Re)Creation of Reality Immediately after 9/11*, 35 POL. & POL’Y 810, 826 (2007).

<sup>85</sup> MITCHELL, *supra* note 7, at 63–64.

<sup>86</sup> U.N. HIGH COMM’R HUMAN RIGHTS, THE ISTANBUL PROTOCOL: MANUAL OF EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, at 29, ¶ 145(n), U.N. Doc. HR/P/PT/8/Rev.1, U.N. Sales No. E.04.XIV.3 (1999).

this sort is also designed to deny detainees—and as a result, the general public—access to potentially incriminating sights and information. The detainees' consequent inability to identify their perpetrators or the place of torture can aggravate their sense of powerlessness vis-à-vis the state, both in real time (while in custody) and later on, for example if the state uses it to deny their accusations. Proximal representational violence (blindfolding or hooding) thus intertwines with distal representational violence (state denial of torture allegations)—demonstrating yet again how the impact of proximal violence extends beyond the particular time and place of its infliction. This representational violence to which detainees are subjected in turn affects the extent and nature of publicly available information (visual and other) on state torture, thus influencing the way physical and mental torture is mediated to others subsequent to its occurrence. While certain sights might be horrifying, being prevented from seeing and knowing can therefore be no less so for detainees as well as for the general public.<sup>87</sup> For the former, the “[d]eprivation of normal sensory simulation,” while indeed traumatic, does not fully describe this ordeal; for the latter, the absence of certain representations of physical and mental torture leaves much to the imagination and therefore invites unnerving speculation on the horrors of torture.<sup>88</sup>

Conversely, distal representational violence (such as the secrecy and denial of state torture), while manifesting itself in the way torture is mediated outside the time and place of detention, also informs the actual infliction and experience of physical and mental torture. States' desire to keep torture invisible has, for example, led to their increased use of torture methods that leave no lasting visible physical marks.<sup>89</sup> At the same time, in the case of the United States, the decline of such techniques has occurred in tandem with “extraordinary renditions” to other countries where interrogational torture is likely to leave physical marks.<sup>90</sup> As this dynamic exemplifies, not only does the dominant visual-evidentiary paradigm inform the creation and reception of torture images, it also—by privileging bodily wounds over other forms of evidence<sup>91</sup>—affects the actual use of physical and mental torture.

State torture is thus part of a broader state violence, a violence of domination by means of (in)visibility. Not always entirely coherently,<sup>92</sup> state

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<sup>87</sup> MITCHELL, *supra* note 7, at 63 (“Prohibit something from being shown, hide it away from view, and its power as a concealed image outstrips anything it could have achieved by being shown.”); GILLIAN ROSE, *VISUAL METHODOLOGIES: AN INTRODUCTION TO THE INTERPRETATION OF VISUAL MATERIALS* 165 (2d ed. 2007) (“[I]nvisibility can have just as powerful effects as visibility.”).

<sup>88</sup> Cf. ALLEN FELDMAN, *FORMATIONS OF VIOLENCE: THE NARRATIVE OF THE BODY AND POLITICAL TERROR IN NORTHERN IRELAND* 114 (1991) (discussing the effects of rumours about violence in interrogations on the general public, as well as the lasting effects of interrogation on suspects).

<sup>89</sup> ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR* 8, 12 (2006); REJALI, *supra* note 39, at 8–9, 44, 75, 381–82, 408–17. See also, in relation to Israel/Palestine, George E. Bisharat, *Courting Justice? Legitimation in Lawyering under Israeli Occupation*, 20 L. & SOC. INQUIRY 349, 379–80 (1995); James Ron, *Varying Methods of State Violence*, 51 INT'L ORG. 275, 276, 285–86 (1997).

<sup>90</sup> Seth F. Kreimer, “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience, 1 J. NAT'L SEC. L. 187, 198 (2005); see also *supra* note 35 and accompanying text.

<sup>91</sup> See *supra* notes 13–14 and accompanying text.

<sup>92</sup> See, e.g., Jon Coaffee, Paul O'Hare & Marian Hawkesworth, *The Visibility of (In)security: The Aesthetic of Planning Urban Defences Against Terrorism*, 40 SECURITY DIALOGUE 489, 496–98 (2009) (characterizing urban defenses against terrorism in the post 9/11 United States and United Kingdom as



violence of this sort operates, as Laleh Khalili has observed, through “powerful state actors compelling subject populations to be visible to their own police and security forces, while preventing them from being visible to audiences not chosen by the state.”<sup>93</sup> Admittedly, the actual effects of this representational violence may differ from its intended consequences (depending on myriad factors), but this diminishes neither the significance nor the potency of this violence.

Placing state torture within this broader political-representational context is crucial for getting to grips with the circumstances under which it occurs. Take the previously mentioned case of the Israeli soldiers who made and later destroyed a videotape of their abuse of Palestinians.<sup>94</sup> These events took place in a specific location—Hebron—the second largest city in the West Bank (after East Jerusalem), which is governed by a particular regime of (in)visibility. According to an Israeli military intelligence officer, the Israeli military has placed about a hundred closed circuit cameras in the Hebron city center, making it “the most documented place on earth.”<sup>95</sup> At the same time, over the years oppression by the Israeli military and harassment by Israeli settlers have forced Palestinians out of the city center, resulting in the near invisibility of the Palestinian population to visitors to this part of the city.<sup>96</sup> The (in)visibility of torture thus operates within a broader matrix of state-induced (in)visibility.<sup>97</sup>

The representational economy of torture is nonetheless a contested and contestable space, inhabited not only by the state and its extensions but also by human rights organizations and others, who increasingly utilize photography and videography in an attempt to record, bring to light, and potentially minimize state violence.<sup>98</sup> International NGO Avaaz, for instance, has trained citizen journalists in Syria and provided them with cameras, laptops, and satellite equipment to disseminate their materials.<sup>99</sup> Israeli NGO B’Tselem likewise distributes video

evincing certain “aesthetic paradoxes”). On the instability, unpredictability, and entropy of violence in general, see BRUCE B. LAWRENCE & AISHA KARIM, *General Introduction: Theorizing Violence in the Twenty-First Century*, in ON VIOLENCE: A READER 1, 1, 7, 14 (2007).

<sup>93</sup> Laleh Khalili, *Palestinians: The Politics of Control, Invisibility, and the Spectacle, in MANIFESTATIONS OF IDENTITY: THE LIVED REALITY OF PALESTINIAN REFUGEES IN LEBANON* 125, 140 (Muhammad Ali Khalidi ed., 2010); see also Elia Zureik, *Constructing Palestine Through Surveillance Practices*, 28 BRIT. J. MIDDLE EASTERN STUD. 205 (2001).

<sup>94</sup> *Supra* notes 53, 76–77 and accompanying text.

<sup>95</sup> Amir Buhbut, *Intelligence Officer: This Is How Hebron Became the IDF’s Nightmare*, WALLA NEWS (Oct. 5, 2012) (Hebrew), <http://news.walla.co.il/?w=/2689/2572849>.

<sup>96</sup> B’TSELEM & ASS’N FOR CIVIL RIGHTS IN ISR., GHOST TOWN: ISRAEL’S SEPARATION POLICY AND FORCED EVICTION OF PALESTINIANS FROM THE CENTER OF HEBRON (May 2007), available at [http://www.btselem.org/download/200705\\_hebron\\_eng.pdf](http://www.btselem.org/download/200705_hebron_eng.pdf); Joel Beinin, *Mixing, Separation, and Violence in Urban Spaces and the Rural Frontier in Palestine*, 21 ARAB STUD. J. 14 (2013).

<sup>97</sup> See also, in relation to the United States, DEREK GREGORY, *THE COLONIAL PRESENT: AFGHANISTAN, PALESTINE, IRAQ* 52–53, 67–68 (2004) (counterposing restricting public access to images of Afghan casualties of U.S. attacks, on the one hand, to the hyper-visibility of the attacks on the World Trade Center, on the other).

<sup>98</sup> Allen, *supra* note 13; Ruthie Ginsburg, *Taking Pictures Over Soldiers’ Shoulders: Reporting on Human Rights Abuse from the Israeli Occupied Territories*, 10 J. HUM. RTS. 17 (2011); Sam Gregory, *Transnational Storytelling: Human Rights, WITNESS, and Video Advocacy*, 108 AM. ANTHROPOLOGIST 195 (2006); Sam Gregory, *Cameras Everywhere: Ubiquitous Video Documentation of Human Rights, New Forms of Video Advocacy, and Considerations of Safety, Security, Dignity and Consent*, 2 J. HUM. RTS. PRACTICE 191 (2010).

<sup>99</sup> *Syrian Activists & Lawyers Fear At Least 28,000 Forced Disappearances in Syria*, AVAAZ.ORG (Oct. 18, 2012), [https://secure.avaaz.org/act/media.php?press\\_id=377](https://secure.avaaz.org/act/media.php?press_id=377).

cameras to Palestinians in the occupied territories to enable them to document and present to the Israeli and international public violations of their rights.<sup>100</sup> “Video documentation,” explains B’Tselem, “lends corroboration to Palestinians’ claims of rights breached, provides evidence for criminal investigations, and illustrates the harsh reality of life under occupation.”<sup>101</sup> Cameras in nongovernmental hands can thus become weapons in the visual war on state violence, or as an Israeli soldier recently put it, “A commander or an officer sees a camera and becomes a diplomat, calculating every rubber bullet, every step. It’s intolerable, we’re left utterly exposed. The cameras are our kryptonite.”<sup>102</sup>

In this light, attempts to think—let alone think critically—about state torture and its socio-political context must involve a close examination of the representational economy of state torture. There is, however, another piece to the puzzle requiring investigation: the law’s implication in state torture, and the relationship between this legal violence and the other types of violence discussed thus far—representational, physical, and mental.

## II. LEGAL VIOLENCE

Like the representational economy of state torture, its legal economy is a site of contestation. Law lends itself to competing uses and interpretations—including by states, which seek to use it, as they use various mechanisms of (in)visibility, to monopolize violence.<sup>103</sup> Thus, along with its representational, physical, and mental dimensions, the violence of state torture is also partly legal in nature: all too often, states use torture either by actively relying on law or by benefiting from law’s indifference. Inasmuch as it facilitates and legitimizes torture, legal violence, like the representational violence with which it is interrelated, causes physical and psychological pain and suffering—even if it does so seemingly less directly than the sort of acts that law itself defines as “torture.”<sup>104</sup> Also like other types of state violence (representational, physical, and mental), legal violence aims at closing the door on certain socio-political possibilities—including resistance, practical and theoretical, to contentious state practices.<sup>105</sup>

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<sup>100</sup> B’Tselem’s *Camera Project*, B’TSELEM, [http://www.btselem.org/video/cdp\\_background](http://www.btselem.org/video/cdp_background) (last visited May 20, 2014).

<sup>101</sup> *Israeli Military Must Permit Video Documentation in Occupied Territories and Conduct Investigation of Attack on Photographers*, B’TSELEM (Dec. 18, 2012), [http://www.btselem.org/press\\_releases/20121218\\_allow\\_video\\_documentation](http://www.btselem.org/press_releases/20121218_allow_video_documentation).

<sup>102</sup> Itamar Fleishman, *Soldiers: Our Hands Are Being Tied*, YNET NEWS (Oct. 12, 2012), <http://www.ynetnews.com/articles/0,7340,L-4317755,00.html>.

<sup>103</sup> WALTER BENJAMIN, *Critique of Violence*, in *SELECTED WRITINGS VOL 1*, at 1237, 239 (Marcus Bullock & Michael Jennings eds., Edmund Jephcott trans., 1999) (1920); MAX WEBER, *Religious Rejections of the World and Their Directions*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 323, 334 (Hans H. Gerth & Charles Wright Mills eds. and trans., 2009).

<sup>104</sup> Cf. Johan Galtung & Tord Höivik, *Structural and Direct Violence: A Note on Operationalization*, 8 J. PEACE RES. 73, 73 (1971) (arguing that structural violence “kills, although slowly, and undramatically from the point of view of direct violence”).

<sup>105</sup> Cf. Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 789 (1982) (“A relationship of violence acts upon a body or upon things; it forces, it bends, it breaks on the wheel, it destroys, or it closes the door on all possibilities.”).

### A. Law's Complicity in the Physical and Mental Violence of Torture

The Bush administration went to great lengths to interpret and move the law in the direction of permitting coercive interrogation tactics and extraordinary renditions to countries with poor human rights records. Epitomizing this trend are the (in)famous “torture memos” drafted by U.S. government lawyers, which, among other things, provided legal arguments in support of the administration’s use of highly controversial “enhanced interrogation techniques.”<sup>106</sup> Two days after his inauguration in early 2009, President Obama issued an executive order limiting permitted interrogation methods to those listed in the 2006 Army Field Manual; however, according to human rights organizations, some of these listed methods constitute torture.<sup>107</sup> The Israeli occupation too has, since its inception, been shaped by lawyers, maintained through legal institutions, and justified by Israel on the basis of legal arguments.<sup>108</sup> This includes the previously mentioned 1999 ruling of the Israeli Supreme Court,<sup>109</sup> which, while prohibiting “physical pressure” in interrogations, held that interrogators who employ it in “exceptional circumstances” might be exempt from criminal responsibility under the “necessity defense.”<sup>110</sup> The legalism<sup>111</sup> of the Israeli occupation has played a major part in making the torture of Palestinians possible,<sup>112</sup> and indeed hundreds of sworn affidavits collected from Palestinian detainees since the Supreme Court’s ruling indicate the persistence of interrogational torture and abuse.<sup>113</sup>

<sup>106</sup> On Bush administration lawyers’ support of such controversial interrogation measures, see M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389 (2006); Clarke, *supra* note 56; Clarke, *supra* note 36; Kreimer, *supra* note 90; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1452–60 (2005); Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT’L L.J. 193 (2010); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2 UTAH L. REV. 345 (2007).

<sup>107</sup> CONSTITUTION PROJECT, *supra* note 23, at 326–27; *Close Torture Loopholes in the Army Field Manual*, CTR. FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/get-involved/action/close-torture-loopholes-army-field-manual> (last visited Jan. 26, 2014).

<sup>108</sup> HAJJAR, *supra* note 25; IDITH ZERTAL & AKIVA ELДАР, LORDS OF THE LAND: THE WAR OVER ISRAEL’S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967–2007, at 341, 343–44, 361–71 (Vivian Eden, trans., 2007); Bisharat, *supra* note 89, at 349, 352–53, 390; Emma Playfair, *Playing on Principle? Israel’s Justification for its Administrative Acts in the Occupied West Bank*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 205 (Emma Playfair ed., 1992); Avram Bornstein, *Palestinian Prison Ontologies*, 34 DIALECTICAL ANTHROPOLOGY 459, 463–64 (2010); Eyal Weizman, *Legislative Attack*, 27 THEORY, CULTURE & SOC’Y 11, 13–14 (2010).

<sup>109</sup> HCJ 5100/94 Pub. Comm. Against Torture in Isr. v. Israeli Government 53(4) PD 817 (Sept. 6, 1999), translation available at [http://elyon1.court.gov.il/files\\_eng/94/000/051/a09/94051000.a09.pdf](http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf).

<sup>110</sup> Barak Cohen, *Democracy and the Mis-Rule of Law: The Israeli Legal System’s Failure to Prevent Torture in the Occupied Territories*, 12 IND. INT’L & COMP. L. REV. 75, 82–84 (2001); Catherine M. Grosso, *International Law in the Domestic Arena: The Case of Torture in Israel*, 86 IOWA L. REV. 305, 327 (2000); Ardi Imseis, “Moderate” Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods, 5 INT’L J. HUM. RTS. 71, 80 (2001).

<sup>111</sup> Judith Shklar has defined legalism as, among other things, “a social ethos which gives rise to the political climate in which judicial and other legal institutions flourish . . . . Legalism is, above all, the operative outlook of the legal profession . . . .” JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 8 (2d ed. 1986); see also Neil MacCormick, *The Ethics of Legalism*, 2 RATIO JURIS 184, 184 (1989).

<sup>112</sup> Cohen, *supra* note 110, at 95–104.

<sup>113</sup> Bana Shoughry-Badarne, *A Decade After the High Court of Justice “Torture” Ruling, What’s*

In countries such as the United States and Israel, which view their law-abiding image as a central source for domestic and international legitimacy, law may be more likely to be actively involved in torture,<sup>114</sup> as compared with authoritarian regimes such as Syria's. Nonetheless, in Syria too, state torture and law are no strangers: In 2012, Syria adopted a broad Counterterrorism Law and set up a Counterterrorism Court, which have reportedly been used alongside Syria's longstanding military field courts to detain, torture, and prosecute tens of thousands of people for activities such as peaceful demonstrations and distribution of humanitarian aid. According to a Syrian lawyer working before the Counterterrorism Court, forced confessions extracted during interrogations under pressure or torture are admitted as evidence and often serve as the only evidence against the defendant.<sup>115</sup>

International and domestic legal sources that define torture are among the means through which the United States has endeavoured to justify its use of coercive interrogations. Violence is at the heart of every legal definition, classification, or interpretation,<sup>116</sup> and part of the violence of these particular legal sources is that they mark certain practices as non-torture, thereby potentially legitimizing them.<sup>117</sup> Thus, the Convention Against Torture distinguishes "torture" from "cruel, inhuman or degrading treatment or punishment,"<sup>118</sup> and this distinction has been used, in official and popular U.S. discourses, to justify certain coercive interrogation tactics.<sup>119</sup> Another distinction, between "torture" and "coercion," is found in the 2006 U.S. Military Commissions Act. While it excluded testimonies obtained through "torture," this Act allowed for the use and non-disclosure of "coerced" testimonies.<sup>120</sup> Among its functions, legalism serves as a state mechanism for the denial of torture;<sup>121</sup> but by relying on legal definitions of torture, what states deny is not their use of physical and mental violence, but the claim that

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*Changed?*, in THREAT: PALESTINIAN POLITICAL PRISONERS IN ISRAEL 114, 116 (Abeer Baker & Anat Matar eds., 2011).

<sup>114</sup> Hajjar, *supra* note 40, at 22; Oona A. Hathaway, *The Promise and Limits of the International Law of Torture*, in TORTURE: A COLLECTION 199, 207–09 (Sanford Levinson ed., 2004).

<sup>115</sup> *Lost in Syria's Black Hole for Doing Their Jobs—Courts*, HUMAN RIGHTS WATCH, <http://www.hrw.org/lost-in-syrias-black-hole> (last visited Oct. 3, 2013); *Syria: Counterterrorism Court Used to Stifle Dissent*, HUMAN RIGHTS WATCH (June 25, 2013), <http://www.hrw.org/news/2013/06/25/syria-counterterrorism-court-used-stifle-dissent>.

<sup>116</sup> Derrida, *supra* note 41, at 995; Peter Fitzpatrick, *Consolation of the Law: Jurisprudence and the Constitution of Deliberative Politics*, 14 *RATIO JURIS* 281, 293 (2001).

<sup>117</sup> John T. Parry, "Just for Fun": *Understanding Torture and Understanding Abu Ghraib*, 1 *J. NAT'L SEC. L. & POL'Y* 253, 258, 267 (2005).

<sup>118</sup> CAT, *supra* note 20, art. 15. Interestingly, according to the United Nations Code of Conduct for Law Enforcement Officials, the phrase "cruel, inhuman or degrading treatment or punishment" "should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental." Thus, like torture, these practices are viewed as confined to physical and mental violence, and consequently, the representational and legal violence they also involve is disregarded. G.A. Res. 34/169, art. 5, cmt. c, U.N. Doc. A/RES/34/169 (Dec. 17, 1979). Cited in Parry, *supra* note 21, at 239–40.

<sup>119</sup> Kreimer, *supra* note 90, at 198–201; Jinee Lokaneeta, *A Rose by Another Name: Legal Definitions, Sanitized Terms, and Imagery of Torture in 24*, 6 *L. CULTURE & HUMAN.* 245, 264–72 (2010); Parry, *supra* note 117, at 258–60.

<sup>120</sup> Military Commissions Act of 2006, Pub. L. No. 109–366, §§ 948(r), 949(a) (current version at 10 U.S.C. § 948). For critical analysis, see Alan W. Clarke, *De-Cloaking Torture: Boumediene and the Military Commissions Act*, 11 *SAN DIEGO INT'L L. J.* 59, 108–11 (2009).

<sup>121</sup> COHEN, *supra* note 12, at 107–08.

this violence falls under such definitions. The perils of this “definitional violence”<sup>122</sup> require treating “legal violence,” “representational violence,” “physical/mental torture,” and the like not as coherent concepts, but as tactical weapons.<sup>123</sup> This means using these terms only as long as they aid rather than hinder a critique of state torture, as long as they help bring to center stage important and overlooked dimensions of the relevant issues, and as long as attention is directed to their important overlaps and interrelations.

### B. *Law’s Complicity in the Representational Violence of Torture*

Whereas law’s involvement in legitimating and even engendering *physical* and *mental* torture has been extensively studied, far less attention has been paid to the way law facilitates or sustains the *representational* violence of torture. Law’s contribution to three types of representational violence discussed above—secrecy, denial, and evidence destruction—will now be examined, with a focus on the following: the prosecution and conviction of individuals who disclosed classified information about state torture; the reliance on law to prevent, conceal, or destroy audio-visual records of interrogations that might have involved torture; the use of secret evidence and the state secrets doctrine to keep state torture out of public sight; and law’s complicity in granting impunity to alleged torturers and those accused of concealing torture-related information.

The Obama administration has prosecuted more individuals under the Espionage Act for unauthorized disclosures to journalists than all previous U.S. administrations combined. Recently, CIA officer John Kiriakou was sentenced to thirty months in prison for revealing information to the press about the identities of CIA personnel involved in torture.<sup>124</sup> Beyond the torture context, disclosers of classified information about other types of state violence have also been prosecuted and convicted. In 2013, U.S. Army intelligence analyst Chelsea Manning (known at the time of her arrest as Bradley Manning) was sentenced to thirty-five years’ imprisonment for leaking to WikiLeaks classified information, including video footage showing a U.S. military helicopter killing two local Reuters employees in Iraq.<sup>125</sup> In Israel too, in 2011, former soldier Anat Kam was convicted of espionage and sentenced to four and a half years in prison, for leaking to an Israeli journalist classified military documents that suggested the military had violated a Supreme Court ruling by assassinating Palestinians who could have been arrested.<sup>126</sup>

<sup>122</sup> I borrow this phrase from JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 310 (2006).

<sup>123</sup> For a similar argument in another context, see Mariana Valverde, *Specters of Foucault in Law and Society Scholarship*, 6 ANN. REV. L. & SOC. SCI. 45 (2010).

<sup>124</sup> CONSTITUTION PROJECT, *supra* note 23, at 332.

<sup>125</sup> REPORTERS WITHOUT BORDERS, ANNUAL REPORT 2012—UNITED STATES (2012), available at <http://en.rsf.org/report-united-states.176.html>; Lisa Hajar, *Wikileaking the Truth about American Unaccountability for Torture*, 7 SOCIETIES WITHOUT BORDERS 192, 197–98 (2012); Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST (Aug. 21, 2013), [http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bec184-09d0-11e3-b87c-476db8ac34cd\\_story.html](http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bec184-09d0-11e3-b87c-476db8ac34cd_story.html).

<sup>126</sup> Naama Cohen-Friedman, *Anat Kam Sentenced to 4.5 Years in Prison*, YNET NEWS (Oct. 30, 2011), <http://www.ynetnews.com/articles/0,7340,L-4141015,00.html>. The following year, the Supreme Court shortened Kam’s sentence to three and a half years, and the journalist to whom the documents were leaked was sentenced to four months’ community service. Aviel Magnezi, *Court Cuts Anat Kam’s*

The prevention, concealment, and destruction of audio-visual records of interrogations are also partly imputable to law. Though Israeli law generally mandates videotaping interrogations of (Israeli) suspects,<sup>127</sup> the law Israel applies to Palestinians in the occupied territories includes no such provision.<sup>128</sup> The Israeli Supreme Court recently rejected an appeal requiring Israel's General Security Service to videotape interrogations of suspected "security offenders,"<sup>129</sup> whose overwhelming majority are Palestinians from the occupied territories.<sup>130</sup> Somewhat similarly, it was by reliance on (their interpretation of) the law that high-ranking CIA officials pushed for the destruction of interrogation videotapes,<sup>131</sup> arguing that there was no legal obligation to retain them.<sup>132</sup> In Syria, law's contribution to the destruction of visual evidence has taken a different form: the recently established Counterterrorism Court<sup>133</sup> has reportedly been used, among other things, to prosecute opposition activists for documenting human rights violations.<sup>134</sup>

In the United States, another legal obstacle hindering public access to information about, and evidence of, state torture is the state secrets doctrine. This common-law evidentiary privilege allows the U.S. government to refuse discovery requests on the grounds of protecting state secrets that are deemed vital to national security interests. The Bush and Obama administrations alike have frequently shut down civil lawsuits concerning the extraordinary rendition program—including previously published details about it—by successfully invoking this doctrine. Such has been the fate of Maher Arar's lawsuit regarding his previously mentioned<sup>135</sup> rendition from the United States and subsequent torture in Syria.<sup>136</sup>

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*Prison Sentence*, YNET NEWS (Dec. 31, 2012), <http://www.ynetnews.com/articles/0,7340,L-4326565,00.html>.

<sup>127</sup> CRIMINAL PROCEDURE LAW (INTERROGATION OF SUSPECTS) (2002), arts. 4, 17, available at [http://www.nevo.co.il/law\\_html/law01/999\\_542.htm](http://www.nevo.co.il/law_html/law01/999_542.htm).

<sup>128</sup> On the considerable disparity between the laws Israel applies to Israeli settlers and those it applies to Palestinian residents in the occupied territories, see HAJJAR, *supra* note 25, at 4–5, 58–61, 80–81; Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 158–61 (2011); Viterbo, *supra* note 13, at 136–38. Another example of this legal disparity is that unlike their Israeli equivalents, Palestinian children in the occupied territories are not entitled under Israeli military law to have an attorney or family member present in their interrogation. YOUTH LAW (ADJUDICATION, PUNISHMENT & MODES OF TREATMENT) (1971, 14th amendment 2008), art. 9h, available at [http://www.nevo.co.il/law\\_html/law01/305\\_004.htm](http://www.nevo.co.il/law_html/law01/305_004.htm) (however, as detailed in art. 9g(a), this requirement, applicable to Israeli children, does not apply in some exceptional circumstances).

<sup>129</sup> H CJ 9416/10 Adalah v. Ministry of Pub. Sec. (Feb. 6, 2013), available at <http://elyon1.court.gov.il/files/10/160/094/s07/10094160.s07.pdf>.

<sup>130</sup> On "security prisoners" in Israeli custody, see Fatmeh El-'Ajou, *Lasting Injustice: Discrimination against Palestinian Political Prisoners in the Commutation of Sentences and Early Release*, 103 ADALAH'S NEWSL. (Apr. 2013), at 1, available at <http://adalah.org/Public/files/English/Publications/Articles/lasting-injustice-elajou-2013.pdf>. On the Israeli "security discourse" more broadly, see generally BARUCH KIMMERLING, *The Code of Security: The Israeli Military-Cultural Complex*, in THE INVENTION AND DECLINE OF ISRAELINESS: STATE, SOCIETY, AND THE MILITARY 208 (2001); JULIANA OCHS, SECURITY AND SUSPICION: AN ETHNOGRAPHY OF EVERYDAY LIFE IN ISRAEL (2011).

<sup>131</sup> On the destruction of these tapes, see *supra* notes 79–82 and accompanying text.

<sup>132</sup> Cox, *supra* note 48, at 134–35, 137, 139, 141–42.

<sup>133</sup> See *supra* note 115 and accompanying text.

<sup>134</sup> *Syria: Counterterrorism Court Used to Stifle Dissent*, *supra* note 115.

<sup>135</sup> *Supra* note 36 and accompanying text.

<sup>136</sup> ROACH, *supra* note 35, at 223–24; Benjamin Bernstein, *Over Before It Even Began: Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, 34 FORDHAM INT'L L.J. 1400, 1410–11 (2011); Laura K. Donohue, *The Shadow of State Secrets*, 159 U. PA. L. REV. 77, 186–87 (2010); Fisher, *supra* note 36, at 1436–48; D. A. Jeremy Telman, *Intolerable*

Secret evidence is another device in U.S. law that invokes secrecy in the name of national security. The 2006 Military Commissions Act, prior to its amendment in 2009, allowed for the use of secret evidence in prosecuting non-citizen detainees in U.S. military commissions.<sup>137</sup> At the Bagram internment facility in Afghanistan, where the United States held thousands of detainees before handing it over to the Afghan government in 2013,<sup>138</sup> a U.S. military board relied on secret evidence when determining whether to release detainees, retain them in indefinite detention, or prosecute them. Former detainees released from Bagram have reported that they were not provided with an explanation for their detention, evidence supporting the initial suspicion against them, or any opportunity to challenge their detention.<sup>139</sup> And at Guantánamo, where indefinite detention is permitted under a 2011 executive order by President Obama, review of continued detention can be based on secret evidence that is not disclosed to the detainee.<sup>140</sup> Moreover, a military judge recently ordered a closed pre-hearing of a Guantánamo detainee—the first session of its kind under President Obama.<sup>141</sup>

Secret evidence plays a similar role in Israel/Palestine. The Israeli military is legally authorized to extend the “administrative” detention of Palestinians from the occupied territories for additional periods of up to six months each, with no maximum cumulative detention period.<sup>142</sup> Israeli military court review of “administrative” detention is held behind closed doors, often based on secret evidence not disclosed to the defense, and the judges are exempt from the regular rules of evidence.<sup>143</sup> Hundreds of appeals against such military court decisions have been submitted to the Israeli Supreme Court in the last decade, but none have resulted in a release order or in a rejection of the secret evidence.<sup>144</sup>

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*Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429, 485–86 (2012).

<sup>137</sup> Clarke, *supra* note 120, at 61.

<sup>138</sup> AMNESTY INT’L, REPORT 2012: THE STATE OF THE WORLD’S HUMAN RIGHTS 56, 357 (2012), available at <http://www.amnestyusa.org/sites/default/files/air12-report-english.pdf>; Alex Rodriguez, *U.S. Hands Over Control of Bagram Prison to Afghan Government*, L.A. TIMES (Mar. 25, 2013), <http://articles.latimes.com/2013/mar/25/world/la-fg-world-1a-fg-bagram-prison-afghanistan-20130325>.

<sup>139</sup> HUMAN RIGHTS FIRST, UNDUE PROCESS: AN EXAMINATION OF DETENTION AND TRIALS OF BAGRAM DETAINEES IN APRIL 2009 1–2, 9, 12, 14–15 (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Undue-Process-Afghanistan-web.pdf>.

<sup>140</sup> ROACH, *supra* note 35, at 210; Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1169 (2011).

<sup>141</sup> Carol Rosenberg, *Guantánamo Judge Orders First Closed Session of Obama War Court*, MIAMI HERALD (June 13, 2013), available at <http://www.miamiherald.com/2013/06/13/3450019/guantanamo-judge-orders-first.html>.

<sup>142</sup> Order No. 1651 Concerning Security Provisions (Integrated Version) (Judea & Samaria) (2009), arts. 284–85, available at [http://www.law.idf.il/SIP\\_STORAGE/files/5/685.pdf](http://www.law.idf.il/SIP_STORAGE/files/5/685.pdf). This provision is currently applied to West Bank Palestinians, whereas Gazan Palestinians can be detained for unlimited periods according to the Internment of Unlawful Combatants Law (2002; amended 2008). For further discussion, see B’Tselem & Hamoked, *Without Trial: Administrative Detention of Palestinians by Israel and the Internment of Unlawful Combatants Law 51–63* (2009), available at [http://www.btselem.org/sites/default/files/publication/200910\\_without\\_trial\\_eng.pdf](http://www.btselem.org/sites/default/files/publication/200910_without_trial_eng.pdf).

<sup>143</sup> Order No. 1651 Concerning Security Provisions, *supra* note 142, arts. 287–91. For further discussion of the issue of administrative detention, see AMNESTY INT’L, STARVED OF JUSTICE: PALESTINIANS DETAINED WITHOUT TRIAL BY ISRAEL (2012), available at [http://www.univie.ac.at/bimtor/dateien/israel\\_ai\\_2012\\_starved\\_of\\_justice.pdf](http://www.univie.ac.at/bimtor/dateien/israel_ai_2012_starved_of_justice.pdf).

<sup>144</sup> Shiri Krebs, *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court*, 45 VAND. J. TRAN’L L. 639, 672 (2012).

Law has also been complicit, by commission or omission,<sup>145</sup> in granting *de facto* impunity to state agents accused of involvement in torture. Attempts to use the U.S. courts as a mechanism of accountability for extraordinary renditions—renditions whose aim is to prevent U.S. citizens from being held accountable for torture<sup>146</sup>—have generally failed.<sup>147</sup> In a similar fashion, concerns about impunity for torture in Syria, though longstanding, have not resulted in any known prosecution or investigation of members of the Syrian security services. Moreover, Syrian law prohibits legal action against members of the state services except by an order of the director of the relevant state agency, and no such orders are known to have ever been issued.<sup>148</sup> As for Israel/Palestine, information provided by the Israeli Ministry of Justice indicates that Palestinians submitted over 750 complaints of abuse or torture by the Israeli Security Agency interrogators to the Israeli State Attorney's Office between 2001 and 2010, but none of these led to a criminal investigation.<sup>149</sup> Similarly, none of the investigations the Israeli Military Police opened in 2012 concerning alleged offenses by soldiers against Palestinians resulted in an indictment.<sup>150</sup> The Israeli State Attorney also refuses to investigate allegations of torture in Facility 1391<sup>151</sup> and prevents human rights monitors from visiting it.<sup>152</sup> Despite frequent allegations of coercive interrogations, Israeli military courts very rarely exclude Palestinians' confessions, and Palestinians' attorneys have described challenging such confessions as ineffective and even potentially harmful to their client's eventual sentence.<sup>153</sup>

<sup>145</sup> On omissions as acts of violence, see, for example, JOHN HARRIS, *VIOLENCE AND RESPONSIBILITY* (1980).

<sup>146</sup> KHALILI, *supra* note 45, at 126; CBS/AP, *CIA Off the Hook for Past Waterboarding*, CBS NEWS (June 18, 2009), <http://www.cbsnews.com/news/cia-off-the-hook-for-past-waterboarding/>.

<sup>147</sup> ROACH, *supra* note 35, at 166–67, 222; OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 35, at 20. In 2012 the U.S. Supreme Court refused to hear the *Mohamed v. Jeppesen* rendition case, leaving in place a 2010 lower court ruling that dismissed a lawsuit brought by five men who claimed they had been subjected to torture as part of the extraordinary rendition program. AMNESTY INT'L, *supra* note 138, at 358.

<sup>148</sup> AMNESTY INT'L, *supra* note 29; HUMAN RIGHTS WATCH, "By All Means Necessary": *Individual and Command Responsibility for Crimes Against Humanity in Syria* 71 (Dec. 2011), available at [http://www.hrw.org/sites/default/files/reports/syria1211webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/syria1211webwcover_0.pdf).

<sup>149</sup> Pub. Comm. Against Torture in Isr., *International Human Rights Day: Press Release* (Dec. 9, 2011) (Hebrew), <http://www.stoptorture.org.il/he/node/1778>.

<sup>150</sup> Yesh Din, *Law Enforcement upon IDF Soldiers in the Territories 2* (Jan. 2013), <http://www.yesh-din.org/userfiles/file/datasheets/Law%20Enforcement%20upon%20-%202012.pdf>.

On the Israeli military's tendency not to investigate soldiers' alleged offenses against Palestinians, see also B'TSELEM, *VOID OF RESPONSIBILITY: ISRAELI MILITARY POLICY NOT TO INVESTIGATE KILLINGS OF PALESTINIANS BY SOLDIERS* (2010), available at [http://www.btselem.org/download/201009\\_void\\_of\\_responsibility\\_eng.pdf](http://www.btselem.org/download/201009_void_of_responsibility_eng.pdf); HUMAN RIGHTS WATCH, *PROMOTING IMPUNITY: THE ISRAELI MILITARY'S FAILURE TO INVESTIGATE WRONGDOING* (2005), available at <http://www.hrw.org/sites/default/files/reports/iopt0605.pdf>. On a culture of impunity among Israeli soldiers serving in the West Bank, as expressed in former soldiers' testimonies, see Matthew Zagor, *'I am the Law'! – Perspectives of Legality and Illegality in the Israeli Army*, 43 *ISR. L. REV.* 551, 562–64 (2010).

<sup>151</sup> On Facility 1391, see *supra* note 68 and accompanying text.

<sup>152</sup> KHALILI, *supra* note 45, at 129–30.

<sup>153</sup> HAJJAR, *supra* note 25, at 109. For an exceptional case, in which a military court excluded a confession on the grounds that it had been coerced, see B'Tselem, *13 Dec. '11: Military Court Partially Acquits Palestinian Due to Forced Confession* (Dec. 13, 2011), [http://www.btselem.org/torture/20111213\\_hamidah\\_verdict](http://www.btselem.org/torture/20111213_hamidah_verdict). When interviewed, Israeli military judges and prosecutors sometimes inferred that torture was not common, often argued that Palestinians' confessions were motivated by wanting to "show off" to the interrogators or to appear heroic in their community, or



Furthermore, along with alleged torturers, those who conceal information of potential relevance to torture have also been granted impunity through legal apparatuses and arguments. Thus, in an opinion issued in 2011, a U.S. federal judge refused to hold the CIA in contempt of court for its destruction of interrogation videotapes.<sup>154</sup> In 2010, the U.S. Department of Justice announced that it would not press criminal charges against those responsible for destroying these tapes.<sup>155</sup> No judicial inquiry into the existence or destruction of other CIA interrogation videotapes has taken place.<sup>156</sup>

### C. *Beyond Liberal Legalism*

The use of state torture, the concealment of torture and information about it, and the impunity granted to those who perpetrate or hide state torture are therefore all largely imputable to law. This account of the legal violence of state torture stands in stark contrast to the liberal view of torture.<sup>157</sup> From a liberal standpoint, law's "function" is to prohibit torture, and torture is therefore an extra-legal or illegal phenomenon, a violation of law.<sup>158</sup> According to this view, reliance on law to justify torture is no more than flawed legal analysis or even a deformation of law. Law's fundamental antipathy toward torture, liberal critics of state torture contend, is embodied by legal sources such as the Convention Against Torture, the Covenant on Civil and Political Rights, and also, in the U.S. case, certain constitutional protections.<sup>159</sup> In further support of this position, examples can be provided of legal restrictions on practices that qualify as *legal* and *representational* violence: the provisions of the Convention Against Torture that call upon state parties to proscribe and penalize torture;<sup>160</sup> the U.S. district court orders that mandated the preservation of all evidence regarding the torture, abuse, and mistreatment of Guantánamo detainees; or the U.S. Supreme Court ruling enabling these detainees to pursue habeas corpus actions.<sup>161</sup>

Some may impugn this view by pointing to a significant gap between law's condemnation of torture and actual state practice<sup>162</sup>—a gap exemplified by the fact that the United States, Israel, and Syria have all ratified the Convention Against Torture, albeit with reservations. This gap, such critics may add, characterizes not only the physical and mental violence of state torture, but also its representational

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contended that Palestinians' torture allegations were designed to prevent those Palestinians from appearing as cowardly. HAJJAR, *supra* note 25, at 109.

<sup>154</sup> AMNESTY INT'L, *supra* note 138, at 358. On the destruction of these tapes, see *supra* notes 79–82, 131, and accompanying text.

<sup>155</sup> ROACH, *supra* note 35, at 222; Cox, *supra* note 48, at 133.

<sup>156</sup> Denbeaux et al., *supra* note 47, at 1308.

<sup>157</sup> The term "liberal" is used here in the sense it has had in modern political thought, not in its popular U.S. usage indicating leftist politics.

<sup>158</sup> See, e.g., Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1721–23, 1726–28, 1739, 1741 (2005).

<sup>159</sup> 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, 283–310 (2003).

<sup>160</sup> CAT, *supra* note 20, arts. 2, 4, 6–9.

<sup>161</sup> Denbeaux et al., *supra* note 47, at 1307–08; AMNESTY INT'L, *supra* note 138, at 358.

<sup>162</sup> Hathaway, *supra* note 114, at 201–04.

violence. For instance, the CIA interrogation videotapes were destroyed<sup>163</sup> despite a court ruling requiring the preservation of such materials.<sup>164</sup>

Yet, a critique of law as merely ineffective in combating torture fails to acknowledge a more fundamental issue: law's inextricable ties with state violence. A more radical critique would challenge the legal/extra-legal dichotomy underlying both the liberal view of state torture as illegal and the critique of law as ineffective.<sup>165</sup> When a state invokes, interprets, or capitalizes on law, what it usually claims is the authority to use law. And such recourse to law is violent, regardless of whether liberal critics or others denounce it as illegal. Its violence lies in its repercussions (actual or potential) on the use of torture, as well as in its evocation of law's own violence. As a number of jurists and others have observed,<sup>166</sup> law is an apparatus of violence: It is maintained through violence and every invocation of it carries violent (albeit not always easily discernible) ramifications. Obviously, law is only part of the story, as illustrated by the fact that detainees in U.S. custody overseas had been tortured before U.S. government lawyers drafted the "torture memos."<sup>167</sup> The important point, however, is that state torture has not only coexisted with the rule of law but has often been written into law, or has at least had the force of law.<sup>168</sup>

### III. EXERCISING VISION: RE-ENVISAGING VISUAL EVIDENCE OF TORTURE

So far, two issues emerge as requiring reconceptualization: the nature of state torture and the representational regime of that torture. Regarding the former, the violence of state torture ought to be understood as representational and legal—rather than solely physical and mental—in nature; accordingly, legal and representational violence must become a key concern for critiques of state torture, as the U.S., Israeli/Palestinian, and Syrian cases clearly illustrate. Regarding the latter, the evidentiary capacity of torture images—their potential and limitations—requires rethinking, given the possibility of such images inadvertently contributing to state dismissal of torture allegations.

These two conceptual reforms are complementary and even interdependent in at least two senses. First, the previously discussed pitfalls of the dominant visual-evidentiary paradigm are not merely obstructions to representing state torture. Rather, they are an integral part of the representational and legal violence that, among other things, engenders denial of, and impunity for torture. Second, in

<sup>163</sup> On the destruction of these tapes, see *supra* notes 79–82, 131 and accompanying text.

<sup>164</sup> On this ruling, see *supra* note 161 and accompanying text.

<sup>165</sup> For more nuanced accounts of the relation between legality and illegality in the context of state violence, see, for example, Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005); David Kennedy, *Lawfare and Warfare*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 158 (James Crawford & Marti Koskeniemi eds., 2012); Krasmann, *supra* note 55; Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 67 (2009).

<sup>166</sup> BENJAMIN, *supra* note 103; LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE (Austin Sarat ed., 2001); LAW'S VIOLENCE (Austin Sarat & Thomas R. Kearns eds., 1993); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Derrida, *supra* note 41.

<sup>167</sup> JOSHUA E. S. PHILLIPS, NONE OF US WERE LIKE THIS BEFORE: AMERICAN SOLDIERS AND TORTURE xv (2010). On the "torture memos," see *supra* note 106 and accompanying text.

<sup>168</sup> John T. Parry, *Torture Warrants and the Rule of Law*, 71 ALB. L. REV. 885, 897–99 (2008).

order to lay bare the representational and legal violence of state torture, a critical aesthetic is needed—alternative ways of looking at, and thinking about, representations and evidence of torture. Such a critical aesthetic in turn relies on rethinking the nature of the object of inquiry itself: state torture. Critically engaging with the issue of state torture is therefore a matter of re-envisioning, of seeing things anew in both a figurative and literal sense.<sup>169</sup> There is, then, an interrelation that is both ontological and analytical: ontological, since state torture is, by its nature, inseparable from its representational regime; and analytical, in that the critical evidentiary potential of torture images both enables and is enabled by a reconceptualization of state torture, so that images and conceptual horizons become inseparable.

To further develop these intertwined conceptual reforms, this Part turns to torture images from the U.S., Israeli-Palestinian, and Syrian cases, which include or evoke three in/visible elements: (a) photographic or video records of the alleged torture; (b) the representation process through which torture images are produced; and (c) the eyes or face of the alleged torture victim. These elements are in various ways not altogether absent but conspicuous in their invisibility. And these elements' oscillation between visibility and invisibility can invite consideration and investigation of the conditions of possibility of state torture. By looking at, for, and beyond the ostensibly invisible, a critical aesthetic will emerge, aimed at making visual, legal, and political absences present.

The importance of (in)visibility not only stems from its centrality to state torture, as made evident above, but also from its centrality to representation and politics more generally.<sup>170</sup> Three key questions concerning (in)visibility arise in the torture context: First, what role does representational and legal violence play in governing the (in)visibility of physical and mental torture? Second, how is the visibility of this representational and legal violence itself governed, considering the dominant visual-evidentiary paradigm discussed earlier? And finally, how do these two registers of (in)visibility—the (in)visibility governed by, and the (in)visibility of the representational and legal violence of state torture—affect and relate to each other? It is such issues that an investigation of (in)visible visual elements may help bring to the fore and tackle.

The discussion here draws on the interdisciplinary field of visual studies<sup>171</sup> from which valuable insights can be gained into the relationship between state violence, law, and evidence. Regrettably, despite the growing legal literature on

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<sup>169</sup> Cf. BIBER, *supra* note 14, at 71 (describing the act of inspecting crime images as involving both seeing and imagining); Matthew Kieran & Dominic McIver Lopes, *Introduction, in* IMAGINATION, PHILOSOPHY, AND THE ARTS 1–2, 4 (Matthew Kieran & Dominic McIver Lopes eds., 2003) (arguing that “users of representations are meant to imagine [the . . . ] truths” representations generate, and adding that the “contents of imaginings are fictional propositions in the trivial sense that they are to be imagined, not in the ordinary sense that they are a species of falsehood”).

<sup>170</sup> JACQUES RANCIÈRE, *THE POLITICS OF AESTHETICS: THE DISTRIBUTION OF THE SENSIBLE* 13 (2004) (arguing that politics revolves around the questions of what is visible or sayable and who can see and speak); JACQUES RANCIÈRE, *THE EMANCIPATED SPECTATOR* 93 (Gregory Elliott trans., 2009) (arguing that an image is “a complex set of relations between the visible and the invisible”).

<sup>171</sup> On visual studies, see generally SARAH CHAPLIN & JOHN A. WALKER, *VISUAL CULTURE: AN INTRODUCTION* (1997); NICHOLAS MIRZOEFF, *AN INTRODUCTION TO VISUAL CULTURE* (1999); ROSE, *supra* note 87; MARITA STURKEN & LISA CARTWRIGHT, *PRACTICES OF LOOKING: AN INTRODUCTION TO VISUAL CULTURE* (2001); *THE PICTORIAL TURN* (Neal Curtis ed., 2010); *THEORIZING VISUAL STUDIES: WRITING THROUGH THE DISCIPLINE* (James Elkins et al. eds., 2012); *THE VISUAL CULTURE READER* (Nicholas Mirzoeff ed., 2d ed. 2002).

issues concerning visuality and law,<sup>172</sup> the field of visual studies itself has yet to receive the attention it deserves from legal scholars.<sup>173</sup> Furthermore, the visual materials typically discussed by the existing legal literature on visuality have been either court evidence<sup>174</sup> or cultural and media depictions of law.<sup>175</sup> Other images, such as those analyzed here, have generally been neglected, and consequently, so has their potential contribution to thinking about legal issues.

Before proceeding, three clarifications about visual evidence are in order. First, in thinking about “evidence,” I make no distinction between a legal and a supposedly non-legal sense of this term, as the two are generally inseparable.<sup>176</sup> Moreover, even if one insists on distinguishing legal evidence from social evidence, both remain relevant to this Article, since evidence law draws on society’s broader conventions for assessing veracity and credibility.<sup>177</sup> Second, as I have argued, representing and seeing torture anew requires going beyond the obsession with mimetic (“accurate”) depiction. It requires combining insight and imagination to enable visual images to re-present—and, in some respects, present for the first time<sup>178</sup>—the multidimensional violence of state torture in a meaningful

<sup>172</sup> See, e.g., LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW (Costas Douzinas & Lynda Nead eds., 1999); SHERWIN, *supra* note 1; LEGAL STAGINGS: THE VISUALIZATION, MEDIALIZATION AND RITUALIZATION OF LAW IN LANGUAGE, LITERATURE, MEDIA, ART AND ARCHITECTURE (Kjell Å Modéer & Martin Sunnqvist eds., 2012); ALISON YOUNG, JUDGING THE IMAGE: ART, VALUE, LAW (2005); Costas Douzinas, *The Legality of the Image*, 63 MOD. L. REV. 813 (2000); Bernard Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229 (1994).

<sup>173</sup> Buccafusco, *supra* note 1, at 610–11; Dag Michalsen, *Law as Visual Communication*, in LEGAL STAGINGS, *supra* note 172, at 91, 91; Leslie J. Moran, *Visual Justice*, 8 INT’L J. L. CONTEXT 431, 431 (2012).

<sup>174</sup> See, e.g., BIBER, *supra* note 14; NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT (2009); TAGG, *supra* note 4; Mnookin, *supra* note 1.

<sup>175</sup> This body of literature is vast. See, e.g., DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION (1999); MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE (1998); IMAGINING LEGALITY: WHERE LAW MEETS POPULAR CULTURE (Austin Sarat ed., 2011); ORIT KAMIR, FRAMED: WOMEN IN LAW AND FILM (2006); LAW AND JUSTICE ON THE SMALL SCREEN (Peter Robson & Jessica Silbey eds., 2012); LAW’S MOVING IMAGE (Leslie J. Moran et al. eds., 2004); CYNTHIA LUCIA, FRAMING FEMALE LAWYERS: WOMEN ON TRIAL IN FILM (2005); ALISON YOUNG, THE SCENE OF VIOLENCE: CINEMA, CRIME, AFFECT (2010); Shulamit Almog & Ely Aharonson, *Law as Film: Representing Justice in the Age of Moving Images*, 3 CANADIAN J. L. & TECHNOLOGY 1 (2004); Lynda Nead, *Visual Cultures of the Courtroom: Reflections on History, Law and the Image*, 3 VISUAL CULTURE IN BRITAIN 119 (2002). There are also studies of the iconography of law. See, e.g., JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS (2011); MICHAEL STOLLEIS, *The Eye of the Law*, in THE EYE OF THE LAW: TWO ESSAYS ON LEGAL HISTORY 1 (2008); Linda Mulcahy, *Imagining Alternative Visions of Justice: An Exploration of the Controversy Surrounding Stirling Lee’s Depictions of Justitia in Nineteenth-Century Liverpool*, 9 L. CULTURE & HUMAN. 311 (2013).

<sup>176</sup> On the inseparability of the “legal” from the supposedly “non-legal,” see, for example, Nikolas Rose & Mariana Valverde, *Governed by Law?*, 7 SOC. & LEGAL STUD. 541, 545–46 (1998); Pierre Schlag, *The Dedifferentiation Problem*, 42 CONTINENTAL PHIL. REV. 35 (2009).

<sup>177</sup> BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 2 (1991); Aviva Orenstein, *“My God!”: A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule*, 85 CALIF. L. REV. 161, 162 (1997).

<sup>178</sup> Cf. Frances Guerin & Roger Hallas, *Introduction*, in THE IMAGE AND THE WITNESS: TRAUMA, MEMORY AND VISUAL CULTURE 1, 9 (Frances Guerin & Roger Hallas eds., 2007) (describing images as capable not simply of evoking the violence of an event, but also of re-presenting it—making it present again and in some cases making it present for the first time).

manner. It is hence not a matter of how people register visual sensory impressions, but rather of vision in its conceptual sense.<sup>179</sup> The analysis that follows is therefore neither about the intentions of those that produced the images in question nor about some viewers' ability or willingness to respond to these images.<sup>180</sup> If alternative reactions to visual images of state torture are regarded as "counter-intuitive," the question should be raised as to why this is the case and how visual intuition can be reinvented. Among other things, this requires exposing to criticism the broader cultural and semiotic field within which visual images function—a field that influences whether elements are regarded as visible and what meaning is ascribed to their in/visibility.<sup>181</sup> Lastly, instead of professing to tease out any supposedly true meaning from torture images,<sup>182</sup> this Article seeks to reveal the stories such images can tell and the conceptual horizons they can provide when they encounter a viewer willing to face them with the necessary attentiveness and imagination. Because such attentiveness and imagination depend on a constant reconstruction and revision of ways of looking, and because different images operate differently, this analysis should be treated not as a prescription but as an example of critically interacting with torture images.

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<sup>179</sup> See also Nicholas Mirzoeff, *On Visuality*, 5 J. VISUAL CULTURE 53, 67 (2006) (adding that it is also this conceptual, rather than sensory, sense with which visibility is concerned).

<sup>180</sup> See also ROSE, *supra* note 87, at 19, 22–23 (noting that most recent visual studies are uninterested in the intentionality of image makers, and that not all audiences can or will respond to certain ways of seeing invited by images and their display practices).

<sup>181</sup> On visual elements as located within a cultural and semiotic system that informs their visibility and meaning, see Judith Butler, *Endangered/Endangering: Schematic Racism and White Paranoia*, in READING RODNEY KING / READING URBAN UPRISING 15 (Robert Gooding-Williams ed., 1993); BIBER, *supra* note 14.

<sup>182</sup> On why no image has any "true" meaning, see generally JACQUES DERRIDA, *THE TRUTH IN PAINTING* (Geoffrey Bennington & Ian McLeod trans., 1987); Stuart Hall, *The Work of Representation*, in REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 1 (Stuart Hall ed., 1997).

As explained above, among the effects of representational state violence is the scarcity of photographs and videos of state torture. Absent such visual materials that could count as corroborating evidence, witnesses to torture have been asked to produce alternative images, including drawings such as these:

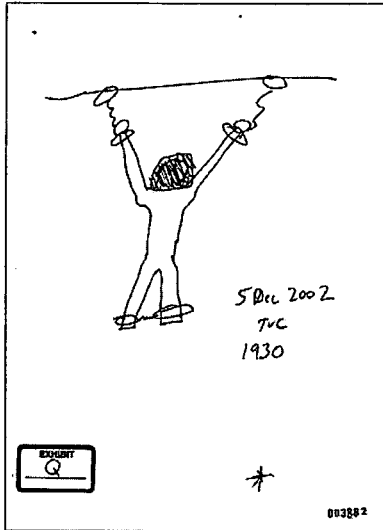


Figure 1



Figure 2

Published by the *New York Times* three years after the death of Afghan detainee Dilawar in U.S. custody, Figure 1, a sketch by former Reserve M.P. sergeant Thomas Curtis, depicts Dilawar chained to the ceiling of his cell at the U.S. detention facility in Bagram, Afghanistan.<sup>183</sup> Figure 2 appears in a report on Israel's detention of Palestinian children by the Swedish section of the NGO Save the Children.<sup>184</sup> Drawn by sixteen-year-old Palestinian Sawsan Abu Turki, this sketch is meant to illustrate the body position abuse she claimed to have suffered while in Israeli custody.

Both images depict interrogation tactics known as “Shabeh,” a variation of “stress and duress” in which detainees are bound or handcuffed in stress positions for protracted periods of time.<sup>185</sup> Though these particular sketches point to the use of such methods by the United States and Israel, such tactics have reportedly been

<sup>183</sup> Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES (May 20, 2005), <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>. For further details, see *No Torture. No Exceptions*, WASH. MONTHLY, Jan./Feb./Mar. 2008, at 16, available at <http://www.washingtonmonthly.com/features/2008/0801.torture.pdf>.

<sup>184</sup> See SAVE THE CHILDREN—SWEDEN, ONE DAY IN PRISON—FEELS LIKE A YEAR: PALESTINIAN CHILDREN TELL THEIR OWN STORIES 18–19 (2003), available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/2443.pdf>. This image appears here with the permission of Mia Gröndahl and Save the Children—Sweden.

<sup>185</sup> REJALI, *supra* note 39, at 327.

in use in Syria as well,<sup>186</sup> which is another testament to the transnational nature of state torture.

By virtue of their naiveté, childlike simplicity, and their production by non-experts, these visual testimonies are far from “realistic” and therefore “fail” to deliver what is usually expected from visual evidence: a sense of immediacy, of “being there” as a witness to “reality.” This supposed failure is likely to diminish the evidentiary status of such images and prevent them from gaining the corroboratory power of “good” photographic evidence.<sup>187</sup>

And yet, the (seeming) failure of these images is a function, or product, of a specific evidentiary-visual regime, a regime that assumes certain relations between exhibition and signification. This regime, some of whose pitfalls I examined earlier, is governed by the previously discussed principles of naïve realism and mimetic depiction, by a preoccupation, explicit or implicit, with distinguishing the representable from the unrepresentable, and by the assumption that determinate relations exist, or should exist, between the subject and the means of representation. Under alternative regimes of representation, more possibilities may open up for rendering apparent absences present.<sup>188</sup> A number of scholars across disciplines have pointed to the importance of looking where nothing seems to exist and making something out of it.<sup>189</sup> I would advance this line of thinking even further: What is necessary is not simply rendering certain invisibles visible, but rather investigating the oscillation between visibility and invisibility which constitutes state torture, on the one hand, and, on the other, provides a valuable platform for critically addressing that torture.

In this vein, it is precisely the non-realistic quality of the above images that carries its own evidentiary potential. It constitutes these images as evidence of the lack of other means of visual representation—photographs or videos—that would more likely be regarded as realistic and therefore as strong corroborating evidence. Aside from depicting the interrogational torture in use by the United States and Israel, these drawings can therefore serve as a reminder of the representational violence through which such countries prevent audio-visual records of their interrogations.

In Abu Turki’s case, the departure from realism is particularly pronounced in two respects. First, the report that tells her story notes her age, sixteen years, and

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<sup>186</sup> AMNESTY INT’L, SYRIA: TORTURE BY SECURITY FORCES 18–21 (1987), available at <http://www.amnesty.org/fr/library/asset/MDE24/009/1987/fr/30caf66d-bf6d-4513-b52a-7cd5c1a017bc/mde240091987en.pdf>; HUMAN RIGHTS WATCH, *supra* note 30, at 18, 20, 36–41, 43–53, 56–58, 63, 66–67, 74.

<sup>187</sup> On the precedence given to photographs taken by professional photographers over photographs of amateurish appearance, see TAGG, *supra* note 4, at 98. In addition, images such as Sergeant Curtis’ sketch, which depict detainees as faceless or unidentifiable, could reinforce the stereotype of terrorist suspects as anonymous, invisible, and faceless. MITCHELL, *supra* note 7, at 162, 165.

<sup>188</sup> On different representational regimes, their characteristics, and the possibilities they produce for representability, see JACQUES RANCIÈRE, *THE FUTURE OF THE IMAGE* 136–37 (Gregory Elliott trans., 2007); RANCIÈRE 2004, *supra* note 170, at 21–22.

<sup>189</sup> See, e.g., Costas Douzinas, *A legal phenomenology of images*, in *LAW AND ART: JUSTICE, ETHICS AND AESTHETICS* 256 (Oren Ben-Dor ed., 2011) (noting the importance of legal creativity that “confronts the *nihil*, what is *not*, the nameless or void, and makes something out of it”); Nicholas Mirzoeff, *The Right to Look*, 37 *CRITICAL INQUIRY* 473, 476–78, 485 (2011); see also Fassin, *supra* note 14, at 535–36 (arguing that testimony is of value fundamentally by virtue of what is absent from it, by bearing witness to what cannot be witnessed).

classifies her as a child. This framing of her case seems bound to detract from the evidentiary status of her drawing, given the prevalent, but debatable, notion that children are relatively unreliable witnesses, unable to distinguish fact from fantasy and incapable of accurately recollecting and clearly communicating past events.<sup>190</sup> Second, in the report quoting her testimony, Abu Turki's drawing is accompanied by another visual image: a photograph showing her holding her sketchbook.<sup>191</sup>



**Figure 3**

Not only does Abu Turki's presence in this photograph authenticate her drawing, but it also underscores the disparity between her "real" self (represented in this photograph as holding up the sketchbook) and the drawn, "unrealistic" representation of herself (which appears in the sketchbook). The juxtaposition of these two disparate representations is a reminder that it is in the absence of an audio-visual record of Abu Turki's interrogation that this sketch was retroactively and amateurishly drawn. In this respect, this photograph is a metapicture, an image of image-making, a representation of the representation process itself.<sup>192</sup> The focus of this meta-representational photograph is on the image maker (Abu Turki), the image (the sketch), the platform (the sketchbook), and implicitly, the background against which the need arose to produce such an image in the first place—namely,

<sup>190</sup> MICHAEL KING & CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN* 66–72 (2d ed. 1995); Nick Lee, *The Challenge of Childhood: Distributions of Childhood's Ambiguity in Adult Institutions*, 6 *CHILDHOOD* 455, 462–65 (1999).

<sup>191</sup> SAVE THE CHILDREN—SWEDEN, *supra* note 184, at 21.

<sup>192</sup> W. J. T. MITCHELL, *Metapictures*, in *PICTURE THEORY: ESSAYS ON VERBAL AND VISUAL REPRESENTATION* 35 (1995).



representational state violence and the consequent absence of photographs and videos.

Re-enactment photographs are similarly meta-representational. Photographs showing re-enactment of waterboarding of non-U.S. citizens by the CIA are pervading the Internet.<sup>193</sup> NGOs have also used re-enactment photographs to depict Israel's treatment of Palestinian detainees.<sup>194</sup> Understanding such images as a mere simulation of real events misses their capacity to call to mind the very real reason for resorting to re-enactment: representational state violence, including the prevention of public and media access to places where state torture takes place.

To a large extent, then, contrary to the sort of photographs and videos that are likely to be regarded as good visual evidence, the evidentiary power of visual images such as the above lies not in their providing what appears to be a realistic and unmediated record of state torture. Instead, precisely through their non-realistic or mediating character these images gain a particular evidentiary potential: the potential of testifying not only to physical and mental torture but also to the way that torture is mediated, both by state efforts to control the visibility of torture and by the processes of representation in which non-governmental actors are engaged. Rather than creating a sense of immediacy, of simply witnessing state torture, the evidentiary value of such images has to do with potentially intimating the representation at work and creating a tension between looking at and looking through an image of torture.<sup>195</sup>

Consider the possible implications for the deadlock in which (verbal) torture testimonies commonly find themselves caught when they are considered not to be directly corroborated by visual evidence: a cycle of denial by the alleged perpetrators, counter-allegations, and counter-denial. As long as this impasse is viewed as stemming from a deficit in convincing evidence, and as long as visual persuasion is associated with such qualities as "accuracy" and "transparency," the only relevant visual evidence will remain "realistic" photographs or videos. But if the representational and legal violence of state torture is acknowledged, and if evidence of torture is evaluated on grounds additional to its mimetic accuracy, then non-realistic images such as the above can help move beyond (instead of just

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<sup>193</sup> See, e.g., 2005: *CIA Waterboarding*, WATERBOARDING.ORG, (Nov. 6, 2007), <http://waterboarding.org/node/17>; Toby Harnden, *Osama bin Laden Killed: CIA Admits Waterboarding Yielded Vital Information*, TELEGRAPH (May 4, 2011), <http://www.telegraph.co.uk/news/worldnews/al-qaeda/8491509/Osama-bin-Laden-killed-CIA-admits-waterboarding-yielded-vital-information.html>.

<sup>194</sup> DEFENCE FOR CHILDREN INT'L—PALESTINE, BEARING THE BRUNT AGAIN: CHILD RIGHTS VIOLATIONS DURING OPERATION CAST LEAD 53–54, 101, 105 (2009), available at <http://www.dci-palestine.org/sites/default/files/bearingthebruntagain.pdf>; DEFENCE FOR CHILDREN INT'L—PALESTINE, PALESTINIAN CHILD PRISONERS: THE SYSTEMATIC AND INSTITUTIONALISED ILL-TREATMENT AND TORTURE OF PALESTINIAN CHILDREN BY ISRAELI AUTHORITIES 88 (2009), available at <http://www.dci-pal.org/english/publ/research/CPReport.pdf>; DEFENCE FOR CHILDREN INT'L—ISRAEL & DEFENCE FOR CHILDREN INT'L—PALESTINE, ALTERNATIVE REPORT FOR CONSIDERATION REGARDING ISRAEL'S INITIAL OPAC PERIODIC REPORT TO THE CHILD'S RIGHTS COMMITTEE 47, 49, 51 (2009).

<sup>195</sup> For a socio-legal discussion of the power of certain media to expose the representation at work, see Buccafusco, *supra* note 1, at 629–38; cf. Leslie J. Moran, *Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press*, in INTERSECTIONS OF LAW AND CULTURE 31, 34 (Priska Gisler et al. eds., 2012) (arguing that with courtroom sketches, "the marks of the process of making the image are visible and are part of the image. With a photograph, there is rarely anything in the image that evidences the process of image-making . . .").

struggling to resolve) this deadlock by broadening the conversation about what torture is and how it can be represented.

Other images, such as the following, have an additional capacity: to uncover the legal violence of state torture:



Figure 4

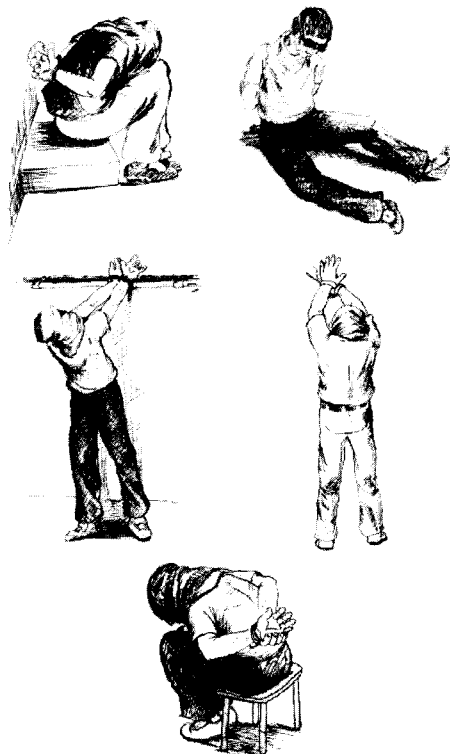


Figure 5

Figure 4 is one of several drawings that the NGO Human Rights Watch commissioned from a Syrian artist for its 2012 report on the detention, ill-treatment, and torture of anti-government protesters in Syria. According to this report, the torture tactics depicted in these drawings have been widely used in detention centers across Syria, including the practice, which is shown in this particular image, of beating bound and blindfolded detainees with objects.<sup>196</sup> Figure 5 shows five sketches that appear in at least two reports by the Palestine section of NGO Defence for Children International,<sup>197</sup> representing, like the two images analyzed above, variations of the Shabeh interrogation method. Again, “non-realistic” sketches allude to the absence of photographic or video records of the allegedly abusive interrogations. But these particular images also provide their viewers with

<sup>196</sup> HUMAN RIGHTS WATCH, *supra* note 30, at 20, 22. © [2012] Human Rights Watch.

<sup>197</sup> COOK, HANIEH & KAY, *supra* note 43, at 79; DEFENCE FOR CHILDREN INT’L—PALESTINE, PALESTINIAN CHILD POLITICAL PRISONERS 3, 4, 7, 13, 43 (2007), available at <http://www.dci-palestine.org/sites/default/files/pcpreport.pdf>.

something else: in both of them the detainees are depicted as blindfolded or hooded. Similar images of blindfolded or hooded detainees are abundant in media reports<sup>198</sup> and NGO publications.<sup>199</sup> Though there are obviously other images, in which detainees' faces appear as visible, the focus of images such as these on blindfolding or hooding highlights the importance of these forms of proximal representational violence.

Further still, the visible invisibility of detainees' eyes or faces brings to center stage the decisive impact invisibility has on the tortured, the torturer, and the viewer, in terms of their experience or conceptualization of state torture.<sup>200</sup> First, such images create some affinity between the viewer and the tortured: Both of them are forced to be visually impaired, so to speak, by the representational violence to which they are, in substantially different ways, subject. And second, in such images, the hood mirrors the hood-as-mask that torturers sometimes wear to conceal their identity.<sup>201</sup>

In addition to shining a spotlight on representational state violence, such images of blindfolded detainees also conjure up the image of Lady Justice, who is herself commonly portrayed as wearing a blindfold. Although this image has come to symbolize the impartiality of law, it can point, in this context, in at least two problematic directions. First, in early visual representations of Lady Justice as blindfolded, her covered eyes were, in fact, negative emblems of law's inability to get things straight.<sup>202</sup> In view of the above discussion of legal violence, part of engaging critically with images of blindfolded detainees must be to revisit and revive this disused yet relevant image of law as incapable of, and in some circumstances even insufficiently interested in, preventing the use, concealment, and disavowal of torture. Second, law's blindfold serves a double function: while preventing law from seeing its subjects, it also prevents these subjects from knowing where law's gaze is directed. Law's potency thus stems, to a large extent, from its ability to simultaneously conceal both state violence and its own

<sup>198</sup> Harnden, *supra* note 193.

<sup>199</sup> DEFENCE FOR CHILDREN INT'L—PALESTINE, BEARING THE BRUNT AGAIN, *supra* note 194, at 101; PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT, at cover page (2008), available at [https://s3.amazonaws.com/PHR\\_Reports/BrokenLaws\\_14.pdf](https://s3.amazonaws.com/PHR_Reports/BrokenLaws_14.pdf); PUB. COMM. AGAINST TORTURE IN ISR., BACK TO A ROUTINE OF TORTURE: TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES DURING ARREST, DETENTION AND INTERROGATION—SEPTEMBER 2001—APRIL 2003, 25 (2003), available at <http://www.stoptorture.org.il/files/back%20to%20routine.pdf>; WATERBOARDING.ORG, *supra* note 193; Witness Against Torture, *Broken—Promises / Laws / Lives* (2012), <http://witnessorture.org/pdf/tri-fold-leaflet-1-6-2012.pdf>; Witness Against Torture, *Will You* (n.d.), [http://witnessorture.org/pdf/Will\\_You.pdf](http://witnessorture.org/pdf/Will_You.pdf).

<sup>200</sup> This feature—the invisibility of detainees' eyes or faces—is present in other images used by NGOs: B'TSELEM & HAMOKED, ABSOLUTE PROHIBITION: THE TORTURE AND ILL-TREATMENT OF PALESTINIAN DETAINEES 50, 52, 70, 72, 73, (2007), available at [http://www.btselem.org/download/200705\\_utterly\\_forbidden\\_eng.pdf](http://www.btselem.org/download/200705_utterly_forbidden_eng.pdf); DEFENCE FOR CHILDREN INT'L—PALESTINE, BEARING THE BRUNT AGAIN, *supra* note 194, at 54; DEFENCE FOR CHILDREN INT'L—PALESTINE, PALESTINIAN CHILD PRISONERS, *supra* note 194, at 88; DEFENCE FOR CHILDREN INT'L—ISRAEL & DEFENCE FOR CHILDREN INT'L—PALESTINE, *supra* note 194, at 49; HUMAN RIGHTS WATCH, *supra* note 30, at 21.

<sup>201</sup> This latter argument appears in MITCHELL, *supra* note 6, at 62. On the tactics state agents use to conceal their identity from detainees, see *supra* text accompanying notes 45–46.

<sup>202</sup> ERWIN PANOFSKY, STUDIES IN ICONOLOGY: HUMANISTIC THEMES IN THE ART OF THE RENAISSANCE 109–10 (1972); Martin Jay, *Must Justice Be Blind?: The Challenge of Images to the Law*, in *LAW AND THE IMAGE*, *supra* note 172, at 19, 19–21. For relevant discussions of images of Lady Justice, see also RESNIK & CURTIS, *supra* note 175, at 62–105; Mulcahy, *supra* note 175.

involvement in that violence.<sup>203</sup> Hence, the violence of law is no less embodied by Lady Justice's blindfold than by the sword she is often portrayed as holding. The resemblance of images of blindfolded detainees to law's imagery thus provides an opportunity for framing law, for visually foregrounding its violence, for incorporating it into the troubling picture/story of detainees' suffering.

Important elements of state torture that all too often remain overlooked due to their ostensible invisibility or absence—such as an (absent) photographic or video record of an alleged torture incident, or the processes through which a torture image was produced, or the law's culpability for state torture—can thus be rendered present or conspicuous in their invisibility. This, however, does not simply mean that supposedly weak visual evidence actually brings torture to light while supposedly good visual evidence fails to do so. Such a conception would be no more than a simplistic inversion of the dominant visual-evidentiary regime. The exercise in vision put forward in this Article is more ambitious: It seeks to destabilize, rather than merely reverse, the visible/invisible binary. Critical engagement with state torture should not be about proclaiming the invisible to be visible (or vice versa) for the purpose of “resolving” or “suspending” entanglements of in/visibility. Instead, oscillations between visibility and invisibility—a key factor in the relationship between state torture, representation, and law—should themselves be subjected to inquiry.

#### CONCLUSION

Legal and social thinking about state torture is governed by two prevailing assumptions. First, under the dominant visual-evidentiary regime, images that “capture” torture incidents as “accurately” and “transparently” as possible are—so the assumption goes—the best visual evidence of torture. Second, in its dominant conceptualization, state torture is understood as exclusively physical and mental. Both the dominant visual-evidentiary regime and the dominant conceptualization of state torture, however, can obscure no less than they reveal about the nature, context, and implications of state torture.

The Abu Ghraib pictures, a well-known exception to the scarcity of photographic and video evidence of torture, are a testament to some of the pitfalls of the dominant visual-evidentiary regime of state torture. Their public reception exemplifies a tendency to visually decontextualize torture—to leave out of the picture the social, legal, and political forces that brought about the incidents depicted in the image—and consequently, to sustain the widespread impunity of high-level state agents. In addition, the elevated evidentiary status commonly ascribed to photographs and video of torture, such as the Abu Ghraib pictures, can unwittingly play into the hands of state denial of torture by making it easier for the state to dismiss verbal torture testimonies uncorroborated by such privileged visual materials.

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<sup>203</sup> Cf. Costas Douzinas, *Prosoption and Antiprosoption: Prolegomena for a Legal Iconology*, in *LAW AND THE IMAGE*, *supra* note 172, at 36, 58 (“As in Kafka’s story ‘Before the Law,’ the law is always somewhere else, in the next room, deferred and unseen, awesome in its power, a sign of the transcendent apprehended in its absence.”); Peter Goodrich, *The Iconography of Nothing: Blank Spaces and the Representation of Law in Edward VI and the Pope*, in *LAW AND THE IMAGE*, *supra* note 172, at 89, 94, 100 (discussing the facelessness and unrepresentability of the source and power of law).

The dominant conceptualization of state torture has its limitations as well. Thinking of the violence of state torture as solely physical and mental in nature overlooks two interrelated types of violence that play a decisive role in the operation of state torture, in the impact state torture has on those subjected to it, in what enables it in the first place, and in the way knowledge about it is shaped and mediated. The first—representational violence—consists, in the present context, of state attempts to control the (in)visibility of state torture; the second—legal violence—concerns law’s complicity in legitimating, bringing about, and concealing state torture. By taking into account these two pivotal yet hitherto neglected forms of violence, this Article has sought to shed new light on state torture in three cases: the detention of non-citizens by the United States overseas (particularly in Afghanistan, Guantánamo, and Iraq); the detention of Palestinians by Israel; and the detention of opposition group members in the ongoing armed conflict in Syria.

This Article has examined various manifestations of the representational violence of state torture in these three cases, including blindfolding, hooding, using cameras during interrogations or torture, concealing information about state torture, destroying audio-visual evidence of torture, and denying the very use of torture. As for legal violence, while law’s complicity in physical and mental torture has drawn considerable scholarly attention, its involvement in the representational violence of state torture remains greatly under-examined. Addressing this lacuna, this Article has investigated manifestations of both these aspects of legal violence, including, with regard to the latter (representation-related legal violence): the prosecution and conviction of individuals who leaked information about state torture (and state violence generally); legislation used to prevent, conceal, or destroy audio-visual records of interrogations; reliance on secret evidence in prosecuting dissidents or non-citizens who could be exposed to torture; use of the state secrets doctrine, which allows non-disclosure of information concerning alleged torture; and the contribution of legal institutions, by commission or omission, to the unaccountability of state agents alleged to have used or concealed torture.

In the currently prevailing approach to visual evidence of state torture, representational and legal violence ordinarily remain invisible, as do other processes pertaining to state violence and its representation. But perhaps by reinterpreting what representation does and means, torture images, rather than merely being limited and burdened by these seemingly invisible forces, can also be harnessed to lay bare and challenge them. Using visual materials from the U.S., Israeli-Palestinian, and Syrian cases, this Article has provided a rethinking of the evidentiary capacity of torture images, with a focus on visual elements that oscillate between visibility and invisibility, such as photographic or video evidence of torture, the process of producing torture images, and the law’s culpability for torture. Such in/visible elements possess a unique evidentiary potential of exposing the problematic representational and legal economy of state torture to criticism while challenging conventional notions about legality and (in)visibility.

Thus, this Article aims to encourage conversation about how to think and see beyond what might appear visible and imaginable, in an attempt to challenge the seeming invisibilities of state torture. This in turn involves not only broadening but, equally importantly, reinventing the field of inquiry, envisaging anew state torture, representation, and law.