Indefinite Detention / Enduring Freedom:
What Former Detainees’ Experiences Can Teach Us
About Institutional Violence, Resistance and the Law

By

Kimberly Alexa Koenig

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Abstract

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This dissertation focuses on the experiences of former Guantánamo detainees as communicated in 78 interviews. An analysis of those interviews centers on former detainees’ “worst” experiences to parse how those experiences might inform society’s understanding of cruel, inhuman and degrading treatment. The dissertation is organized into nine chapters.

Chapter one situates this study in the context of the United States’ response to the events of 9/11, with an emphasis on the imprisonment of individuals at the U.S. detention center in Guantánamo Bay, Cuba. This chapter summarizes the major philosophical, legal and social science research relevant to detainees’ experiences—including analyses of cruel, inhuman and degrading treatment—and explains how this dissertation contributes to existing empirical work. In this chapter, I argue that Guantánamo is an example of the United States’ use of incarceration as a means of social control that has extended beyond the nation’s borders, and discuss the possible relationship of political-military prisons to the phenomenal growth of supermax prisons in the United States.

Chapter two offers a history of the prohibition against cruel, inhuman and degrading treatment through the end of the twentieth century. This chapter expands upon the legal framework presented in the introduction to demonstrate the prohibition’s origins and evolution, and the ways in which judicial interpretations have increasingly distorted its intended breadth.

Of course, understanding the law and its contemporary expression requires attention to the political forces that motivate its development and shape its parameters. Accordingly, chapter three builds on the history in chapter two to describe the United States’ legal and political responses to the events of September 11, 2001. In the process, chapter three illustrates the legal and political voids into which many detainees were thrust, a phenomenon that culminated in an invisibility and voicelessness that facilitated later abuse.
Chapter four introduces the men whose stories form the basis of this dissertation. This chapter provides an overview of my research methodology, explains the sources for the interviews, highlights research limitations, and issues important caveats regarding the extension of my dissertation findings.

Chapter five, the first empirical chapter, details former detainees’ responses to the question, “what was your worst detainment-related experience?,” to demonstrate the varied nature of abuse and reveal the ways in which existing jurisprudence fails to adequately recognize and prevent numerous harms. Importantly from a theoretical perspective, chapter five illustrates several of the mechanisms that contributed to detainees’ experience of cruel, inhuman and degrading treatment, and demonstrates the link between ill-treatment and threats to identity.

Chapter six focuses in on one form of degrading treatment—sexual violence—to provide a more fine-grained analysis of the relationship between degrading treatment and identity. Descriptively, this chapter contributes to an empirical understanding of male sexual violence, and especially sexual violence as it occurs in political-military prisons. Finally, this chapter underscores the critical role of culture in interpretations of cruel, inhuman and degrading treatment, arguing that objective and subjective legal analyses of such treatment should better incorporate cultural perspectives.

Chapter seven posits that inhuman and degrading treatment are experienced as particularly egregious because they threaten a social—versus physical—death. This chapter illuminates the mechanisms through which social death occurred at Guantánamo, and discusses how for many men the experience of social death extended beyond their confinement into their release.

Chapter eight, the final substantive chapter, addresses the issue of prison resistance. Empirically, this chapter documents former detainees’ stories of resistance, providing a basis for better understanding when, why, how and in what ways former detainees resist institutional practices. This chapter also highlights when resistance did not occur, drawing a negative space around the phenomenon of resistance to more clearly pinpoint its parameters. Theoretically, this chapter emphasizes the ways in which threats to identity engender resistance. I conclude that much detainment-related resistance reflects—at its core—a struggle for the survival of both social and self-identity, and that failing to recognize this link can have serious implications not only for prisoners, but for prison personnel and the institutions in which they are embedded.

Chapter nine weaves these chapters together to present an empirically-supported theory of cruel, inhuman and degrading treatment, one that is intimately tied to the stories of former detainees. In this chapter, I make several recommendations regarding the ways in which detainees’ experiences might inform future jurisprudence, enabling that jurisprudence to more fully acknowledge the character and scope of cruel, inhuman and degrading treatment. This chapter explains how the dissertation, when considered as a whole, offers a detailed analysis of the very worst institutional treatment, as perceived by those who were themselves once labeled the very “worst.”
This dissertation is dedicated to the men who have so courageously shared their stories of Guantánamo, and to Zander West Mercer and Sophie Mielle Mercer, whose lives have marked its progress.
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Thank you.
“[O]pen your eyes to what’s happening. … Not just in Guantánamo, ‘cause Guantánamo will probably close down. But there’re like these secret facilities that nobody knows of. ‘Cause this is one of the things they used to say to us in Guantánamo, ‘We’ve made a mistake. We brought you to Guantánamo and the world found out.’ And one of my interrogators said that ‘the next thing we do, no one’s going to know.’ … And I believe it. … Close Guantánamo down and open another facility that no one knows about. And no, no, no Red Cross—no one’s—going to have access to it.”

I. “War of Terror”: What Former Detainees’ Stories Reveal About Political-Military Prisons and the Legal Phenomenon of Cruel, Inhuman and Degrading Treatment

The men and women currently being held in United States supermaximum prisons are among the most hidden in the world. However, there is another prison-based population comprised of hundreds, perhaps thousands, of individuals who are being held in a global network of secret prisons that is even more invisible. Estimates of how many secret prisons are in operation range from approximately ten into the hundreds. Although President Obama publicly ordered the closing of the U.S. secret prison system in 2009, many of these prisons almost certainly still operate as supplements and alternatives to domestic prisons and will continue to do so—in one form or another—for the indefinite future.

This dissertation analyzes the stories of individuals who have been released from one such prison—the Guantánamo Bay detention facility located on the Guantánamo Bay Naval Base in Cuba—in order to better understand their experiences. Allegations of torture that have emerged from Guantánamo suggest an investigation into its inner-workings may be critical for understanding the failings of laws that have been designed to mitigate abuse. Such an investigation also holds tremendous promise for revealing the micro-dynamics that occur in such prisons, including deep-rooted struggles over dignified treatment and the construction of self and social identities—and, from a macro perspective, the roles such institutions play in society.

This dissertation addresses the question “What do former Guantánamo detainees’ stories reveal about how individuals experience detention in a political-military prison?” The insights

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1 Former Guantánamo detainee when asked what he would say to the American people if he had the opportunity to address them.
2 In late 2006, then-President Bush publicly acknowledged the existence of secret prisons operated by the CIA, confirming the claims of reporters and human rights workers. CNN.com, “Bush: CIA kept terror suspects in secret prisons,” Sept. 6, 2006, at http://web.archive.org/web/20060906193917/http://www.cnn.com/2006/POLITICS/09/06/bush.speech/index.html. These prisons have also been termed “black sites.”
that can be gleaned from these experiences can be used to help guide future policy, legal developments, and human rights considerations. They can also make important contributions to several disciplines. Because of this dissertation’s emphasis on individual and interpersonal experiences in the context of a prison—an institution in which law and legality are especially salient—this research potentially contributes to the fields of law and psychology, legal sociology, law and society, and criminology, as described in the literature review in Part C, below.

A. Background on Political-Military Prisons

The United States’ secret prison system was created by the CIA in late 2001 as an alternative to covert assassinations and a burgeoning population being held for interrogation in connection with the so-called “war on terror.” Authorized by then-President Bush on September 17, 2001 through the issuance of a secret directive, such “black sites” have reportedly operated out of several countries, most of which have denied their existence. While the Guantánamo facility was initially expected to remain a secret like the others, that secret leaked, as did evidence that Guantánamo housed a black site deep within the general detention facility, holding prisoners who seemed to hover, like ghosts, on a border between reality and imagination, life and death.

Today, a loosely affiliated network of prisons is run by the U.S. military, U.S. civilian organizations (such as the CIA), and foreign countries. Such facilities have operated in tandem with U.S. military prisons in Iraq and Afghanistan, as well as prisons run by foreign governments, to achieve U.S. political and military objectives affiliated with the “war on terror.” “Ghost detainees”—those detainees whose identities are hidden from the public by the

5 Dana Priest, “CIA Terror Suspects in Secret Prisons,” Washington Post, Nov. 2, 2005. Of course, the overlapping practice of extraordinary rendition—by which criminal or terrorist suspects are kidnapped and transported to third countries to be tortured or killed—has existed for much longer. See Honigsberg, Our Nation Unhinged, 179.

6 Honigsberg, Our Nation Unhinged, 180; Larry Siems, “How America Came to Torture Its Prisoners,” Slate, April 20, 2012 (discussing a still yet-to-be-released 12 page memorandum sent by President George W. Bush to the National Security Council on September 17, 2001, which authorized the CIA to establish and run its network of secret prisons. That memo is being so closely guarded by the CIA that purportedly “even [its] font is classified”).


governments holding them\(^9\)—have also purportedly been held on military ships that operate as floating prisons and/or makeshift interrogation sites, or rendered to third countries to be tortured.

These prisons have played a controversial yet key role in the United States’ efforts to combat the “war on terror,” and especially to control (and preemptively punish) presumed terrorists. Indeed, switching perspectives from the dominant hegemony, several former detainees have re-labeled this phenomenon “the war of terror,” in light of the harsh prison conditions in which they have been kept and the onerous impact of their detainment on their families and themselves.\(^10\)

In this dissertation, I collectively refer to these institutions as “political-military prisons” because of their hybrid political and militarized nature. They are military in the sense that they are frequently run by military and quasi-military branches of the U.S. government. However, their objectives are often political. As a result, civilian agencies—such as the CIA and FBI—have played a central role in running these facilities and creating the pipeline of prisoners.\(^11\)

So why have these prisons, and prisons-within-prisons, been kept so secret? Largely because of their use of “harsh” interrogation practices, practices that have reportedly and repeatedly descended into what is legally described as “cruel, inhuman and degrading treatment”—including torture.\(^12\)

The United States government’s “harsh interrogation” program, which encouraged the practices that gave rise to these allegations, was based on Survival, Evasion, Resistance, Escape


\(^10\) This perspective does not seem completely unjustified, when considered from their perspective. According to the U.S. definition, terrorism “means activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws … [and] appear to be intended to intimidate or coerce a civilian population [or] to influence the policy of a government by intimidation or coercion.” 18 U.S.C. § 2331(1). In interviews, former detainees repeatedly reported acts that could be construed (and in some cases were) dangerous to human life, whether they killed a detainee outright or created such psychological torment that detainees took their own lives. Some former detainees have also suggested that some U.S. practices and treatment of detainees were carefully orchestrated to manipulate the actions of the detainees’ home governments.

\(^11\) For purposes of this dissertation, I use the designations of “detainee” and “prisoner” interchangeably, except where clearly inappropriate. Of course, the two are not synonymous: a detainee is typically someone held in custody for political or intelligence reasons, while a prisoner can broadly mean anyone captured and held by an enemy, or narrowly, someone who has been sent to prison as punishment for a crime. Political-military prisoners almost never qualify as the latter since they are rarely convicted. Thus, when I use the term “prisoner,” it is generally to refer to its broadest sense.

\(^12\) Scott Shane and Mark Mazzetti, “In Adopting Harsh Tactics, No Look at Past Use,” New York Times, April 21, 2009. One interrogation expert has explained that the main reason why the White House, through Cheney, kept pushing for and authorizing increasingly intensive interrogation and the use of such harsh interrogation techniques was the administration’s “desperate attempt” to “obtain” statements linking Saddam Hussein to Al Qaida. Email from Anonymous to Kimberly Dozier, Intelligence Writer, Associated Press (on file with the author).
(SERE) training. Such training is typically provided for servicemen and women “to give American pilots and soldiers a sample of the torture methods used by Communists in the Korean War, methods that had wrung false confessions from Americans,” to help them better anticipate and endure torture in the field. The Office of Legal Counsel at the Department of Justice would later compare these trainees’ experiences with SERE practices inflicted on detainees to argue that any harm detainees experienced must be nominal since few trainees have ever been permanently impaired by their training. However, critics have since argued that the situation of service people and detainees differ: service people can be reasonably assured that the United States does not intend to kill them, whereas detainees—as the purported enemy—can not be so sure. Thus, at a minimum, the probable psychological impact is incomparable.

While the Bush and Obama administrations have attempted to justify the indefinite imprisonment of detainees and the use of harsh interrogation tactics as necessary to secure American safety, there is a legal limit to what can be done with people who are held at the mercy of states. Interrogation tactics that constitute torture are illegal in all circumstances—no derogation from the prohibition against excessive cruelty is permitted, either under U.S. or international law. Crossing over that line can, at least theoretically, implicate criminal sanctions for the individuals who have implemented and/or ordered such abuse, which means there is a significant incentive to keep such practices from leaking into common awareness. And yet the contours of this line have been the subject of much debate: Where do legitimate penal practices end and the boundaries around cruel, inhuman and degrading treatment begin? What is the difference between cruel, inhuman and degrading treatment, and torture? Is it one of degree or kind? What factors weigh in determining whether torture has occurred? Is the standard objective or subjective? And what exactly is meant by objective and subjective?

While these questions have been intermittently debated by politicians, judges, attorneys and the general public, if one of the purposes underlying the prohibition against torture and other forms of cruel, inhuman and degrading treatment is to safeguard the lives and wellbeing of prisoners, as it presumably is, we must interrogate these phenomena from the perspective of prisoners and make sure their voices contribute to the debate.

To begin to ascertain answers to these questions and better understand prisoners’ perspectives, this dissertation considers how political-military prisoners have interpreted and responded to the kinds of treatment they received in Guantánamo. This is a study about these men’s experiences during—and following—their capture and imprisonment, but mostly the ways in which they interpreted those experiences. Thus, this is a dissertation about a specific institution and the relationship of men both with and within that institution. It is also a dissertation about a broader phenomenon: meaning-making by those subjected to political-military detention, and the potential implications of that meaning-making for law.

13 Shane and Mazzetti, “Adopting Harsh Tactics.”
14 President Obama did, however, sign an executive order in January 2009 that purported to bar the CIA from using harsh interrogation techniques that deviate from those permitted by the United States military. See, e.g., Michael Isikoff, “The End of Torture,” Daily Beast, Jan. 21, 2009.
15 These questions are not my primary research questions but did help motivate those questions. However, they are addressed—both directly and indirectly—throughout this dissertation.
B. Dissertation Overview

The prohibition against cruel, inhuman and degrading treatment is a central tenet of international criminal law and has serious implications for the prohibition of torture under U.S. constitutional law. However, the words “cruel,” “inhuman” and “degrading” have never been statutorily defined. Instead, it has been left to courts to interpret the parameters of excessive institutional violence. Understanding these words is extremely important because they define the legal limits of the appropriate treatment of prisoners. While these words’ meanings can be interpreted by both those who have experienced such treatment and those who have not, only those who have experienced such treatment can illuminate the subtleties others might miss. Yet, the subjective experience of detainees and others who have experienced such treatment has largely been overlooked by lawmakers, interpreters and society-at-large.

Based on an original data set culled from 78 in-depth, semi-structured interviews with former Guantánamo detainees,¹⁶ this dissertation develops a victim-centered theory of cruel, inhuman and degrading treatment, one that is anchored in the prohibition’s legal history and the subjective, empirical realities of detainment-related abuse. Thus, this dissertation is informed by Max Weber’s verstehen—¹⁷ an interpretive examination of social phenomena that is committed to understanding the meaning of social action from the actor’s point of view. Such an approach treats humans as agents or subjects, rather than objects as in many legal and social scientific inquiries. But verstehen is not only about humanizing social science; it is also about using subjective meaning to be more precise and accurate in understanding social phenomena.

Accordingly, this dissertation relies on the subjective experiences of former prisoners to shed much-needed light on the operation of the United States’ political-military prison system, including the experiences of the actors within that system and the potential function of that system within society. In so doing, it shines a spotlight on the constitutive power of prisons, including how political-military prisons control and reshape the social- and self-identities of the people held within them, and the ways in which prisoners interpret and rail against those facilities’ efforts. Finally, through its illumination of the nature and character of that struggle, this dissertation aims to refine society’s understanding of illegal institutional abuse and resistance to such abuse, and thereby enrich our understanding of cruel, inhuman and degrading treatment.

i. Research Questions

As noted above, the primary question this dissertation addresses is: “What do former Guantánamo detainees’ stories reveal about how individuals experience detention in a political-military prison?”

While this question is quite broad, several sub-questions focus in on the potential implication of former detainees’ experiences for law. For example, the United States’ reaction to the events of September 11, 2001 made salient the fact that there is no clear, universal definition

¹⁶ These interviews represent the impressions of approximately ten percent of the 779 men who have been held at Guantánamo.

of torture or cruel, inhuman and degrading treatment. Consequently, a public debate ignited around how these legal prohibitions should be conceptualized under domestic and international law, and how those concepts should be operationalized with regard to detainee treatment.

This dissertation contributes to that debate by positing that former detainees’ perspectives are essential for informing any related legal, social or political analysis. This argument is based on two premises. First, it depends on the widely-agreed-upon understanding that the prohibitions against cruel, inhuman and degrading treatment (including torture) are, at their heart, aimed at preserving human dignity. Thus, better understanding human dignity—not in the abstract, but how people come to define and enact dignity in ongoing situations—becomes essential to refining society’s understanding of these prohibitions. Second, because these prohibitions are divided into two parts (torture—which states are required to criminalize—and cruel, inhuman and degrading treatment, which they are not), it is important to interrogate the boundaries between these categories, in order to better understand what kinds of conduct falls within them. Tying these precepts together, it becomes critical to investigate meaning-making by former detainees to know what actions are most likely to endanger human dignity, and thus what should be legally prohibited.

Accordingly, this dissertation also addresses the sub-question “Under what conditions do former political-military prisoners interpret their past treatment as especially abusive, and thus as likely to constitute cruel, inhuman or degrading treatment?” The predominant focus of this sub-question is not on torture per se but on the nature of cruel, inhuman and degrading treatment. This is, first, because less research has been conducted into the broader category of cruel, inhuman and degrading treatment than torture, suggesting the need for such an inquiry is especially great. Second, because courts find most abusive institutional treatment not to be torture but “merely” cruel, inhuman and degrading, additional insights into the nature of the latter are particularly needed.

Because the line between torture and cruel, inhuman and degrading treatment is unclear, however, these phenomena are impossible to discuss in the absence of each other. Thus, solidifying the boundaries around one necessarily delineates the “negative space” around the other. At the same time, the findings in this dissertation complicate the law’s treatment of these phenomena as distinct, and the perception by many legal actors that torture is simply an aggravated form of cruel, inhuman and degrading treatment: as evidenced throughout this dissertation, a strong argument can be made that these terms may reflect a broad range of harms, which depend on context more than kind for the ways in which victims experience their severity. Thus, this dissertation investigates the extent to which these legal categories are able to capture and reflect—and respond to—the lived experiences of prisoners, both as those experiences have been interpreted in the past and as they might be interpreted in the future.

This dissertation also addresses a second sub-question: “Under what conditions do detainees resist their treatment in political-military prisons?” Stories of resistance provide a basis for better understanding meaning-making by prisoners, including why, when, how and in what ways detainees interpret prison practices as cruel, inhuman or degrading, and thus as worthy of push-back. Such stories also provide an opportunity to consider institutional dynamics, both as they emerge between detainees and prison personnel, and between various groups of detainees. Finally, they enable a consideration of agency, especially the ways in which agency can be exercised in extreme institutions that labor to achieve complete control over their inmates.

To answer these questions, this dissertation marries data culled from 78 interviews with
former detainees with diverse theoretical and empirical research to develop a victim-centered approach to cruel, inhuman and degrading treatment, one that is informed and enriched by the stories of former detainees. While a number of scholars have looked at how victims experience institutionalized cruelty quite generally (including Scarry, Conroy, Rejali, Das et al, and Basoglu), this dissertation builds on their findings to contribute to an increasingly nuanced understanding. Unlike the ways in which the law and legal scholars have often conceived of illegal violence—as discrete acts (such as waterboarding) that either do or do not violate the Convention Against Torture—this study lends empirical support for an emerging understanding of torture and other forms of cruel, inhuman and degrading treatment as a social process, one that is cumulative and necessarily grounded in the entire experience of detainees.

As for the cumulative nature of this process, empirical investigations of detention-based treatment—such as this dissertation—increasingly recognize that subjective experiences cannot be analyzed in a vacuum. The entire range of acts and the context in which detainees experience those acts mediate their relative impact, including the short- and long-term harm that results. Included in this context are the number of acts to which individuals are subjected; the temporal relationship of those acts (including any overlap and the duration of their application); the type of physical setting in which they occur; and the number and identities of other victims and perpetrators who may be present. As demonstrated below, whether former detainees perceive of their past treatment as cruel, inhuman or degrading is therefore less dependent on particular acts of violence than on the cumulative nature of their experience. At the same time, the experience of torture and other forms of cruel, inhuman and degrading treatment is extraordinarily subjective, and our understanding of these phenomena may not be well grounded in definitions that rely on objective, positivist assessments of the brutality of physical acts, considered in isolation from their broader context.

To empirically ground this research, I analyze how former detainees made sense of actions by and interactions with various institutional actors, the meanings with which they imbued those experiences, and the factors that contributed to such meaning-making. On the one hand, detainees may be especially likely to perceive punitive actions taken by institutional actors as cruel, inhuman or degrading when such actions intentionally or unintentionally violate strong

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cultural or identity-based norms to which detainees adhere; that is, when cultural distance\textsuperscript{24} looms the greatest between detainees and prison personnel. On the other hand, interactions between guards and/or interrogators may become normalized over time, which can complicate or moderate detainees’ perceptions. For example, John Irwin has explained how prisoners’ evaluations of guards’ behavior are moderated around four characteristics: fairness, consistency, stringency, and empathy.\textsuperscript{25} Thus, interactions with guards that implicate one or more of these four characteristics, such as consistency, may significantly impact perceptions as to the “rightness” or “wrongness” of given practices.

Such meaning-making can also be ascertained, in part, by considering the conditions under which detainees resist institutional practices. A number of conditions are relevant, including cultural and social distance,\textsuperscript{26} the physical and/or psychological character of any perceived abuse, the degree of social support detainees enjoy, and the normalization of interactions between detainees and institutional actors. It is also helpful to consider what resistance tells us about which institutional practices former detainees consider impermissible, as well as the ways in which their stories of resistance, in themselves, might constitute a form of ongoing resistance.

The stories told during interviews uncovers how detainees have made sense of and managed their experiences while drawing from their cultural and social backgrounds, including their self-identity\textsuperscript{27} prior to and within Guantánamo, as well as the physical versus psychological nature of any abuse. The answers to the questions former detainees were asked also illuminate the ways in which cultural norms and perceptions of identity may have been manipulated by the military to “punish” detainees psychologically, yet avoid engaging in blatant instances of what the dominant culture would understand to be torture. Examples from Guantánamo include descriptions of cultural and identity-based struggles that erupted between detainees and military personnel over appropriate handling of the Quran, gender roles, and nudity; culturally-founded perceptions of social connection and support; the ways in which interactions between detainees and institutional actors became normalized; and cultural differences with regard to perceptions of and responses to various forms of physical and psychological violence.

Culture’s role in shaping meaning has important policy implications. Alison Dundes Renteln argues that cultural defenses should be accommodated in courtrooms.\textsuperscript{28} I argue that culture should also be considered at a much earlier stage of the legal process: when deciding

\textsuperscript{24} For purposes of this research, cultural distance is defined as a lack of homogeneity (as described by Donald Black, “The Geometry of Terrorism,” 22 Sociological Theory 15-25 (2004)), and, relying on Geertz’s definition of culture, as mismatches between the “historically transmitted … system[s] of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about attitudes towards life.” C. Geertz, \textit{The Interpretation of Cultures} (New York: Basic Books, 1973).

\textsuperscript{25} John Irwin, \textit{The Felon} (University of California Press 1970).

\textsuperscript{26} For an overview of cultural and social distance, see K. Alexa Koenig, “Closing Distance: The Normalization of Indian Casinos” (unpublished paper, on file with the author).

\textsuperscript{27} For purposes of this research, identity is defined as “concepts of the self that emerge from interactions among individuals and groups over time.” David M. Engel and Frank W. Munger, \textit{Rights of Inclusion: Law and Identity in the Life Stories of Americans with Disabilities} (University of Chicago Press 2003): 41.

\textsuperscript{28} Alison Dundes Renteln, \textit{The Cultural Defense} (Oxford University Press 2004).
whether particular acts are cruel, inhuman or degrading, even torturous, as experienced by the subjects of such violence. As Renteln notes, international human rights law recognizes a right to culture in Article 27 of the International Covenant of Civil and Political Rights: 29 to what extent was this right respected at Guantánamo? And, in the absence of such respect, to what extent did former detainees draw on their diverse cultures, perceptions of identity, and the types of abuse to which they were subjected to make sense of their experiences, including whether they were tortured? The empirical answers to these questions can contribute to a more normative consideration of when and how cultural rights and meanings should be recognized.

Ultimately, the questions explored in this dissertation reflect a commitment to the notion that the meaning of any social action has to take into consideration the experience of the recipient. In the case of Guantánamo, it is necessary to analyze how detainees experienced the treatment they received to inform our future interpretations of law.

ii. Dissertation Structure

The answers to this dissertation’s research questions are presented in nine chapters. In the first, this introduction, I situate my research in the context of the United States’ practices following 9/11, as experienced by the men the United States took into custody and transferred to Guantánamo, as well as in the context of existing philosophical, legal and social science frameworks on cruel, inhuman and degrading treatment. Later in this introduction, I build upon my argument that Guantánamo is not an isolated phenomenon—as the government has repeatedly asserted—but an example of the United States’ use of incarceration as a technology of control that has been extended beyond the nation’s borders. This is evidenced by the significant number of black sites and other political or political-military prisons that have operated around the world.

This introduction also discusses the possible relationship of political-military prisons to the phenomenal growth of supermax prisons in the United States, briefly identifying the diffusion of supermax-related architecture and practices to Guantánamo and beyond. In addition, this chapter suggests that the use of political-military prisons is linked to the use of interrogation tactics that leave no physical marks: both rely on secrecy, and both have as a goal the minimizing of criticism for the especially harsh treatment of prisoners. Finally, this introduction briefly summarizes the major social science research relevant to the experience of cruel, inhuman and degrading treatment, provides the theoretical foundations for my research, and explains how my research contributes to existing empirical work.

To provide an historical context for my analysis, chapter two offers a history of the prohibition against cruel, inhuman and degrading treatment as it developed prior to 9/11. In that chapter, I expand upon the legal framework presented in this introduction to demonstrate the prohibition’s origins and evolution, and the ways in which judicial interpretations have distorted its intended breadth.

Of course, understanding the development of the law and its contemporary expression requires attention to the political forces that motivate its development and shape its parameters. Accordingly, chapter three builds on the history presented in chapter two to describe the United States’ political, legal and operational responses to the tragic events of September 11, 2001. In

29 Ibid.
the process, chapter three illustrates the legal and political voids into which detainees were thrust, culminating in an invisibility and voicelessness that facilitated the abuses to which they were later subjected.

In chapter four, I introduce the men whose stories form the basis of this dissertation, and summarize the data upon which my empirical and theoretical conclusions are founded. I also provide an overview of my methodology, explaining the sources for the interviews I analyzed, highlighting the limitations of my research, and issuing important caveats regarding the extension of my dissertation findings to other contexts.

Chapter five, the first empirical chapter, relies on former detainees’ stories to investigate the nature of cruel, inhuman and degrading treatment. Specifically, it details former detainees’ responses to the question, “what was your worst detainment-related experience?,” to demonstrate the varied nature of abuse and reveal the ways in which existing jurisprudence fails to adequately recognize (and protect against) diverse harms. Perhaps most importantly from a theoretical perspective, chapter five illustrates the mechanisms that contributed to former detainees’ experience of cruel, inhuman and degrading treatment, and demonstrates the link between ill-treatment and identity.

Chapter six zeroes in on one form of degrading treatment—sexual violence—to provide a more fine-grained analysis of the relationship between degrading treatment and identity. This chapter is also important because it contributes to an empirical understanding of male sexual violence and especially sexual violence as it occurs in political-military prisons, a phenomenon that is drastically underexplored. This chapter also underscores the critical role of culture in interpretations of cruel, inhuman and degrading treatment, arguing that objective and subjective legal analyses should better incorporate cultural perspectives.

Taking a more holistic perspective, chapter seven provides an explanation of the ways in which detainees experience inhuman and degrading treatment as particularly egregious because it threatens a social—versus physical—death. This chapter illuminates the mechanisms through which social death occurred at Guantánamo, and discusses how the social death that many men experienced extended into their release. Perhaps most importantly, this chapter analyzes the intimate relationship between social vitality and identity to raise the possibility that cruel, inhuman and degrading treatment are experienced as particularly egregious because of the threat they pose to one’s social and self-identities.

Chapter eight, the final substantive chapter, addresses the issue of prison resistance. Empirically, this chapter documents former detainees’ stories of resistance, providing a basis for better understanding meaning-making by prisoners, including when, why, how and in what ways detainees interpret various practices by prison personnel as worthy of resistance. This chapter also highlights when resistance didn’t occur, drawing a negative space around resistance in order to better pinpoint its parameters. Theoretically, this chapter emphasizes the ways in which threats to identity engender resistance. If “personal and collective identities are defined as products of social, psychological, and biological structures,”[30] then it makes sense that physical and psychological abuse, as well as detainees’ denigration in society more generally, may have a severe impact on those identities, and vice-versa. I conclude that much detainment-related resistance relates—at its core—to a struggle for the survival of both social and self-identity, and

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that failing to recognize this link can have serious implications not only for prisoners, but prison personnel and the institutions in which they are embedded.

Chapter nine weaves the preceding chapters together to present an empirically-informed theory of cruel, inhuman and degrading treatment, one that is intimately tied to former detainees’ experiences. This last chapter offers recommendations regarding the ways in which legal actors might incorporate this dissertation’s findings to embrace a broader understanding of cruel, inhuman and degrading treatment.

An appendix details the various coding categories—and thus the themes—that emerged during analysis.

C. Philosophical, Legal and Social Science Perspectives on Cruel, Inhuman and Degrading Treatment

Whether institutional practices are cruel, inhuman or degrading is—to some extent—a legal consideration. Therefore, to understand what cruel, inhuman and degrading treatment is, it is necessary to start with the law. Because cruel, inhuman and degrading treatment is also a social phenomenon, however, it is important to situate explorations of that phenomenon within existing social science analyses. Finally, because the prohibition is meant to protect human dignity, it is critical to interrogate conceptions of human dignity, including the inverse relationship between dignity and ill-treatment.

A brief summary of what philosophers have revealed about the character of human dignity and its need for protection through law; what those resulting laws dictate; and what social science research has uncovered about those laws’ violation, is provided below.

i. Philosophical Frameworks

To understand torture and cruel, inhuman and degrading treatment as legal constructs, it is important to first recognize the values underlying their prohibition, or—more specifically—what their prohibition is meant to protect. Many scholars agree that the protection of human dignity is the underlying motivation not only for the prohibition against torture and other ill-treatment, but the entire field of human rights law.31 This concern with the protection of human dignity is evident both in recent case law,32 and in ongoing scholarship that considers the role of dignity in human rights protections.33

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31 See, e.g., the foreword to Paulus Kaufmann, Hannes Kuch, Christian Neuhauser and Elaine Webster, *Humiliation, Degradation, Dehumanization: Human Dignity Violated* at v (Springer 2011), explaining that “human dignity is the main philosophical foundation of human rights.” As noted there, the 60th anniversary commemoration of the Universal Declaration of Human Rights was appropriately titled “Protecting Dignity: An Agenda for Human Rights,” underscoring the continued salience of dignity as the foundation of this entire field of law.

32 On the domestic front, see Brown v. Plata, No. 09-1233 (U.S. 2011), an 8th Amendment prison conditions case in which Justice Kenney declared that “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.” On the international front, see, e.g., the preamble to the Declaration of Human Rights, which pronounces that “recognition of the inherent dignity and of
Thus, whenever analyzing such prohibitions, it is critical to discuss the relationship between dignity and ill-treatment, precisely because it is from the notion of dignity that all such prohibitions commence.

Arnd Pollman has provided a particularly helpful overview of the philosophy of human dignity. According to Pollman, human dignity was first acknowledged as important during Roman Antiquity. The version of human dignity that coalesced during this era equated dignity with an exalted social status, as exemplified by the then-emergent term “dignitary.”

A second conception, one intimately linked to Christian theology, materialized during the Middle Ages. This era witnessed a shift in which the notion of human dignity was “generalized” and applied not only to those who held a relatively high status, but all human beings; this notion of dignity reflected humanity generally as the “pride of God’s creation” and people as made in “God’s image.”

Human dignity became secularized with the writings of Immanuel Kant and Pico della Mirandola. As Pollman explains, the conception they fostered suggests that “as human beings we do not owe our dignity to the fact that we reflect a divine splendor but because we ourselves are capable of something great: of ‘reason’ and ‘moral autonomy.’”

The final conception of human dignity (and the version Pollman argues is the basis for the modern-day human rights regime) emerged in the aftermath of World War II. As opposed to an “inalien value” that could never be lost, dignity was perceived as something precious and vulnerable; accordingly, it birthed the need for legally-recognized and enforced rights, to protect this essential human characteristic.

Pollman posits that dignity may be substantively conceptualized in four ways, each of which corresponds to one of these historic periods. The first is to perceive of dignity as something that must be achieved by living a life “worthy of social respect.” The second is to conceive of dignity as a “dowry,” something automatically accorded all human beings. The third is to envision dignity as directly tied to various capacities, such as the capacity for moral rationality and autonomy, or the capacity to experience pain. The fourth is to conceptualize of dignity as “potential.” Pollman explains that per this final view, although every human being—as a member of humankind—has an individual ‘potential’ to live a life in human dignity, the question whether we really are able to fully unfold this potential or capability is dependent upon the concrete circumstances of our life. Therefore, human beings live in dignity sometimes ‘more’ and sometimes ‘less,’ and that is why human dignity should not be seen as

the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

33 Pollman, “Embodied Self-Respect.”
34 Ibid.
35 Ibid.
36 Ibid., 246 (emphasis added).
37 Ibid.
38 Ibid., 248.
39 Ibid.
40 Ibid., 249.
41 Ibid., 250.
a natural gift that every one simply has and cannot lose anyway but rather as a fragile possibility, a possibility of human flourishing.\textsuperscript{42}

Thus, dignity becomes something that must be preserved and facilitated through law and related social norms—such as laws that prohibit torture and cruel, inhuman and degrading treatment.

Andreas Maier shifts the focus from conceptions of dignity to the ways in which torture can be conceived as its violation. He theorizes that the essence of the wrong is the “relationship between torturer and victim.”\textsuperscript{43} He explains:

What the torturer denies the victim is not merely her exercise of autonomy or respect for her right not to be violated but her very standing as a moral being with the right to be given a justification for what is done to her …. This kind of asymmetric relationship, where one person denies another person her very standing as a moral being, is the specific reason why torture is a violation of the person’s dignity.\textsuperscript{44}

Thus, his conception of torture is intimately linked to a violation of one’s identity as a human being with certain rights. While this approach seems to capture much of what’s wrong with torture, Maier’s inter-subjective account fails to fully address the role of institutions, and thus more is needed. In the same vein, Avishai Margalit has argued that it is crucial for scholars to not only study human dignity as an abstract concept, but to study its violations, and thus focus “on what it means for people to be degraded, humiliated and wronged.”\textsuperscript{45} While “abstract values and human capacities have to be considered as well,”\textsuperscript{46} this dissertation is in the camp that believes empirical realities have much to contribute to a full understanding of dignitarian harms, especially as they relate to law.

ii. Legal Frameworks

In the contemporary era, the seminal relevant legal authority is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\textsuperscript{47} According to the Convention’s first article, torture is

\begin{itemize}
\item[42] Ibid., 250 (in this essay, Pollman also provides a very interesting discussion of the relation between dignity and rights, laying out four different dimensions on which they might be related, including 1) dignity as being the normative basis of human rights, 2) dignity as a human right (albeit a particularly special one), 3) dignity as the sum of human rights, and 4) dignity as the underlying purpose of human rights). Ibid., 251-52.
\item[44] Ibid.
\item[46] Ibid.
\end{itemize}
any 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 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.\textsuperscript{48}

Notably, the Convention does not define cruel, inhuman or degrading treatment: it states only that such acts “which do not amount to torture” are subject to similar prohibitions as torture when “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”\textsuperscript{49} While this prohibition appears in similar form in a number of international conventions and treaties, no universal definition of cruel, inhuman or degrading treatment has ever been established.

As discussed in greater detail later below, this lack of definition has largely been due to a conscious effort on the part of drafters to ensure that the prohibition is construed as broadly as possible. However, this lack of definition has also meant that the prohibition remains incredibly indeterminate. Somewhat ironically, and unfortunately, this indeterminacy has resulted in judicial and legislative interpretations that are actually quite narrow, as judges and legislators have been squeezed diplomatically and politically to avoid finding that this most egregious set of wrongs has occurred. Importantly, such pressures are especially great during periods that threaten further social unrest—the very context in which institutionalized violence is most likely to occur.

Because I delve further into legal conceptualizations and interpretations of cruel, inhuman and degrading treatment in chapter two, I turn now to what social science inquiries reveal about the nature and experience of cruel, inhuman and degrading treatment.

\textbf{iii. Social Science Frameworks}

Several bodies of social science research help explain when detainees’ experiences may constitute cruel, inhuman and degrading treatment, and especially when detainees may interpret their experiences as such. Most previous research on government-sanctioned cruelty in institutional settings, however, focuses on its perpetrators—those agents who commit violent acts under the aegis of legitimate state authority. In a series of classical experiments, for example, researchers have demonstrated the conditions under which lay-persons playing the roles of interrogators and prison guards quickly become capable of following orders they perceive to be legitimate to commit systematic violence against other persons playing victims.\textsuperscript{50}

\begin{footnotesize}
\begin{enumerate}
\item CAT, art. 1.
\item CAT, art. 16, para. 1.
\end{enumerate}
\end{footnotesize}
This research has been extended to demonstrate how actors in a variety of institutional settings, ranging from the military to government bureaucracies, commit “crimes of obedience” when they perceive the authority they are following to be legitimate.\(^{51}\)

All of these works assume, to one degree or another, that the definition of institutional violence is broadly understood and shared by both perpetrators and their victims. Such an assumption may not be warranted, however, given an increasing recognition of the subjectivity of torture and the role of culture in patterning such subjectivities.\(^{52}\) As Stover and Nightingale caution, “[b]ecause cultures vary, not all practices considered torture in one society will be considered so in another.”\(^{53}\)

Whether institutional abuse is predominately physical or psychological, or some combination of the two, may also make a difference in these interpretive dynamics. Elaine Scarry, in her seminal treatise on torture, focuses predominately on the experience of physical pain resulting from violence in perceptions of torture.\(^{54}\) But as Darius Rejali has suggested, it may be that physical violence—although horrific—is less difficult to endure than its psychological counterpart, as the experience of pain itself may facilitate endurance. As he explains, “torture victims draw sustenance from their pain.”\(^{55}\) Mental torture, as well as “stealth torture”—physical torture that leaves no marks and has been favored by democracies such as the United States—“denies precisely this home in the body, tangling the victims ... in doubts, uncertainties, and illusions.”\(^{56}\) Such studies suggest a need to more carefully interrogate psychological forms of cruel, inhuman and degrading treatment, those that “leave no marks,”\(^{57}\) and their relevance to victims’ interpretations of their experiences.

The social science scholarship relevant to this dissertation, and to which this dissertation arguably contributes, primarily falls into three categories: 1) empirical victimology studies, such as those that have focused on the experiences of concentration camp and other war-related trauma survivors; 2) sociological studies of total institutions, and especially prisons, including how individuals respond to, experience and shape their legal and social environments; and 3) socio-legal, story-based investigations into the relationship between identity, meaning-making and resistance.

a. Empirical Victimology Studies


\(^{54}\) Stover and Nightingale, *Breaking of Bodies and Minds*, 3.


\(^{56}\) Ibid.

Victimology studies provide information about how individuals make sense of, respond to and endure abusive institutionalized authority by investigating interactions and relationships between victims and perpetrators, including prisoners’ relationships to the criminal justice system and to society more generally, as well as how prisoners give meaning to the violence they experience. This dissertation adds to the subset of victimology studies that considers the experiences of those who have been subjected to cruelty during detainment. Perhaps the richest relevant literature focuses on World War II concentration camp survivors, including how survivors endured and resisted their incarceration.

In his seminal study of detainees in German concentration camps, Elie Cohen found that prisoners tended to pass through three stages, including one of initial reaction, then adaptation to one’s surroundings, and finally resignation. According to his research, which was based on his observations as well as his personal experiences at Auschwitz and elsewhere, one of the most difficult aspects of life in concentration camps was not knowing how long one would be imprisoned, a finding that has its parallel in recent empirical studies of Guantánamo detainees, which reveal that the indefiniteness of their detention has been especially challenging to endure.

Viktor Frankl has also analyzed man’s ability to adapt to and endure abusive treatment in prison, based on his first-person observations in Nazi concentration camps. He concluded that...
the deepest desire of humanity is not the sexual drive, as Freud asserted, but to uncover meaning and purpose in one’s experiences. He observed that the search for meaning continues throughout the cycle of imprisonment, even in the face of death. Frankl, like Cohen, explained that prisoners pass through three psychological stages, including 1) shock, 2) apathy (during which prisoners predominately focus on survival), and, after release, 3) reactions that can include depersonalization, bitterness and disillusionment. Importantly, he also observed that psychological responses to imprisonment depend on one’s cultural and experiential background, choice, and an ability to hold onto a faith in the future. His work thus creates an opening to consider the roles of culture and personality in the context of meaning-making, as well as the impact of time.

More recently, Lawrence Langer has explored the limits of the capacity for meaning-making—that is, for gleaning something positive from one’s experiences—in the face of unjustified violence. While reviewing thousands of filmed interviews with holocaust survivors, Langer noted the extreme difficulty most survivors had finding any meaning in their experiences, an observation that provides an important complement to Frankl’s insights. While the ultimate drive may be to generate meaning from one’s experiences in the face of extraordinary horror, doing so may prove especially difficult when the violence to which one is subjected is experienced as arbitrary and unfounded.

In addition to these qualitative insights, a number of scholars have quantitatively analyzed detainees’ experiences. Metin Basoglu—head of the section of Trauma Studies at King’s College London and the Istanbul Centre for Behaviour Research and Therapy—has found that being held captive in a hostile and life-threatening environment while deprived of basic needs and subjected to sexual abuse, psychological manipulations, humiliation, extreme temperatures, isolation, and/or forced stress positions, can cause even more psychological damage than physical torture, depending on the context. When Basoglu and his colleagues examined the effects of captivity on 432 individuals held in two different contexts, they found that being detained in a war setting was associated with a 2.8 times greater risk of Post-Traumatic Stress Disorder (PTSD) as compared with being detained by state authorities in one’s own country, possibly due to the greater perceived threat to life. In addition, being held captive by an enemy was a stronger risk factor for PTSD than physical torture itself. Their research, therefore, highlights the important role of one’s physical and political context in meaning-making relevant to specific acts of abuse.

Basoglu has also observed that experiences of institutional abuse can vary dramatically based on the level of psychological preparedness one has for his treatment. What this strongly suggests is that the most “hardened terrorists” may experience ill treatment as least distressing; those men who are innocent of wrongdoing and/or unprepared for captivity will likely experience the greatest distress.

This is a particularly important finding for purposes of evaluating the experiences of

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65 Langer, *Holocaust Testimonies*.
67 Ibid.
former Guantánamo detainees. United States officials have estimated that as many as 95 percent of the men who were held at Guantánamo were “innocent” of any wrongdoing,68 most were captured because they were “at the wrong place at the wrong time,” or were swept up in a bounty fever that resulted in thousands of innocent adults and teenagers being sold to the United States in exchange for cash. Almost all of the men who have been released by the U.S. government, and thus whose interviews form the basis for this study, fall into this category.

Finally, Basoglu and his colleagues have concluded that “[i]llicit treatment during captivity, such as psychological manipulations, humiliating treatment, and forced stress positions, does not seem to be substantially different from physical torture in terms of the severity of mental suffering they cause, the underlying mechanism of traumatic stress, and their long-term psychological outcome.”69 Thus, he concludes that many forms of ill treatment that are predominately psychological—those that are most frequently discounted—are actually experienced as particularly severe, and thus as a form of torture.70

Other research of Basoglu’s, however, suggests that some cruel, inhuman and degrading treatment may be qualitatively different from torture. This deviates from the characterizations of many legal actors (including judges) who view the phenomena as simply existing along a sliding scale of severity.71 The often-implicit assumption that psychological abuse is somehow “lesser” than physical abuse—an assumption that Basoglu’s work directly counters—is evident in the following comment from Alan Dershowitz. According to Dershowitz, torture is a continuum and the two extremes are on the one hand torturing someone to death—that is torturing an enemy to death so that others will know that if you are caught, you will be caused excruciating pain—that's torture as a deterrent. . . . At the other extreme, there's non-lethal torture which leaves only psychological scars. The perfect example of this is a sterilized needle inserted under the fingernail, causing unbearable pain but no possible long-term damage. These are very different phenomena.72

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While I don’t disagree that these can be very different phenomena, Basoglu’s research and this dissertation challenge the very commonly held assumption that torture resides along a fixed continuum with biological death at one extreme and “mere” psychological harm at the other.

One reason for the bias towards recognizing physical over psychological harms may be that it is a lot easier to comprehend what someone is suffering physically (even though that understanding is necessarily incomplete), than what is going on in his or her head. Unfortunately, however, the perversion that occurs when only physical harm is adequately recognized has become evident. For example, in the now infamous “Torture Memos,” a series of legal memoranda written by attorneys from the Office of Legal Counsel for the Department of Justice to substantiate the use of harsh interrogation practices in the post-9/11 era, the memos’ authors argued that waterboarding would not be considered torture because, despite the drowning sensation experienced by the detainee, “[n]othing leads us to believe that the detainee would understand the procedure to constitute a threat of imminent death,” and thus the requisite intensity of psychological harm would not be met. Later, they focus on the temporal aspect of the practice, explaining that, because each application would last no more than 40 seconds, any physical distress (“which … would occur only during the actual application of water”) would be minimal and, thus, any mental suffering could not be considered prolonged, and thus tantamount to torture. Setting aside the fact that 40 seconds can seem quite long when in distress, these comments ignore the numerous times that an individual could be waterboarded in close succession. Indeed, at least one detainee was waterboarded more than 180 times across three episodes.

Similarly, Jose A. Rodriguez, Jr., former director of the CIA’s National Clandestine Service, has publicly argued that waterboarding and other forms of mostly-psychological torment are not torture: instead, he recognizes as torture only those practices that implicate “brute force, the breaking of bones, passing out from pain, and blood on walls.” In one interview, he states his belief that only these kinds of practices constitute torture because “this is what people who have been tortured tell us torture is” — an allegation that this dissertation directly counters.

Ultimately, Basoglu and his colleagues conclude that traumatic stress resulting from torture has less to do with whether torture is predominately physical or psychological, than the

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74 Ibid., 45.
75 Ibid., 46.
78 Ibid.
degree of control that an individual associates with a particular stressor. As Basoglu explains, psychological manipulations, ill treatment, and torture are all “geared toward creating anxiety or fear in the detainee while at the same time removing any form of control from the person to create a state of total helplessness. Thus, manipulations designed to remove control from the detainee might have a severe traumatic impact, even when they do not involve physical [abuse].”

At a minimum, these studies suggest the need for legislators and judges to better recognize the harm of psychological violence. Acknowledging the bias towards recognizing physical harms, Basoglu has warned:

Such views reflect a rather stereotypical image of torture as involving only certain atrocious acts of physical violence. While such disturbing images may be useful in channeling public reactions against torture, they also foster a skewed image of torture, reinforcing the perception in some people that “cruel, inhuman, and degrading” treatments do not amount to torture. Far from downplaying the problem of torture, our studies highlight the fact that the reality of torture is far more serious than people generally believe.

Ultimately, in the case of psychological suffering, because there is no obvious evidence of lasting physical harm, even extreme examples of wrong-doing become frighteningly easy to discount.

What this dissertation adds is a more nuanced look at the various ways in which detainees experience psychological and social harm: the forms such practices take and the ways they are interpreted by the recipient and how he chooses to share that interpretation with the world. While the controlled experiments and quantitative analyses reported above are critical for illustrating the relative impact of psychologically-oriented practices, the qualitative data presented below provides a more contextual understanding of why and how that impact is so great.

b. Total Institutions

If victimology studies provide empirical and theoretical information about how individuals make sense of and experience abuse, the sociology of total institutions provides a means to understand the organizational contexts underlying such dynamics. In his classic work, *Asylums*, Goffman defines the total institution as an organization that attempts to “encompass” the entire social, psychological, bodily, spatial, and temporal experiences of its custodial members. Examples, of course, include prisons, concentration campus, and mental hospitals. Upon becoming custodial members of such total institutions, individuals find themselves embarked on a moral career that is cut off and decidedly different from the lives they led on the outside. They are compelled to re-orient themselves to invasive rules and procedures that govern

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80 Basoglu et al, “Torture vs Other,” 283.
81 Basoglu, “A Multivariate Contextual Analysis,” 143-44.
82 See also Foucault’s mention of Baltard, who, in the early 1800s, wrote of “complete and austere institutions.” Foucault, *Discipline and Punish*, 235-6.
every aspect of their daily routines, and in so doing they have their identities and selves remade in the image of the total institution.

Despite the “totalizing” power of such institutions, however, what Goffman observed is that individuals never quite embrace their custodial identities as completely as the description above would suggest. Custodial members engage in what Goffman called “secondary adjustments” as a means of “getting around the organization’s assumptions as to what [they] should do...[and]...be.”\textsuperscript{83} Secondary adjustments revolve around attempts to re-define the self apart from official definitions. Some secondary adjustments are contained in the sense that they simply offer alternative meanings to individuals regarding their daily routines, while others are intended to disrupt official structures and activities.\textsuperscript{84} Secondary adjustments also demonstrate that captives retain some power, despite attempts to squash that power entirely; it is this retention of power—and the ability to exercise control that comes with it—that makes resistance possible.

c. Resistance, Meaning-Making, and Identity

David Snow and Leon Anderson have extended Goffman’s concept of secondary adjustments beyond institutions, to a more general identification with marginalized social status. In their detailed ethnography of homelessness, Snow and Anderson observe that homeless individuals have an “existential need to infuse their situation with a sense of meaning that helps to salvage the self.”\textsuperscript{85} Referencing Goffman’s concept of secondary adjustments, they note the ways in which “individuals who find themselves trapped in demeaning social contexts attempt to stand ‘apart from the role and the self’ implied,” by engaging in adaptive behavior that provide them with “an alternative source of self-regard.”\textsuperscript{86} As they explain, marginalized persons—whether homeless persons or former prisoners—regularly confront the need to establish “who they are in the course of interaction with others.”\textsuperscript{87} They note that “[s]uch identities can be established in two ways: they can be attributed or imputed by others, or they can be claimed or asserted by the actor.”\textsuperscript{88} While the former results in “social or role identities,”\textsuperscript{89} the latter creates “personal identities.”\textsuperscript{90}

Social and personal identities can either be consistent or inconsistent with each other. When inconsistent, marginalized individuals often attempt to “salvage” themselves from their

\textsuperscript{84} Goffman, \textit{Asylums}, 199.
\textsuperscript{86} Ibid., 212.
\textsuperscript{87} Ibid., 213.
\textsuperscript{88} Ibid.
\textsuperscript{89} By social identities, I mean (as borrowed from Snow and Anderson) the “identities attributed or imputed to others in an attempt to place or situate them as social objects … based primarily on information gleaned on the basis of appearance, behavior, and the location and time of action.”
\textsuperscript{90} By personal identities, I further borrow from Snow and Anderson to indicate “the meanings attributed to the self by the actor,” that are “self-designations and self-attributions brought into play or asserted during the course of interaction.”
denigrated social identities; the primary means through which individuals attempt to align their social and personal identities is “identity talk.” As noted by Snow and Anderson, one means through which identity talk occurs is through “distancing,” which consists of attempts to distance one's self from roles, associations or institutions “that imply social identities inconsistent with their actual or desired self-conceptions,” and thus operate as a means of resistance to marginalized social identities. As Snow and Anderson have observed, investigating “the concept of identity and its relationship to role and self … is consistent with longstanding sociological concern with the relationship between the individual and society and with the theoretical function of identity as a kind of interface or conceptual bridge linking the two.” Their scholarship suggests that interviews with socially marginalized individuals may reveal considerable identity work (efforts to promote a particular identity to the interviewer) that is designed to positively align the interviewees’ social and personal identities. In the case of Guantánamo, this can be seen in former detainees’ extensive efforts to frame themselves as innocent or to frame their religion as requiring patience or non-violence. These framings counter the social identity being promoted by the U.S. government that the men in Guantánamo were guilty of terrorism and that their terrorism was motivated by their religion.

Ewick and Silbey also provide a useful theoretical orientation to investigate meaning, identity and resistance from the perspective of the relatively powerless. They identify the ways in which both dominant institutional power and resistance to such power “draws from a common pool of sociocultural resources, including symbolic, linguistic, organizational and material phenomena.”

Importantly, they locate their work within story-based, narrative approaches to understanding everyday legality and authority, focusing on how laypersons make sense of and act on (and against) institutionalized practices. As Ewick and Silbey emphasize, “people tend to explain their actions to themselves and to others through stories.” Thus, stories communicate how individuals give meaning to and make sense of their experiences. Relatedly—and combining their work with that of Snow and Anderson—the positioning of the protagonist within that story has implications for identity, specifically the identity he or she hopes to project to the listener.

Ewick and Silbey reason that the stories people tell, especially those of resistance, tend to branch out along four analytical dimensions of social action, including normativity, constraint, capacity, and time/space. As for the first dimension, “[any] narrative, including a story of law, is not just a description of what happened but also a statement of the normative grounds

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91 Ibid., 213-14.
92 Ibid., 215-16.
93 Ibid.
95 Ewick and Silbey, “Narrating Social Structure,” 1340-41.
96 Ibid., 1341. The stories told by former detainees also enable me to incorporate and potentially build upon Ewick and Silbey’s typology to investigate whether former detainees used techniques of “masquerade, rule literalness, disrupting hierarchy, and colonizing space” and/or other tactics to redistribute power and advantage. Ibid., 1328, 1350.
Accordingly, stories can reveal which behaviors interviewees perceive to be proper or improper. Thus, such stories have relevance for the law, the field that regulates social norms around proper and improper behavior.

Maynard-Moody and Musheno have similarly revealed the tremendous potential for stories to elucidate the meaning of various actions for various actors: as they have written, stories can “present highly textured depictions of practices and institutions … [that can] bring institutions to life … [and] give research a pungency and vitality because they give prominence to individual actions and motives … [as] the textual embodiments of the storytellers’ … perspectives.”

Also relevant are the ways in which—and under what conditions—individuals come to “name” their injuries and “blame” others, as well as the ways in which individuals use their understanding of the law to facilitate resistance and other responses to bureaucratic oppression, including blatant exercises of authoritative power. As noted by Morrill, Zald and Rao, individuals may turn to “master frames” to help them interpret their experiences. Such frames may be structured around religion, gender, national identity, and even a sense of one’s guilt or innocence, each of which may encourage or discourage resistance to oppressive institutional behaviors.

Finally, this dissertation draws on research that has considered the relationship between culture and law, culture and organizations, culture and identity, and the ways in which culture ultimately helps shape the frames that give experiences meaning. For example, Renteln discusses the phenomenon of enculturation (“the notion that culture shapes cognition and

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98 Ewick and Silbey, “Narrating Social Structure,” 1343.
99 Steven Maynard-Moody and Michael Musheno, “State Agent or Citizen Agent: Two Narratives of Discretion,” 10 J. of Public Administration Research & Theory 329-358 (2000): 336. This dissertation owes a debt to Kristin Bumiller’s work, which suggests the importance of looking at legal and social injustices not only from the perspective of those in power, but from the perspective of law’s subjects. In her 1986 article, “Victims in the Shadow of the Law,” Bumiller analyzed individuals’ responses to discrimination, including when and why individuals chose not to seek legal redress, to reveal where anti-discrimination laws failed to meet their needs. In a similar vein, this dissertation draws on the narratives of former detainees to discover whether and why human rights laws, specifically those intended to mitigate and/or eradicate torture, may have failed to meet their objectives at Guantánamo.
conduct”) and thus the meaning with which institutional practices and experiences are imbued. Relatedly, Morrill elucidates the ways in which culture (roughly equated with shared norms, myths and symbols, or “socially constructed systems of meaning”) can be used as both “threat and resource” within an institutional setting, while Engel and Munger argue that how an individual relates to authority and the law, including whether one perceives that he or she has been wronged, is closely tied to an individual’s self-identity. That self-identity is (in turn) informed by the society and culture in which one lives. Abdullah Ahmed An-Na’im, a scholar who has illuminated Western biases underscoring current interpretations of cruel, inhuman and degrading treatment, has similarly argued for the importance of considering culture when determining whether particularly practices are inhuman and/or degrading, providing an important foundation for this dissertation.

Ultimately, the social science literature outlined above suggests that attributed meanings are communicated through stories. Those stories—especially as shared by marginalized individuals—often feature identity work designed to help align individuals’ self and social identities and to do so in conformance with positive master frames. Those master frames are shaped and borrowed from one’s cultural references, which imbue social interaction with meaning. Thus, the meanings ascribed to various social phenomena can be ascertained by carefully peeling back the layers the stories in which they are shared.

d. Summary of the Literature

This dissertation marries the scholarship above with the empirical evidence provided by former detainees’ interviews to show how the struggle within political-military prisons centers on a struggle to salvage and sustain positive self- and social identities. More specifically, the scholarship outlined above is used to analyze the clash of former detainees’ personal identities as “innocents” with their social identities and treatment as the "worst of the worst," including what that clash meant for detainees and the mechanisms they embraced to win that war. This dissertation also notes how the public framing of detainees as “enemy combatants” and later as “unprivileged enemy belligerents” essentially ensured the near-irrelevance of detainees’ individual identities, and became a key mechanism to justify removing them from the civilian justice system and placing them in military custody, thereby significantly magnifying the stakes.

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103 Renteln, Cultural Defense, 6.
105 Engel and Munger, “Rights of Inclusion,” 41. For purposes of this research, identity is defined as “concepts of the self that emerge from interactions among individuals and groups over time.” Ibid.
in their battle for identity.\textsuperscript{107} That investigation is tied to the work of scholars who have explored the ways in which institutional efforts to encompass the lives of custodial members can result in an experience of social death\textsuperscript{108} — a struggle that implicates one’s dignity — leaving its inhabitants physically alive but socially and emotionally destroyed. The identity-work that occurs both during detention and in former detainees’ post-detention interviews is conceptualized as a form of resistance to the threat of psychological and social devastation, and linked to a proposed refinement of our understanding of cruel, inhuman and degrading treatment.

D. From the Micro to the Macro: The Relationship Between Cruel, Inhuman and Degrading Treatment and Social Control

In addition to the value that former detainees’ experiences have for a more grounded understanding of abusive institutional treatment, studying Guantánamo also reveals quite a bit about the role of political-military prisons in society. When I began working on this dissertation, I regularly faced the reaction from others that while Guantánamo is fascinating, it is such a unique phenomenon that it is, perhaps, unworthy of study. What can former detainees possibly tell us about any larger social condition, if Guantánamo is an “extreme” case, an outlier? The belief that Guantánamo is singular — a phenomenon specific to a particular time and place — certainly contributed to the difficulty I had securing funding and convincing others that what I hoped to study was not only worthwhile, but imperative.

What I have learned is that this impression of Guantánamo’s uniqueness — an impression that has been encouraged by the United States government — is inaccurate. While Guantánamo is certainly infamous as one of the most spectacular and publicized military detainment facilities of all time, it is also indicative of a much larger phenomenon: namely, the ever-expanding use of prisons to facilitate social control.

All practices and experiences are embedded within a larger social context, one that has relevance for meaning-making by the individuals who live and operate within that context. This iterative relationship between society and individual can never be completely disentangled. For example, prisons are a tool used by nations to help organize and control society, while harsh interrogation practices, including cruel, inhuman and degrading treatment, are tools used by interrogators and military police to control people within these institutions. Considering prisons and prison practices as technologies of social and individualized control is important for understanding detainees’ experiences, even as understanding detainees’ experiences has relevance for comprehending the broader social phenomenon of mass imprisonment as it operates within society.


In his seminal work *The Culture of Control*, David Garland discusses the role that prisons play in social life, identifying “the social processes that … tend to lock us into an institutionalized culture of control.”

Similarly, Jonathan Simon has analyzed how societies are governed through their governments’ responses to crime, and how governments utilize the fear of crime to secure a broad range of social objectives. I believe that Guantánamo is not only indicative of the larger phenomenon of mass imprisonment that has been occurring domestically, but also of the ways in which the United States has expanded its reach beyond its territorial borders to assert control over purportedly *global* threats, relying on familiar tactics of fear to motivate and justify that expansion.

From a macro perspective, this dissertation has important implications for our understanding of the ways in which the United States uses penalty, symbols of penalty, and the threat of crime as means of governance. Just as the hyper-active building of prisons within the United States has been rationalized by a perceived threat of *internal* crime, so too has terrorism (which has mostly been framed as an *external* threat) been the primary concept used by the United States to justify the spread of U.S.-run political-military prisons overseas. The invocation of terrorism to motivate domestic and international allies and engender support for the spread of prisons to incarcerate shockingly high numbers of mostly Muslim men—who have arguably become as ideologically linked to terrorism as African-American males have been to domestic crime—has been observed by former detainees and non-detainees alike.

Simultaneous with this geographic expansion has been an expansion of the contexts in which prison-based control is considered appropriate. While imprisoning people has generally been deemed legitimate when individuals have been convicted of criminal activity, this more recent paradigm legitimates imprisonment based on a “new apparatus of prevention and security.” Framing this development as necessary to successfully wage the “war on terror” has been a critical mechanism through which to transform “the means and rationalities by which elites justify and set the desired dimensions of their own governance.” Unlike the domestic context, in which the binary of elite/non-elite is comprised of people, however, here the binary is comprised of states, with the United States the paradigmatic example of an elite nation.

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111 Of course, there are exception to this, as when numerous Muslim-Americans were rounded up in the immediate aftermath of 9/11, and as evident in the post-9/11 interweaving of immigration and anti-terrorism policies.
112 As one former detainee begged during his interview, “What was my crime? Was being Muslim my crime?”
113 Garland, *Culture of Control*, 170.
115 Simon has noted the potential for “wars of governance” to cut across political divides, using the example of Nixon and his hope to use the wars on crime and cancer to realign American politics. The notorious Bush/Gore election of 2000 was one of the very closest in U.S. history; the emergence of a new war on terror in its immediate aftermath, a “war” that cut across party
Indeed, this scaling up—this linking of criminal activity to harms against government (and thus all citizens) as opposed to harms against discrete individuals—is made explicit in the Patriot Act’s\textsuperscript{116} definition of international and domestic terrorism as “acts dangerous to human life that are in violation of the criminal laws … [and] appear to be intended to influence the policy of government.”\textsuperscript{117}

One of the dangers of this criminological shift, whereby policy has tilted away from individualized retribution and towards a more general concern with prevention and harm reduction, is that the individual who is criminalized becomes even more inconsequential than previously. While a wrongdoer’s individualized punishment and reformation were an early focus of crime control, there is a very real danger that in this new paradigm the imprisoned will disappear from geographic, temporal, political and social space, locked away in a far and undisclosed location for an undisclosed or indeterminate length of time. As Garland has noted, “instead of concentrating upon individual offenders, [this] preventative sector targets criminogenic situations.”\textsuperscript{118} The “situation” that Guantánamo has come to symbolize takes this paradigmatic shift to its extreme, demonstrating the extent to which individuals can be “disappeared” from society.

Concordant with this hyper-institutionalism has been an exacerbation of the shift from physical to psychological control as a means of interrogation and related penal and investigatory practices. Several decades ago, Foucault richly described a change in Western societies’ penal practices from an earlier focus on corporal punishment towards imprisonment. This shift was accompanied by a concordant rise in psychological technologies of control. As Foucault explained, “If … penalty in its most severe forms no longer addresses itself to the body, on what does it lay hold? … [S]ince it is no longer the body, it must be the soul. The expiation that once rained down upon the body must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations.”\textsuperscript{119}

Notably, that shift toward the soul, toward the psychological, can, on one hand, underscore the power of penalty to rehabilitate, to reform; on the other, it can be used to bludgeon the spirit, just as during the corporal era, bodies once were. Whereas the battle for survival was once for the prisoner’s life, that battle is now arguably for his identity; thus, a much more metaphorically-oriented tension has emerged, one that implicates psychology, sociology and social psychology even more than biology.

While many scholars have lauded this shift from the physical to the psychological, suggesting that psychological tactics are somehow less threatening to “life” than physical ones,\textsuperscript{120} they have also noted that the increased focus on psychological tactics tends to make abuse

\textsuperscript{116} Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 115 Stat. 272 (2001). This act expanded the definition of terrorism to include both foreign and domestic acts, broadened the FBI’s search capacity, and authorized the indefinite detention of immigrants, among other effects.

\textsuperscript{117} 18 U.S.C. § 2331(1), (5) (emphasis added).

\textsuperscript{118} Garland, \textit{Culture of Control}, 171.

\textsuperscript{119} Foucault, \textit{Discipline and Punish}, 16.

\textsuperscript{120} See, e.g., Leo, \textit{Police Interrogation}. 
more hidden by switching out practices that leave marks for those whose consequences are far less visible. What has largely been overlooked, however, is the extent to which many prisoners perceive this battle to be equally if not more serious than a battle for physical survival.

This dissertation demonstrates how the shift from corporeal to psychological control identified by Foucault is both supported—and contradicted—by the case of Guantánamo. On the one hand, stories from Guantánamo illustrate this development: there is certainly evidence of cruel, inhuman and degrading treatment that depends on psychological mechanisms. However, these practices often operated in conjunction with corporeal practices, such as chaining detainees, using hoods, nakedness, etc. While such practices do not desecrate the body in the same manner as being drawn and quartered (as in the opening pages of Foucault’s *Discipline and Punish*), the way into a detainee’s “soul” is often through his body or the bodies of others. Thus, prison practices are not only discursive in the Foucauldian sense (e.g., via the categorizing of persons through science and other rationalizing discourses) but also corporeal in the service of desecrating psychological identity. Thus, at Guantánamo the two approaches inter-relate and necessarily co-exist, suggesting a needed refinement in Foucault’s observation.

Importantly, psychological and social control is not just exerted upon detainees within the context of imprisonment, but frequently extends—at least ideologically—post-release. Those who are the object of such control are not just detainees, but individuals in society more generally. In the context of domestic crime-control, offenders are now less likely to be dealt with by probation and parole than depicted as “culpable, undeserving and somewhat dangerous individuals who must be carefully controlled for the protection of the public and the prevention of further offending. Rather than clients in need of support they are [framed] as risks who must be managed.”

This perspective implicates the constitutive aspects of penalism. Indeed, the United States’ treatment of suspected terrorists has been consonant with this perspective: those individuals who are incarcerated in our political-military prisons are no longer marketed as men, but “terrorists.” Much like domestic supermax prisons in the United States, our political-military prisons are operating as “a kind of reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety … function[ing] as a form of exile, its use shaped less by a rehabilitative ideal and more by … an ‘eliminative’ one.” The dehumanization of inmates, which results in their reduction from human beings to mere symbols, can also be seen in their “sentence,” namely indefinite detention. As Garland has noted in the domestic context of revised sentencing laws, “the offender is rendered more and more abstract, more and more stereotypical, more and more a projected image rather than an individuated person.” Subjecting individuals to indefinite detention for the remote possibility that they might be terrorists—which, per the interviews on which this dissertation relies, was frequently determined by religious affiliation and the unsubstantiated accusations of strangers and enemies—takes this reliance on stereotypes and de-individuation to the extreme. It is also consonant with Garland’s “criminology of the dangerous other” upon which the federal approach to purported terrorists has relied, fostering the assumption that these men are “simply wicked,

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121 Garland, *Culture of Control*, 175.
122 Ibid., 178.
123 Ibid., 179.
and in this respect intrinsically different from the rest of us.”

In such contexts—where detainees are dehumanized and othered—the worst abuses are most likely to occur and particularly extreme examples of cruel, inhuman and degrading treatment can be found. Because Guantánamo detainees have been among the most vilified and stereotyped of prisoners, having become the paradigmatic “other” of the first decade of the 21st century, it makes sense that the stories they have to tell about their time in and after detention provide fertile grounds for identifying and exploring the phenomena of cruel, inhuman and degrading treatment, and of social control more generally.

E. Implications for Domestic Law

In addition to its international implications, this dissertation has significance for domestic law and prison practices. Guantánamo operates as something of a hybrid between extraterritorial prisons and the U.S. domestic system: while located in a “foreign” country, it is also located within the United States’ “jurisdiction and control.”

The facility was built by Americans and organized based on American notions of crime control—indeed, two of the prisons at Guantánamo are exact replicas of supermax prisons in Indiana and Michigan. Not only are several of the complexes modeled on U.S. supermax designs and strategies (the use of cages, extreme isolation, and sensory deprivation, to name but a few), many of the individuals who have worked at Guantánamo operated as prison guards domestically prior to or between their military assignments.

Understandably, then, significant mimetic isomorphism has occurred between the domestic and political-military penal systems. Because of this, it is conceivable that detainees’ experiences at Guantánamo may overlap with those of men who have been held in domestic supermax prisons and thus may have relevance for such prisoners.

Of course, while Guantánamo’s hybrid nature may be able to tell us quite a bit about both domestic and international prisons under U.S. control, there are also strict limitations as to what Guantánamo can tell us about either system—the voices of former detainees, as captured within this dissertation, can only reveal the experiences of specific individuals in the specific places in which they were held and as they were recalled months or even years later. At bottom, however, such interviews provide one of the richest potential sources of information we have to begin to understand how U.S. prison policies translate into the military context and vice-versa, and to locations beyond America’s borders. For example, in addition to a transfer of practices and personnel from domestic penal systems to Guantánamo, it is possible to trace the spread of

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124 Ibid., 184.
127 This interaction between domestic prison guards and “terrorists” can also be seen in the significant numbers of convicted individuals currently serving sentences in the United States. See, e.g., Scott Shane, “Beyond Guantánamo, a Web of Prisons for Terrorism Inmates,” NY Times, Dec. 10, 2011.
especially harsh interrogation tactics and conditions of confinement from Guantánamo abroad. General Geoffrey D. Miller—Guantánamo’s commanding officer from November 2002 to August 2003, who became notorious for implementing a particularly punitive regime based on the reverse engineering of SERE tactics—brought many of the practices used in Guantánamo to his next assignment in Iraq.¹²⁸

At the very least, an iterative relationship seems to have emerged between international and domestic penal logics and practices. Jonathan Simon posits that the United States may be on the verge of “rethinking” its approach to punishment by incorporating international conceptions of dignity into domestic understandings of the limits of states’ carceral authority.¹²⁹ He points to the recent Supreme Court case Brown v. Plata,¹³⁰ which integrates human rights’-based rhetoric of human dignity to comment on prison conditions that violate the Eighth Amendment. This case implicitly suggests that looking to international understandings of prison conditions and prison treatment to inform the domestic context may not be as implausible as once considered.¹³¹ Certainly, if dignity is the basis for our understanding of the limits of state authority to control prisoners—and dignity is protected through the prohibition of cruel, inhuman and degrading treatment internationally—understanding the concept of dignity as it occurs within one jurisprudential sphere may prove helpful to understanding it in another.

The Plata case, however, is just one of several indicia that the borders between international law and domestic law are becoming increasingly blurred, a blurring that is being facilitated by diverse phenomena.

First is the ever-increasing internationalization of social life. Advances with regard to travel both through physical and cyber space have enabled an increasingly rapid diffusion of knowledge and practices between jurisdictions and sovereign states. Indeed, the diffusion of practices and people is readily apparent in the transfer of prison personnel from domestic prisons to Guantánamo, from Guantánamo to Afghanistan and Iraq, and back. Whereas there once used to exist a relatively rigid divide between military and domestic police officers, that divide has softened considerably with the United States’ increased reliance on reservists, as well as private security operatives, in light of the high costs of maintaining a standing army.

The copying of architecture from domestic supermax prisons, as mentioned above, is also indicative of, and has potentially facilitated, this transfer of technologies. Accordingly, former detainees’ stories may enhance understanding of the ways in which prisoners experience some aspects of their confinement in supermax prisons due to similarities in prison architecture and related systems and penalties.

Another potential contributor is the increased salience of the doctrine of “complementarity,” due to the emergence of the International Criminal Court in 2002. According to this doctrine, the International Criminal Court does not have primary jurisdiction over potential cases, but may act to supplement domestic prosecutions. Only when nations fail to investigate and prosecute crimes within the Court’s jurisdiction may it step in and deem a case

¹³¹ Ibid.
admissible. Along with this complementarity has come the need for a greater standardization of substantive and procedural law between nations. That this standardization is occurring in states that are parties to the International Criminal Court’s Rome Statute is apparent, for example, with the sudden wave of Sexual Offenses Acts recently passed throughout Africa that are aimed at better aligning domestic legal regimes with that of the Court. Domestically, while the United States is not a party to the Rome Statute, it did participate in its establishment, contributing insights regarding its own substantive and procedural law, further nudging international and domestic law into alignment.

Next is the acknowledged overlap between the United States’ Eighth Amendment and the international prohibition of Cruel, Inhuman and Degrading Treatment. Notably, and as explained in chapters two and three, the United States has repeatedly declared (and recently re-declared) that the two are synonymous, further suggesting that understanding one may inform an understanding of the other.

The final engine is a trend towards amplifying the voices of victims in international courts—a trend that comports with the victims’ rights movement domestically. This increase in the willingness to consider the perspectives of victims can be seen with the unprecedented embrace of victim participation in the setup of the International Criminal Court. By privileging victims’ perspectives at relatively early points in judicial processes, a norm is being set that suggests victims’ perspectives are important for educating judges as to whether various crimes have been committed—not just for establishing the relative severity of a violation for sentencing purposes, as occurs in the United States. This underscoring of the importance of listening to victims about their experiences suggests former detainees’ insights are relevant to and important for understanding the impact of law and institutional behavior on human lives and society more generally.

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135 Importantly, this history suggests that such alignment may not just be calibrated from the top (the ICC) down, but from domestic nations up. In addition, because the ICC operates from a global platform, it is in an ideal position to set general norms with which all states may eventually feel compelled to conform in order to symbolically signal their allegiance to the rule of law and attendant human rights, whether they are parties to the Rome Statute, or not.

136 The unprecedented embrace of victim participation is especially evident in the Extraordinary Chambers of the Courts of Cambodia, which were established in the early 2000s to try crimes that had been committed thirty years earlier by the Khmer Rouge. See, e.g., Eric Stover, Mychelle Balthazard and K. Alexa Koenig, “Confronting Duch: Civil Party Participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia,” 93 Int’l Rev. Red Cross 1 (2011).
Ultimately, interviews with former detainees indicate that cruel, inhuman and degrading treatment may be integral to the exercise of institutional control in political-military prisons and other extreme incarceration contexts. This suggests that attempts to control such treatment solely through law may be doomed to failure.  

When one examines Guantánamo from the “bottom up,” as here, cruel, inhuman and degrading treatment becomes evident as a key part of the institutional undergirding of the prison. This incongruence—of the law’s prohibition of cruel, inhuman and degrading treatment and the institution’s inherent reliance on practices that are often experienced as such—likely explains much of the difficulty in ensuring accountability for such practices, the outrage of those few who have been held accountable, and the frustration of those who advocate for an even greater response.

F. Conclusion

Decades ago, Falk Pingel, a holocaust researcher, stressed the importance of paying attention to detainees’ experiences to facilitate society’s understanding of institutional abuse. As Pingel explained in the context of the extermination camps of Nazi Germany, “[t]he forms chosen by survivors to come to terms with their experience … have become a part of [our] social history … As horrible as the experiences of camp prisoners were, their scope is not limited to what is individual. In order to understand those contents that can be generalized, we utilize the scientific approach. It does not exclude, but rather presupposes our appreciation for the individual experience. Thus, a prerequisite for everything else is that we listen to the narratives told by former prisoners.”

Addressing how detainees experience political-military prisons and under what conditions their experiences devolve into cruel, inhuman or degrading treatment has renewed importance in the wake of 9/11. This dissertation develops an empirically-grounded, victim-centered theory of institutional violence that offers a rare opportunity to assess how a total institution operates from the ground up (from prisoners’ perspectives) rather than from the top down. In relaying insights from approximately ten percent of the men who have been detained at Guantánamo, I hope to shine a light on the ways in which political-military prisons operate and the meanings of those operations for both prisoners and society-at-large.

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137 This observation recalls Marx’s notice of how attempts to control the exploitative aspects of capitalism through liberal legal rights are ultimately futile.
139 Ibid.
II. A Legal History of Cruel, Inhuman and Degrading Treatment

“The State is the coldest of cold monsters.”

This chapter presents the legal history of the international prohibition of cruel, inhuman and degrading treatment, focusing on the period before 9/11. This history is intended to illustrate how the experiences conveyed through former detainees’ stories might enhance our understanding of what the prohibition is, and how the prohibition should arguably be interpreted to better protect those who are at risk of such treatment and to better ensure accountability after it has occurred.

Today, all of the major instruments of international law that deal with human, civil or political rights explicitly prohibit torture, including some variation of cruel, inhuman and degrading treatment. While, in the west, the Catholic Church broadly condemned the “inhumanity” of torture as early as the 4th century (ending with Pope Innocent IV’s authorization of the use of torture against heretics in the mid-thirteenth century), the post-World War II era resulted in the first international, cross-jurisdictional attempt to regulate the practice through law.

These authorities include Article 5 of the Universal Declaration of Human Rights of 1948; Article 3 of the European Convention of Human Rights of 1950; Article 7 of the International Covenant on Civil and Political Rights of 1966; Article 4 of the European Union’s Charter of Fundamental Rights; the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

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140 Nietzsche, as quoted by Go’mez Go’mez of Columbia to mark the occasion of the passage of the United Nations Convention Against Torture on December 10, 1984. See Matthew Lippman, “The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,” 17 Boston College Int’l & Comp. L. Rev. 275, 312 (1994).

141 See, e.g., Matthew Lippman, The Development and Drafting of the United Nations Convention Against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, 17 B.C. Int’l & Comp. L. Rev. 275, 278 (1994).


of 1987;147 Article 37(a) on the Rights of the Child;148 as well as the four Geneva Conventions and their Additional Protocols.149

The official definitions provided by these authorities, and the ways they have been interpreted by scholars and practitioners, provide a critical framework for and potential juxtaposition with detainees’ experiences. They also underscore the lack of any satisfactory theory of the relationship between torture and cruel, inhuman and degrading treatment (which are frequently defined in relation to each other), and reveal the need to better understand cruel, inhuman and degrading treatment specifically.

Judicial interpretations of cruel, inhuman and degrading treatment have proven inconsistent and—at times—incoherent. This chapter discusses how international law has embraced a variety of approaches to defining cruel, inhuman and degrading treatment, each of which is problematic. By documenting the evolution of the prohibition and the various paths pursued, this chapter provides a basis for my argument that domestic and international jurisprudence has improvidently taken an overly “objective” approach to understanding these phenomena, as well as prioritized physical over psychological forms of cruelty, thereby turning a blind eye to the diversity of abusive treatment to which prisoners are subjected. Existing interpretations are so restrictive that most prison-based abuse will never be interpreted as torture, no matter how onerous.

Ignoring the full range of threats that prisoners face is normatively problematic if one of the purposes underlying the prohibition against cruel, inhuman and degrading treatment is to protect against those harms that prisoners experience as the very worst. In order to develop a stronger jurisprudence—one that better reflects this policy goal—it is necessary to understand what types of harms prisoners most decry, why those are understood to be the very worst, and under what conditions they are believed to be so.

All of these understandings depend, at least in part, on meaning-making by prisoners: specifically, how prisoners make sense of practices employed by the institutions in which they are held. In order to fully understand the gap that has developed between what prisoners experience as the most egregious forms of prison-based treatment, and what existing laws protect against, it is critical to understand the prohibition’s history. History illuminates what the prohibition was intended to prohibit and clarifies how that intention has been perverted in international customary and treaty-based law, which has come to prioritize an objective standard

149 The Geneva Conventions, as well as their additional protocols, can be accessed at http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp. See also McCourt and Lambert, Interpretation of the Definition, 7. Since the Geneva Conventions do not use the precise terms “cruel, inhuman and degrading,” they are not addressed in detail here, despite their importance and relevance to the treatment of civilians and POWs in the context of war.
and thus the assumptions of legal authorities over a subjective one—the experiences of prisoners.\(^{150}\)

By prioritizing physical cruelty over inhuman and degrading treatment, and by failing to retain an understanding of the range of violence that the terms “inhuman” and “degrading” were specifically intended to acknowledge, case law misses many of the ways in which inhuman and degrading treatment can constitute as great a threat to prisoners’ psychological survival as physical torture does to their physical survival. As I attempt to establish later in this dissertation, the primary threat underlying physical torture is destruction of the body, and ultimately, death; the threat underlying psychological torture is destruction of the mind. Both endanger victims’ social- and self-identities. It is through this destruction of identity that torture and other forms of cruel, inhuman and degrading treatment become, through the physical and psychological pain that they inflict, “world destroying.”\(^{151}\)

In Part I of this chapter, I describe the evolution of the prohibition against cruel, inhuman and degrading treatment. Part I(a) introduces the current leading authority underscoring the international prohibition—the Convention Against Torture—while Part I(b) journeys back in time to explore the emergence of the prohibition in the aftermath of World War II. Part I(c) illustrates how the prohibition, as originally conceptualized, became increasingly distorted through later treaties and early judicial interpretations of those treaties. Part I(d) explains how the prohibition came to be interpreted by the International Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and how their jurisprudence both clarified—and further muddied—international conceptions of the prohibition. Part II addresses the United States’ interpretation of the prohibition, including its relationship to cruel and unusual punishment. Part III summarizes the key issues that emerge from this history, while Part IV concludes the chapter.

A. Evolution of the Prohibition Against Cruel, Inhuman and Degrading Treatment

i. Contemporary Basis for the Prohibition and Why an Understanding of its Legal History is so Important

Any contemporary analysis of the prohibition of cruel, inhuman and degrading treatment necessarily begins with the Convention Against Torture, which is currently considered its primary international authority.\(^{152}\) Drafted during the late 1970s and early 1980s and opened for

\(^{150}\) When the test has incorporated subjective elements it has tended to focus on the intent of the perpetrator and not the experiences of the victim; alternately, it has been predominately limited to the demographic considerations of a the victim’s sex, age and state of health. See, e.g., Aisling Reidy, The prohibition of torture: A guide to the implementation of Article 3 of the European Convention on Human Rights, Human rights handbooks, No. 6, at 15 (Council of Europe 2002).


\(^{152}\) See Matthew Lippman, “The Development and Drafting of the United Nations Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment,” 17 Boston College Int’l & Comp. L. Rev. 275 (1994). The Convention was followed by the 1987 Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment; however, that Convention’s scope is less broad than the general Convention Against Torture.
signature on February 4, 1985, the Convention was signed by as many as twenty-five countries within its first two months alone, a rapidity that reflects the depth of universal condemnation against the state-sanctioned abuse of individuals in state custody. According to Article 16 of the Convention, States Parties are obliged to prevent (and presumably, to prosecute) acts of torture, as well as prevent “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture” committed by, or at the behest of, a public official. Torture has been recognized by the world community as so despicable that it has been categorized as one of only a few jus cogens crimes, meaning they are absolutely prohibited under all circumstances; no deviation from the prohibition against torture is permitted, even for states of emergency. Unlike the prohibition against torture, however, the Torture Convention does not require States to criminalize cruel, inhuman or degrading treatment that falls short of torture, although it does maintain that if States Parties fail to prevent such treatment, they have violated their treaty obligations.

If the prohibition against cruel, inhuman and degrading treatment (and torture) is so ubiquitous, how did it come to be so? And why were these particular harms—those that are “cruel,” “inhuman” and “degrading”—chosen as worthy of such outrage?

Unfortunately, the Committee Against Torture—the organization that oversees compliance with the Convention—has declined to define the terms cruel, inhuman or degrading. All that is known is that the distinctions between “torture” and “cruel, inhuman or degrading treatment” have been kept purposely vague with the hope that the scope of their application will be “interpreted so as to extend the widest possible protection against abuses, whether physical or mental.”

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153 See, e.g., Lippman, “Development and Drafting,” 312.
154 The United States was not one of the original signatories, although, as described below and as mentioned in the previous chapter, it later became a signatory, albeit with significant reservations. Convention Against Torture and other Cruel, Inhuman and Degrading Treatment, at http://www.hrweb.org/legal/cat.html (last edited Jan. 25, 1997).
155 UNCAT, art. 16; Koenig et al, "The Cumulative Effect," 151.
158 NCAT, Articles 4 and 16. See fn.24. Also see, for example, Gail H. Miller, Defining Torture (New York: Benjamin N. Cardozo School of Law, 2005), pp.3-4: Miller explains that States have the right to prosecute those who commit torture in a territory within their jurisdiction, based on the prohibition of torture as jus cogens and, thus, as a fundamental principle of international law to which there are no exceptions. This status does not extend to cruel, inhuman or degrading treatment, which States are required to prevent but not prosecute.
159 UNCAT, arts. 4 and 16. Also see Gail H. Miller, Defining Torture, 3-4 (Benjamin N. Cardoza School of Law 2005) (explaining the requirement that states prosecute those who commit torture within their jurisdictional territory).
While refusing to define the terms to permit the widest possible interpretation is certainly laudable, this practice necessarily fails if courts only recognize treatment that is physically cruel, and if inhuman and degrading treatment become “lumped out” of those institutional practices recognized by courts. Today, the Committee Against Torture largely refers to cruel, inhuman and degrading treatment by one term: “ill-treatment.” Describing the three prohibitions as “interdependent, indivisible and interrelated”—and despite rhetoric that the prohibitions should be understood as embracing the widest range of abuses possible—as discussed below, interpretations of the Convention have increasingly failed to acknowledge the diversity of harms that these three prohibitions were originally meant to protect against. While it may not be necessary to create hard and fast definitions for each of the terms, human beings are unnecessarily endangered if the world forgets to acknowledge the various abuses that gave rise to each of the prohibitions and the reasons for their initial inclusion.

Ultimately, the drafting history of the Convention provides no guidance as to why the terms inhuman and degrading were included. The prohibition’s phrasing appears to have been borrowed whole cloth from the International Covenant on Civil and Political Rights, and before that, from the 1948 Declaration of Human Rights. Since the earliest source for the phrase “cruel, inhuman and degrading” is the 1948 Declaration, it is important to understand how the phrase made its way into the Declaration in order to determine what it was meant to protect.

### ii. Evolution of the Prohibition in the Wake of World War II (1945-1948)

Shocked by revelation of the “hidden horrors” of World War II, the international community came together in 1945 to create a global legal framework to prevent such horrors.

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162 For evidence of this see the introduction to the Convention Against Torture, available at http://www.hrweb.org/legal/cat.html. The Convention Against Torture’s introduction also acknowledges the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was adopted by General Assembly resolution 3425 (XXX) on December 9, 1975. See Office of the United Nations High Commissioner for Human Rights, at http://www2.ohchr.org/english/law/declarationcat.htm. This Declaration similarly fails to define cruel, inhuman and degrading treatment, noting only that torture “constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.” Ibid. at art. 1.¶2. It exempts from the definition any “pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.” Ibid. at art. 1, ¶1.

163 Yukie Tanaka, Hidden Horrors: Japanese War Crimes in World War II (Westview Press 1996). The abuses and genocide of millions of people during the holocaust have been well documented and are far too numerous to detail here. They ranged from forced disappearances, to gassing, to medical experimentation on live, human subjects. However, many of them can be found in the draft War Report cited later in this chapter, as well as across a plethora of biographies, autobiographies, and non-fiction accounts of the War.
from reoccurring, and to assert a universal consensus as to “the supreme value of the human person.” An intricate system of treaties, commissions, covenants and protocols would emerge from this endeavor, establishing a universal body of fundamental rights and freedoms designed to protect against future abuse, provide for legal accountability, and (in some cases) offer remedies for egregious wrongs. The Declaration was the first step in that process, establishing a foundational international norm against torture and other forms of institutionalized violence.

So how did the Declaration come to be, and why was its specific terminology employed? The first draft can be traced back to a Canadian named John P. Humphrey, who served as Director of the United Nations Division of Human Rights starting in 1946, and as Secretary of the Declaration’s Drafting Committee during the mid-to-late 1940s. While many have wrongly attributed the Declaration’s first draft to René Cassin, the commission’s vice-chairman under Chairman Eleanor Roosevelt, Humphrey’s autobiography and diary establish that he was, in fact, the original author of many of the Declaration’s provisions, and that it was his version upon which the drafting committee (including Cassin), ultimately relied. The records he left behind also clarify that he had very little drafting experience when it was decided by a small group of four, overseen by Mrs. Roosevelt, that Humphrey would be charged with developing an initial outline for the Committee’s use. That outline became a full-blown draft that was based, by his own admission, on a montage of documents, which he provided to the Committee to support their further editing.

Several of the documents from which he borrowed most heavily were a draft declaration of international duties and rights, which Cuba had sponsored at the United Nation’s Convention

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166 See, e.g., Anne Huestis Scott, The Boy Who Was Bullied: John Peters Humphrey—Drafter of the UN Declaration of Human Rights (Glen Margaret Publishing 2011); Clinton Timothy Curle, Humanité: John Humphrey’s Alternative Account of Human Rights (University of Toronto Press 2007).
170 Ibid.
171 Ibid., 31-32.
in San Francisco in 1945.\textsuperscript{172} The American Law Institute also authored a seminal text, sponsored by Panama at the same conference; Humphrey considered this the “best” of all the documents from which he borrowed.\textsuperscript{173} However, a review of his notes reveals that the draft he prepared contained no mention of cruel, inhuman and degrading treatment: instead, Humphreys’ then-

\begin{quote}
Article 4 proclaimed that “[n]o one shall be subjected to torture, or to any unusual punishment or indignity,”\textsuperscript{174} seeming to borrow heavily from the United States’ Constitutional prohibition against cruel and unusual punishment.\textsuperscript{175}
\end{quote}

It was in René Cassin’s later draft (the second) that the words “cruel” and “degrading” appear for the first time, although “inhuman” remains absent.\textsuperscript{176} Specifically, Cassin’s proposed Article 7 declared that “[n]o person, even if found guilty, may be subjected to torture, cruelty, or degrading treatment.”\textsuperscript{177} The notion of degradation seems to have been particularly salient at that time in France, the country that Cassin represented and thus to have made its way into the prohibition: the French Constitution, newly drafted in 1947, includes in its preamble a concern with regimes that had recently “sought to enslave and degrade humanity.”\textsuperscript{178}

“Inhuman,” however, did not make its first appearance until July 1947 in a modification that was ultimately attributed to the drafting committee.\textsuperscript{179} Specifically, proposed Article 2 provided that “No person shall be subjected to: (a) torture in any form; (b) any form of physical mutilation or medical or scientific experimentation against his will; [or] (c) cruel or inhuman

\begin{quote}
\textsuperscript{172} Ibid.
\textsuperscript{173} Ibid., 32.
\textsuperscript{174} Secretariat Outline, E/CN.4/21, at 9 (emphasis added).
\textsuperscript{175} The eighth amendment was adopted in 1791. It borrows from the identically-worded declaration denouncing “cruel and unusual punishments” as it appeared in the English Bill of Rights of 1689.
\textsuperscript{176} Interestingly, René Cassin remains associated with these two categories of treatment contemporaneously: the human rights website that bears his name stresses the need to protect human beings against “torture” and “degrading” treatment. Notably, “torture” has come to replace “cruel,” much as it has generally in the wording of international treaties, and “inhuman” remains absent. See, e.g., René Cassin: The Jewish Voice for Human Rights, at http://www.renecassin.org/campaigns. Cassin noted, per the summary record of the seventh meeting of Declaration’s drafting committee, that the primary sources upon which he relied for his draft were the Declarations of Cuba and of the American Association of Human Rights and the Protection of Man, see E/CN.4/AC.1/SR.7 19 June 1947, p. 2, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/NG9/001/11/PDF/NG900111.pdf?OpenElement
\textsuperscript{177} E/CN.4/AC.1/SR.7 19 June 1947, p. 53. In the original, French version, his proposal read “[a]ucun individu, meme coupable, ne peut etre soumis a la torture, a des peines cruelles ou a des traitements degradants,” Ibid., 54.
\textsuperscript{178} Preamble to the 27th of October 1947 Constitution, text available at http://www.equalrightstrust.org/ertdocumentbank/Preamble%201946%20ENG.pdf.
\end{quote}
unfortunately, while notes are attached to many of the committee’s suggested edits, no notes are attached to this one to suggest why this term was chosen. however, a close review of the meeting minutes, which record the background discussion relevant to each article, reveals that on June 18, 1947 Chairman Roosevelt announced that a new proposal regarding torture had been submitted to the drafting committee (which was then meeting at Lake Success in New York) by the representative from the United Kingdom, Mr. Geoffrey Wilson. This proposal—which prohibited “torture in any form,” any physical mutilation or scientific experimentation, as well as “cruel and inhuman punishments”—was the version that ultimately appeared in the draft dated 1 July 1947, and would be submitted to the full Human Rights Commission for consideration. While the wording would be condensed for the Declaration’s final draft, Mr. Wilson appears to have motivated use of the term “inhuman.” In the drafting committee’s final meeting, Mr. Wilson proposed substituting “drafting committee” for his name as the new phrasing’s source, which explains why he was never credited for the provision.

A possible reason for this apparently uncontroversial deference to Mr. Wilson is that a significant debate was raging at the time within the drafting committee whether to use Humphrey’s draft or a draft declaration prepared by the United Kingdom, as the basis for the document that the committee was creating. Ultimately, Mrs. Roosevelt chose Humphrey’s version, but may have felt it prudent to include several of the United Kingdom’s recommendations to soften any insult. Mrs. Roosevelt similarly concluded that the United Kingdom version would be used as the basis for a later Convention to support enforcement of the Declaration’s provisions, once the Declaration was complete.

181 Ibid.
184 Mrs. Roosevelt’s concern with diplomacy is further suggested by her treatment of Australia: while Australia had proposed another version (briefly discussed in the eleventh meeting), Mrs. Roosevelt explained that Humphrey’s draft would be the basis for the Declaration, the United Kingdom’s would be the basis for any Convention, but that any other proposals (including Australia’s) would be submitted as an addendum to the full Commission on Human Rights. Then, in the very next meeting, she proposed that the Australian representative rewrite certain passages, combining Humphrey’s version and Cassin’s, suggesting she may have wanted to give the Australian representative mother ownership of the emerging master draft, and thus greater buy-in. See E/CN.4/AC.1/SR.12., p. 3-4. Her papers further underscore this concern with diplomacy.
One of the only scholars who has carefully considered the origins of the Declaration’s torture provision—Johannes Morsink—has attempted to explain the lack of notes accompanying this particular article.186 He credibly suggests the Committee may have felt no explanation was needed, particularly in light of atrocities committed by the Nazis during World War II, of which they were then being apprised through a draft of the War Crimes Report.187 The detailed War Crimes Report was being compiled by the United Nations War Crimes Commission during the same time period as the Declaration’s drafting to document human rights issues emerging from the trials of (predominately) German and Japanese war crimes defendants. This report—which officially remained a draft and was never published in final form since the trials were ongoing—was officially reviewed by the Human Rights Division of the United Nations Economic and Social Council in December 1947.188 While this date falls after the July 1947 modification that introduced the term “inhuman” into the Declaration, a number of preparatory papers and/or conversations that occurred outside formal channels may well have informed the Commission’s drafting process. Certainly, newspapers of that era were increasingly revealing the atrocities coming to light in the context of the Nuremberg and related trials, which were being held at the same time.

The terms “inhuman” and/or “inhumane” ultimately appear on 40 pages of the 350-page War Crimes Report.189 The Report implicitly suggests that a tight relationship may have been emerging between conceptions of “inhuman treatment” and a newly-emerging category of international crimes. Labeled “Crimes against Humanity,” this new category was one of three with which World War II defendants were then being charged190 (this connection between the nascent Crimes Against Humanity and inhuman treatment would be made explicit by the International Criminal Tribunal for the former Yugoslavia a half century later).191 The need to justify a new international crime, one especially designed to protect the humanity of victims, may have provided an impetus for incorporating the term inhuman into the Declaration, and thus

187 Ibid.
189 Ibid. Notably, as has been pointed out by Jeremy Waldron, inhuman and inhumane do not mean the same thing; in fact, proscriptions against the latter are “more demanding” than the former, since inhuman treatment is always inhumane, but not vice-versa. See Waldron, “Cruel, Inhuman and Degrading,” 29-31. However, because, as Waldron has also noted, the two terms tend to be conflated, both seemed relevant to search for here.
190 See War Crimes Report (for example, on page 332 the Report says, “It will be necessary to investigate whether, at least in specific cases, inhuman acts committed against German citizens before the war were considered as crimes against humanity….”) The three categories of crimes that were typically being charged included Crimes Against Peace, War Crimes, and Crimes Against Humanity.
191 Prosecutor v. Delalic, No. IT-96-21-T (ICTY 1998) [Celebici].
establish humanity as a seminal concept underlying the new legal order. This is especially likely since the new category of crimes was highly controversial, as many believed it was being applied retroactively in contravention of a basic principle of criminal law that one cannot commit crimes that do not yet exist. On that basis, charging defendants with such crimes would be legally impermissible—yet not doing so would mean failing to hold defendants responsible for some of the most egregious and unprecedented abuses that had occurred during the war. Incorporating humanity into the Declaration may have been an attempt to provide a normative and legal foundation for this emerging concept.

Other resources on which the committee relied mention the term “inhuman,” however, and may also be plausible sources for the term’s adoption. As noted above, the original 408-page Secretariat Outline prepared by Humphrey became a key resource on which the Commission relied for later drafting support. That outline included an overview of the resources he consulted while composing the Declaration’s first draft, and which motivated its phrasing. In the outline, the term “inhuman” appears twice: in the Constitution of Honduras and the Constitution of Bolivia. In the notes accompanying Article 4 (Humphrey’s original, proposed torture provision), citations to both Constitutions can be found, making them plausible sources for later use of the term “inhuman.” Indeed, article 53 of Honduras’ Constitution specifically established that “[p]roscriptive, confiscatory laws are prohibited, as well as those ordering inhuman or perpetual punishment.” Bolivia’s Constitution, Article 14, similarly declared that “[i]n no case shall torture or any other kind of inhuman punishment be employed.”

Ultimately, though, despite the fact that the wording of the Declaration was considered in 97 meetings and underwent 1200 rounds of voting before its finalization, very little can be found that definitively establishes the intent underlying this particular phrasing and thus its intended meaning. And a careful review of Humphreys’ diaries (one of the only detailed sources

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192 For example, on page 342, the Report explains that “Crimes against humanity, as defined in Article 6(c) of the Charter cover acts of inhumanity, and persecution on political racial and religious grounds,” suggesting the nexus between crimes and against humanity, acts of inhumanity, and the later prohibition against inhuman treatment. Interestingly, American weighed regarding the principles that should be considered the “standard of justice” in measuring charges against indicted war criminals is also phrased in terms of inhuman treatment. The Report notes, on page 12, that “the American observations on the principles which should be the standard of justice in measuring charges of inhuman or atrocious conduct during the prosecution of a war” would necessarily permit “no charge of cruelty, inhumanity or impropriety” against a party whose methods conform with the “accepted rules of war.”


195 Ibid., 22.

196 Ibid., 21.

197 Award Ceremony Speech by Mrs. Aase Lineaes, Chairman of the Nobel Committee, given upon the awarding of the Nobel Peace Prize 1968 to Rene Cassin, at http://nobelprize.org/nobel_prizes/peace/laurates/1968/press.html
regarding the background politics and negotiations underlying the Declaration) provides no further clues. However, what a consideration of the drafting history of cruel, inhuman and degrading treatment does strongly suggest is that 1) “inhuman” and “degrading” practices were meant to be prohibited by the Declaration, along with physical cruelty, since included in the final wording; 2) the Declaration went through numerous revisions, suggesting the terms were carefully selected, and 3) the prohibitions included in the Declaration were meant to reflect the experiences of prisoners and other victims as they had occurred during World War II.

An analysis of later jurisprudence and the commentaries accompanying several later treaties reveals that this nexus between the experiences of prisoners and interpretation of the Declaration’s provisions has, however, largely disintegrated. This may be due, in part, to the decades-long gap following the initial rush to create a new international order in the immediate aftermath of war. It would be years before additional conventions and treaties would be drafted to support the prohibition of torture, and decades before their violation would be interpreted by courts.

iii. Evolution of the Prohibition in Later Treaties and Early Case Law (1960s-1990s)

Since its establishment, the Declaration has become the foundation for a number of later treaties designed to prohibit torture and other forms of cruel, inhuman and degrading treatment. Importantly, the Declaration, on its own, is not legally binding; the concept underlying its inception was that it would set a general norm against torture that would be given legal weight through later treaties, which would enshrine its principles with legal force. Several have subsequently incorporated the right to be free from torture and other forms of cruel, inhuman and degrading treatment. Thus, later drafting commissions have certainly had opportunities to consider whether to devise a definition for each of the terms cruel, inhuman and degrading, and thereby clarify their meaning; most, if not all, have declined to do so.

The first major effort to fold some form of the prohibition into a legally binding document culminated in the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR). Signed in Rome in 1950, just two years after the Declaration, the Convention entered into force on May 3, 1953. Two institutions—the European Commission of Human

198 While Humphrey’s diary mentions the final drafting of the Declaration’s anti-torture provision, not much specificity is provided with regard to how its specific terms were chosen.
199 In common law countries such as the United States, a well-known canon of construction is that “every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary.” Raven Coal Corp. v. Absher, 149 S.E. 541, 542 (Va. 1929). Per this canon, each word in the prohibition would be assumed to have a meaning separate from the others.
200 The Council of Europe was established by the Treat of London in 1949. Its members sought to encourage greater unity throughout Europe by promoting social, political and cultural development, as well as the protection of human rights. See, e.g., Howard Davis, *Human Rights Law Directions* (Oxford University Press 2009), available in part at http://www.oup.com/uk/orc/bin/9780199554348/davis_ch02.pdf.
Rights and the European Court of Human Rights—were created along with the European Convention as fora through which to establish principles and guidelines for interpreting the Convention’s provisions and determine when they had been violated.\textsuperscript{202} Article 3 of the European Convention, which purports to represent “one of the most fundamental values” of a democratic society, declares that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\textsuperscript{203} Notably, the omission of any mention of cruelty suggests that by 1950 the international community had already begun to conflate cruelty with torture.

Despite the impressive rapidity with which this major body of human rights law was established, Article 3 would remain untested in court until the late 1960s. In the meantime, the United Nations—another international body—adopted the next major treaty to prohibit cruel, inhuman and degrading treatment. The International Covenant on Civil and Political Rights opened for signature in 1966 and entered into force in 1976.\textsuperscript{204} This Covenant is considered the direct ancestor of the Declaration of Human Rights (unlike the ECHR) because it is also a creation of the United Nations, unlike its European cousin, which harkens from the Council of Europe. Specifically, its Article 7, as originally worded, declared that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”\textsuperscript{205}

While this phrasing closely reflects the original nexus between the Declaration and protecting the world from the cruel, inhuman and degrading horrors of World War II—medical experimentation having been a significant form of violence recognized by the Declaration’s drafters\textsuperscript{206}—in 1992 the Convention’s wording was changed. Notably, for purpose of my thesis,

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\textsuperscript{202} The Commission was dissolved in November 1, 1998, with the coming into force of the Conventions Protocol No. 11. See Implementation Guide, 6 n.2.
\textsuperscript{203} European Convention on Human Rights, art. 3. See also Reidy, Implementation Guide, 8.
\textsuperscript{205} ICCPR, part III, art. 7.
\textsuperscript{206} See War Crimes Report. See also Yuki Tanaka, Hidden Horrors: Japanese War Crimes in World War II (Westview Press 2996). In the book Hidden Horrors, Tanaka provides a history of Japan’s biological warfare plans and experiments conducted on POWs, which included experiments on live humans at the notorious Unit 731, a secret biological warfare unit established by the Japanese in northeast China. During the unit’s existence, doctors dissected thousands of people while alive and anaesthetized, infected Chinese communities by dropping plague-infected fleas from planes, bound captives to a stake in a field where they were “bombarded” with anthrax, and subjected other POWs to smallpox, cholera and syphilis. See Christopher Reed, “The United States and the Japanese Mengele: Payoffs and Amnesty for Unit 731 Scientists,” History News Network, July 30, 2006; Haruko Taya Cook and Theodore F.
physical cruelty has increasingly overshadowed the equally important consideration of inhuman and degrading treatment. By the 1990s the phrasing of the ICCPR’s prohibition was modified to prohibit “torture and cruel treatment or punishment,” dropping any mention of inhuman or degrading. While the United Nations Human Rights Committee—the body of independent experts charged with overseeing implementation of the Covenant—has not explained this change, in its Commentary the Committee provides some guidance as to how this provision should be understood for purposes of the Covenant’s application. In its Commentaries from 1982 and 1992 (and thus as relevant to both the original and revised phrasing), the Committee explicitly confirms that the International Covenant on Civil and Political Rights never defines the terms cruel, inhuman or degrading, simultaneously declaring “nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.”

Case law has further illuminated how the world community has come to think about cruel, inhuman and degrading treatment. Soon after the ICCPR opened for signature in 1966, the European Commission on Human Rights had its first opportunity to determine what state treatment qualifies as torture versus cruel, inhuman or degrading treatment, and how those prohibitions should be conceptualized under the earlier European Convention on Human Rights. In 1969, in a case known as the “First Greek Case,” the Commission declared that “all torture

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must be inhuman and degrading,” but not all inhuman and degrading treatment is torture.\footnote{See Reidy, Implementation Guide, 11 (quoting the Greek Case).} Instead, they reserved the term torture for those extreme forms of inhuman treatment that have, as their “purpose,” obtaining information or confessions, or inflicting punishment.\footnote{See Reidy, Implementation Guide, 14, 16 (describing interpretation of the “purposive” element of torture and the difference between inhuman treatment and torture).}

This seminal case is critical for establishing two of the three dominant ways of conceptualizing the relationship between torture and cruel, inhuman and degrading treatment. The three concepts that have been underscored in the international jurisprudence include consideration of cruel, inhuman and degrading 1) as a hierarchy, 2) as phenomena to be weighed under a “totality of the circumstances” perspective, and 3) as a listing of specific harms. In this instance, the first concept of the relationship—as a hierarchy that ranges from degrading treatment at one extreme, through inhuman treatment, and ultimately to torture—was emphasized. Notably, such a hierarchy conflates cruelty with torture, reflecting the prohibition of torture as expressed by the European Convention on Human Rights.\footnote{See also Aisling Reidy, “The Prohibition of Torture: A Guide to the implementation of Article 3 of the European Convention on Human Rights,” Human Rights Handbooks, No. 6 (Council of Europe 2002), available at http://echr.coe.int/NR/rdonlyres/0B190136-F756-4679-93EC-42EEBEAD50C3/0/DG2ENHRHAND062003.pdf} As the Commission explained in the Greek Case, “The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation, is unjustifiable. The word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.”\footnote{Greek Case, 1969 YB Eur. Conv. on HR 186 (Eur. Comm’n on HR)), as reprinted in Anthony Cullen, “Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights,” 34 Cal. Western Int’l L.J. 29 (2008).} In this way, torture was conceived as an “extreme” form of inhuman treatment, one which merely required an additional element: a particular purpose.\footnote{Degraging treatment, by contrast, received a more specific interpretation. It was defined as that which “grossly humiliates him before others, or drives him to an act against his will or conscience.” Ibid.}

This hierarchical approach would largely be adopted by the European Court of Human Rights when, in 1978, it decided what would arguably become the most influential and foundational case to address the prohibition against torture and cruel, inhuman and degrading treatment. In Ireland v. United Kingdom,\footnote{Ireland v. United Kingdom, 25 Eur. Ct. of Hum. Rts. (1978).} the European Court of Human Rights established the foundation for a soon-to-explode body of jurisprudence.\footnote{Ibid., 15.} In Ireland, the Court considered whether various men who were detained in Northern Ireland had been tortured by British authorities.\footnote{Ibid. See also Deirdre E. Donahue, “Human Rights in Northern Ireland: Ireland v. the United Kingdom,” 3 Boston College Int’l and Comp. L. Rev. 377 (1980).} There, the court embraced the notion that the difference between torture and cruel, inhuman and degrading treatment is merely one of degree when it concluded that “th[e]
difference derives principally from a difference in the intensity of the suffering inflicted.” The Court ultimately held that the institutional treatment of detainees that they were reviewing (wall-standing, hooding, and depriving detainees of food and sleep) did not descend into torture. However, they concluded that the techniques used on the prisoners were cruel, and therefore, still impermissible.

The Court has been heavily criticized for its determination, in Ireland, that these practices were not torture, and especially for its reasoning. As one critic writes,

> The concept of torture [embraced by the court] is one that requires extreme intensity of pain or suffering. It is significant in this regard that a subjective test, assessing the ill-treatment from the point of view of the victim, was not applied by the Court, which chose not to call witnesses. … By failing to engage with the victims’ point of view, the Court overlooked a fundamental aspect of how to assess the severity of ill-treatment. It also merits attention that by defining torture primarily in terms of its physical intensity the practice of torture is narrowly conceived by the Court so that it does not include acts that are not exceptionally [physically] brutal.

Indeed, Justice Mehmed Zekia, who wrote a separate opinion in the case, emphasized the importance of incorporating a subjective test into determinations of torture and other forms of cruel, inhuman and degrading treatment. Notably, the country from which he hailed—Cyprus—had recently faced a period of extreme violence, including a Greek military junta that had taken place in 1974, which may have particularly sensitized him to the contextual specifics of institutional abuse.

Justice Evrigenis, who drafted a dissenting opinion in the case, warned further that an objective, stereotypical conception of torture, such as that employed by the majority, would fail to encompass modern, predominately psychological forms of torture, especially inventive techniques that had yet to emerge. As he noted,

> Torture no longer presupposes [physical] violence, a notion to which the judgment refers expressly and generically. Torture can be practiced—and indeed is practiced—by using subtle techniques developed in multidisciplinary laboratories which claim to be scientific. By means of new forms of suffering

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220 This typically consists of a prisoner being required to stand facing a wall with his arms outstretched, and then resting his weight against his fingers for an extended period of time.
222 The European Commission, which had considered the case before it was appealed to the European Court, had found such practices to be torture.
that have little in common with the physical pain caused by conventional torture it aims to bring about, even if only temporarily, the disintegration of an individual’s personality, the shattering of his mental and psychological equilibrium and the crushing of his will.\textsuperscript{225}

As law professor Richard Leo has written about the contemporary era, during this post-World War II period interrogators increasingly favored psychological, “rationalized,” and “scientific” forms of torture that left no marks on victims and thus could more readily evade detection than physical ones.\textsuperscript{226} These newer forms of abuse that were especially discounted by the Court’s rationale.\textsuperscript{227}

The overly narrow interpretation of the majority—including why a subjective understanding of institutional abuse was omitted in favor of an “objective” one—has been explained, in part, by the justices’ presumed concern with the real-world ramifications of the case. According to at least one scholar, the judges were likely worried about the potential heightening of retaliatory violence against British security forces if it were determined that British authorities had tortured Irish captives, and thus they relied on a broad notion of deference to states to narrow their findings.\textsuperscript{228} Unfortunately, however, that concern perverted the definition of torture that emerged from one of the first—and certainly one of the most influential—cases to ever interpret the prohibition.

The warning offered by Judge Evrigenis when the decision was released about the case’s overemphasis of stereotypical and historic modes of physical torture and under-emphasis of psychologically-based wrongs is especially prescient:

The notion of torture which emerges from the judgment is in fact too limited. By adding to the notion of torture the notions of inhuman and degrading treatment, those who drew up the Convention wished, following Article 5 of the Universal Declaration of Human Rights, to extend the prohibition in Article 3 of the Convention [Against Torture]—in principle directed against torture—[to] other categories of acts causing intolerable suffering to individuals or affecting their dignity, rather than to exclude from the traditional notion of torture certain apparently less serious forms of torture and to place them in the category of


\textsuperscript{228} See Cullen, “Defining Torture,” 40–41. Such deference has been institutionalized through the doctrine known as the “margin of appreciation.” See Reidy, \textit{Implementation Guide}, 5. At its best, the doctrine acknowledges that nations may be in a better position than international courts to decide a particular case; at its worst, the doctrine provides international courts with a political “out” from having to make controversial determinations.
inhuman treatment which carries less of a ‘stigma’—to use the word appearing in the judgment.229

From the outset, then, judicial interpretations of torture and cruel, inhuman and degrading treatment in the Greek Cases and Ireland set the evolution of the jurisprudence on a path that “essentially weaken[ed] its application and stifle[d its] future evolution,” as well as discounted prisoners’ subjective experiences, leading to one of the first gaps to emerge between the law and rhetoric of torture. Despite a tendency of later jurisprudence to similarly “freeze” understandings of torture in time, courts continued to cite the oft-repeated maxim used as a primary justification for failing to endow the terms torture, cruel, inhuman and degrading treatment with precise definitions—that conceptualizations of torture and other “ill-treatment” must be able to grow and change with time, and thus keep pace with the reality of experience and the evolving creativity of state-sanctioned abuse.230 As opposed to the general intent that the terms “inhuman” and “degrading” expand the scope of barbarous behavior found impermissible and provide for flexibility as torture tactics change over time,231 instead it has often been used as an “out” to avoid calling various state practices “torture,” and thereby avoid the political heat—and feared instability—that an international tribunal might otherwise attract. This argument reflects a classic, perceived tension between accountability and peace that has been repeatedly cited within the field of international criminal law.232

Two decades later, however, in 1997, the United Nations Committee Against Torture233 found that especially harsh treatment of prisoners by Israel had violated the Convention Against Torture’s prohibitions against cruelty and torture.234 There, the practices under investigation included the “standard” use of multiple prison-based practices, especially in combination: restraining individuals in painful positions, hooding them, exposing them to loud music, depriving them of sleep for prolonged periods, threatening them, shaking them, and using cold air to chill them.235 But two years later, in 1999, Israel’s High Court similarly ruled that certain

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230 This principle is reflected in both domestic and international law. For example, in Trop v. Dulles, 356 U.S. 86 (1958), Chief Justice Earl Warren famously pronounced that “The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”
231 This is, of course, in tension with what the European Court of Human Rights later said it hoped to do, which is adopt an “evolving standard” of torture, one that “takes into account present-day conditions and human rights norms.” See Dikme v. Turkey, App. No 23178/94, 25 Eur. H.R. Rep. 251, 295 (1997); Weissbrodt and Heilman, “Defining Torture,” 376.
232 For an overview of this tension as it has played out in the context of arrests, see Eric Stover, Victor Peskin and Alexa Koenig, Hiding in Plain Sight: The Politics of Pursuing War Crimes Suspects in the 21st Century (University of California Press, forthcoming).
233 The U.N. Committee Against Torture is the body of experts that reviews state compliance with the Torture Convention’s obligations.
235 Committee against Torture, Concluding Observations of the Committee against Torture: Israel, para. 257. These practices were all used later at Guantánamo.
interrogation methods used by Israel’s General Security Service—including shaking, sleep deprivation, and use of the shabach position (the shackling of detainees in a painful configuration, typically while hooded and bombarded with loud music)—were illegal, although they avoided saying these practices amounted to torture. Instead, the Israeli High Court referenced Ireland v. United Kingdom to note that, in Ireland, similar interrogation techniques were found inhuman and degrading but not torturous and, thus, were barred only on that lesser ground. On that basis, the High Court ruled that the “combination” of techniques gave rise to pain and suffering such that they should be prohibited as cruel and inhuman, although not as torture.

While the Israeli High Court largely parroted Ireland, Israel v. Israel underscores the second major approach courts have come to take when interpreting the relationship between torture, cruel, inhuman and degrading treatment: a contextual approach, one more akin to a “totality of the circumstances” analysis than a sliding scale.

The decade from 1990-2000, when these latter cases were decided, would ultimately prove one of the most prolific with regard to interpreting the international prohibition against cruel, inhuman and degrading treatment. As these cases were proceeding through treaty-based courts and the court of public opinion, two new international tribunals were being formed. The first since Nuremberg and Tokyo to determine accountability for horrors committed in the context of specific conflicts, the International Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) exploded onto the international scene. These tribunals had to quickly establish a jurisprudence to expound upon the crimes articulated in their statutory law, including their prohibitions against torture.

iv. The International Criminal Tribunals for the former Yugoslavia and Rwanda

The tragedies of Rwanda and the former Yugoslavia are infamous. While a detailing of the specific abuses that occurred is beyond the intent of this chapter (and has been thoroughly addressed elsewhere), it should be noted that many of the horrors witnessed during World War II played out in the Balkans and Rwanda during the 1990s on a smaller—but no less horrifying—scale. The Rwanda conflict is frequently cited as the contemporary example of mass genocide, while the sexual and other abuses perpetrated in concentration camps in the Balkans are notorious for their barbarity.

The Yugoslavia Tribunal was the first to be established; unlike the Nuremberg and Tokyo tribunals, however, it was created while the region under consideration was still embroiled in bloody conflict. Since its founding in 1993, the Tribunal has had several opportunities to

236 Israel v. Israel, HCJ 5100/94 (1999).
237 Ibid.
239 See United Nations, “About the ICTY,” at http://www.icty.org/sections/AbouttheICTY.
determine whether the “hellish orgy of persecution” that occurred in detention centers at Omarska, Jereaterm and Trnopolje constituted torture or cruel, inhuman or degrading treatment. Instead of relying on international treaties, the Tribunal has relied on its own statutory law as the basis for its legal determinations. Yet, in doing so, the Tribunal has recognized international authorities as persuasive resources that can be used to help interpret its statutory provisions.

One of the most thoughtful and detailed attempts to define cruel, inhuman and degrading treatment appears in the Tribunal’s 1998 “Celebici” case. There, the Tribunal considered the illegality of various acts perpetrated by concentration camp authorities, including the forcing of a father and son "to beat one another repeatedly over a period of at least ten minutes," and whether that comprised cruel or inhuman treatment. The Tribunal’s authorizing statute specifically criminalized the "inhuman treatment" of prisoners (in Article 3) as well as their "cruel treatment" (in Article 2).

In its analysis, the Tribunal noted the lack of any international definition of cruel or inhuman treatment and the need to establish a definition to analyze the facts of the case. To arise at a working definition, the various justices first considered the Oxford English Dictionary's definition of inhuman (“brutal, lacking in normal human qualities of kindness, pity, etc.”). They concluded inhuman means "not humane," an interpretation they found concorded with the Geneva Conventions. This reliance on the phrase “not humane” may have helped cement the modern trend of looking at the actions of perpetrators as opposed to the experiences of victims when interpreting these provisions. Looking at the Commentary to the Fourth Geneva Convention's obligations to treat protected persons humanely, they also noted the Commentary's declaration that humane treatment is so important it is "in truth the leitmotiv of the four Geneva Conventions." Yet from the Commentary to the First Geneva Convention, they determined that creating a specific list of prohibited behaviors would be inadvisable, since "however much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts and the more specific and complete a list tries to be, the more restrictive it becomes."

The justices then noted the sliding scale of severity approach that had been adopted by the European Court and the European Commission of Human Rights, providing examples of treatment that had been found inhuman or degrading on that basis. For example, in Tomasi v. France, the European Court of Human Rights had declared as "inhuman" the fact that "during a police interrogation [the applicant] had been slapped, kicked, punched, given forearm blows, made to stand for long periods without support, had his hands handcuffed behind his back, been spat upon, made to stand naked in front of an open window, deprived of food and threatened..."
with a firearm," noting that "the large number of blows ... and their intensity ... are two elements which are sufficiently serious to render such treatment inhuman and degrading." Notably, consistent with the European Court’s earlier decisions, the emphasis in that analysis was on physical abuse, as it was (for example) in later cases like Ribitsch v. Austria, where the European Court found that "in respect of a person deprived of his liberty any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity," and thus violates the prohibition against torture and inhuman and degrading treatment. Importantly, such an interpretation ties the notion of even dignitarian harms to physical abuse. And once again, a court focused on the abuser and his acts, not the recipient and his experiences. In addition to this case law, the Tribunal justices also considered expert commentary, including one authority's conclusion that "inhuman treatment ... includes ill-treatment that does not reach the requisite level of severity to qualify as torture," another version of the "sliding scale" approach.

Based on these sources, the Tribunal ultimately determined that inhuman treatment is “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity." The Tribunal defined cruel treatment in identical terms, declaring it equivalent to inhuman treatment and distinguishing such treatment from torture as "treatment that [simply] does not meet the purposive requirement for the offense of torture" (for example, beatings used for such purposes as discrimination, intimidation, coercion or punishment). Embracing these definitions, the Court ultimately concluded that requiring a father and son to beat each other constituted inhuman treatment, and not torture.

The Tribunal’s later decisions took a slightly different approach, more completely embracing a “totality of the circumstances” analysis. In one especially relevant case from 2002, the Tribunal determined that, in evaluating whether particular acts constituted torture versus cruel, inhuman or degrading treatment, the Tribunal needed to “take into account all the circumstances of the case,” which included the “nature and context of the infliction of pain,” the extent to which abuse was planned and “institutionalized,” the physical condition of the victim, as well as the methods used and the manner in which the treatment was administered. If an individual had been subjected to a variety of ill-treatment, the court reasoned, “the severity of the acts should be assessed as a whole to the extent that it can be shown that this lasting period or the repetition of acts are inter-related, follow a pattern or are directed toward the same prohibited

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247 Para. 537.
249 Ibid.
250 Para. 541 (referencing Manfred Nowak, UN Convention on Civil and Political Rights, CCPR Commentary, 131).
251 Para. 543.
252 Para. 551 (emphasis added).
253 Importantly, and ironically, despite their reasoning that dignitarian harms result from a lack of necessity for the abuses perpetrated, the Court found an arguably more severe violation—torture—precisely when there was a purported justification for the abuse, namely information and/or punishment.
The Tribunal has similarly embraced such a totality of the circumstances approach in subsequent cases. Although the Tribunal did establish something of a working definition of cruel and inhuman treatment through these cases, those definitions remain inadequate as a means through which to adequately further the development of the international jurisprudence relevant to cruel, inhuman and degrading treatment.

First, decisions of the Yugoslavia Tribunal are not binding on other international courts; thus, the definitions crafted by the tribunal do not qualify as definitions for international purposes, and the way in which the international community conceptualizes torture and its relationship to cruel, inhuman or degrading treatment remains unsettled.

On the flip side, the Yugoslavia Tribunal’s decisions have increasingly been referenced as norm setting for the international community, meaning these definitions may become institutionalized on a much broader scale than originally intended. This is also problematic, though, since the definitions utilized by the Tribunal are unsatisfactory for a number of reasons. First, they ignore any substantive distinction between cruel and inhuman treatment, despite the fact that the Tribunal’s own statute separates the prohibitions into separate articles, suggesting they are meant to reflect different harms. Second, in Celebici, the Tribunal characterized cruel and inhuman treatment as torture that is just missing one of the elements needed to convict an institutional actor on that basis, instead of as a potentially different crime, further conflating the two. Third, this jurisprudence seems to have furthered the trend toward acknowledging and prioritizing physical abuse over non-physical harms when recognizing egregious behavior.

The example provided by Celebici also seems illustrative of two more points: first, that while courts have generally come to focus on the severity of treatment to distinguish between institutional practices that are cruel, inhuman or degrading, the nature of the treatment (other than the purpose for which they are inflicted) has remained largely unexplored. This is a problem because perceptions of severity can differ in extreme ways from culture to culture — considering the nature of various institutional practices has the potential to provide a second opportunity to help ensure that especially egregious acts are detected in cross-cultural settings. Second, it underscores the argument that treating cruel, inhuman or degrading as mere points along a single continuum offers the danger of de-emphasizing the latter forms of treatment, while playing up the former (as happened with the rewording of the ICCPR in 1992 when “cruel” came

255 Krnojelac, Case No IT-97-25.
257 In a particularly helpful article, David Weissbrodt and Cheryl Heilman have pointed out that international bodies have typically considered five phenomena when considering whether particular acts qualify as torture, cruel, inhuman or degrading treatment: 1) the nature of the act or acts, 2) the severity of harm suffered, 3) the purpose motivating the act, 4) the perpetrator’s official status, and 5) whether the act was otherwise lawful. Weissbrodt and Heilman, “Defining Torture,” 376-77.
to replace “inhuman and degrading”). Such practices may not lie on a continuum but may be qualitatively different.  

Importantly, despite the reluctance of judges and scholars to create a specific list of prohibited behaviors, and in lieu of any sort of clear standard, the resulting jurisprudence is, in effect, creating precisely such a list, through ad hoc findings that specific acts are or are not torture and/or cruel and/or degrading and/or inhuman. Ultimately, other than that list, the notion of a sliding scale of severity, and a vague totality of the circumstances analysis, very few standards seem to have been developed to guide courts' determinations as to what qualifies as torture, cruel, inhuman and/or degrading treatment.

In addition, the definitions that courts are deriving to operationalize the prohibition, and evaluate the illegality of prison abuse based on modern-day standards, are not binding on other courts. Thus, this process is having to be repeated over and over again, threatening to further obscure any nuances that originally distinguished cruel from inhuman, and inhuman from degrading, treatment.

The next section of this chapter turns toward domestic law, to address the relationship between the United States’ prohibition of cruel and unusual punishment and the international prohibition of cruel, inhuman and degrading treatment, to demonstrate how the international prohibition has been conceptualized as applicable to Guantánamo detainees.

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There is some support in the psychological literature that at least torture and cruel, inhuman and degrading treatment should be considered qualitatively different, even if that literature does not explicitly distinguish between that which is cruel, versus inhuman, or degrading. For example, Metin Basoglu and Ebru Salcioglu distinguish between physical torture, sexual torture, and “CIDT.” Examples of the latter include stressor events such as “food deprivation, sleep deprivation, prevention of hygiene, water deprivation, pulling by hair, forced standing, beating over the ears, denial of privacy, infested surroundings, restriction of movement, threats of torture and death, rope bondage, prevention of urination/defecation, deprivation of medical care, witnessing torture, exposure to extreme hot/cold, humiliating treatment, stripping naked, beating, fluctuations of interrogators attitude, cold showers, exposure to bright light, sham executions, throwing feces to detainee, solitary confinement, verbal abuse, forced standing with weight on, asphyxiation/suffocation, threats against family and exposure to loud music.” A Mental Healthcare Model for Mass Trauma Survivors: Control-Focused Behavioral Treatment of Earthquake, War and Torture Trauma (Cambridge University Press 2011): 52. Importantly, they noted the difficulty in distinguishing between torture and CIDT in terms of associated distress. Indeed, according to their research, “evidence shows that it is fear and helplessness associated with CIDT rather than physical torture that account for chronic psychological damage in survivors.” Ibid., 61.

This can be seen, for example, in the implementation guide for the European Convention on Human Rights’ torture provision (article 3). The guide details the various acts found by the European Court to be inhuman or degrading treatment.

In 2003, the European Court of Human Rights distinguished torture from inhuman and degrading treatment on the basis of 1) severity, and 2) underlying purpose. Torture was that treatment that was especially severe, and had as its purpose obtaining information, inflicting punishment, or intimidating. Atkas v. Turkey, App. No. 24351/94 ¶ 313 (2003), available at http://www.echr.coe.int.
B. Kissing Cousins: The Legally Ambiguous and Uncomfortably Close Relationship of Cruel, Inhuman and Degrading Treatment, and Cruel and Unusual Punishment

The United States has a long history of prohibiting torture and related forms of cruelty through its domestic laws, despite an equally long history of engaging in such practices. Along with the Fifth and Fourteenth Amendments, the Eighth Amendment has repeatedly been cited by the United States as prohibiting the abusive treatment of detainees and other prisoners in a manner analogous to the international prohibition against torture and other forms of cruel, inhuman and degrading treatment. Understanding the United States’ prohibition of cruel and unusual punishment is key to comprehending its conceptualization of the international prohibition, and its relevance to Guantánamo detainees.

When the United States enacted its Constitutional provision banning cruel and unusual punishment, it borrowed heavily from both thirteen-century England’s Magna Carta and the seventeenth-century England’s Bill of Rights. Both the Magna Carta and English Bill of Rights, along with their progeny, were designed to limit the power of the sovereign by

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261 The term “kissing cousins” has been defined as signifying a “distant relative known well enough to be kissed when greeted” and “one or two or more things that are closely akin.”


264 Almost all international laws require domestic equivalents—which typically necessitates the adoption of new domestic laws and/or the modification of existing domestic laws—before states are considered in compliance with international requirements. This is because domestic laws are usually required before states are legally obligated to act in furtherance of international law. The United States has repeatedly asserted that it does need to pass new acts to be in compliance with the Convention Against Torture, reasoning that the U.S. Constitution already provides equivalent protections.

establishing fundamental rights, protected for the people.\textsuperscript{266} They were also attempts by the populace to use law to control notoriously brutal events in history, much as the Declaration of Human Rights was in the aftermath of World War II.

Indeed, the English Bill of Rights of 1689 has been acknowledged as the direct ancestor of the Eighth Amendment. The Bill of Rights was initially drafted as a response to the Bloody Assizes of 1685. These were a series of trials held in England, that were designed to make an example of individuals who had recently participated in a Protestant uprising against the Roman Catholic King James II.\textsuperscript{267} Accusations were lobbed against hundreds of men and women, many of whom were sentenced to death. Because of the king’s desire that the public be discouraged from further attempts at rebellion, the sentences resulted in a “horrifying spectacle,” which included “public hanging, disemboweling and then quartering, after which the heads and quarters were dipped in pitch and salt and sent to villages around to be displayed in public on poles.”\textsuperscript{268} Hundreds of additional prisoners were sent to various far-flung British colonies, where they spent long years toiling in servitude.

In 1688-89, however, the English people engaged in the “Glorious Revolution,” which drove King James II from his throne. The revolution has been credited as bringing an end to the longstanding theory of the divine right of kings, and concurrently establishing the supremacy of Parliament over the British monarch. In 1689, Parliament passed the English Bill of Rights to limit the powers of subsequent sovereigns, in part by prohibiting barbarous forms of punishment. In this vein, the tenth provision of the Bill of Rights boldly proclaims that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\textsuperscript{269}

Just over a century later and several thousand miles away, officials in the then-emerging United States would debate whether to incorporate this wording into their nascent Constitution. Much like the later international prohibition against cruel, inhuman and degrading treatment, their resulting prohibition against cruel and unusual punishment would be criticized during the process of its establishment as being worded in a manner that was far too “indefinite.”\textsuperscript{270} As Mr. Livermore, a Congressman from New Hampshire, complained about the soon-to-be Eighth Amendment, “the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it.”\textsuperscript{271} Indeed, it appears to have been adopted whole-cloth as a form of “constitutional boilerplate,”\textsuperscript{272} a view shared by Mr. Smith of South Carolina.\textsuperscript{273} What is clear, however, from the debates surrounding its adoption, is that several

\begin{itemize}
\item \textsuperscript{266} See, e.g., “Featured Documents: The Magna Carta, National Archives and Records Administration,” at http://www.archives.gov/exhibits/featured_documents/magna_carta/
\item \textsuperscript{267} King James II had assumed the throne upon his brother’s (Charles II’s) demise. The leader of the uprising was Charles II’s “bastard” son James, Duke of Monmouth, who had been born to King Charles II when King Charles had been in exile during the 1940s.
\item \textsuperscript{269} See “Modern History Sourcebook: The Bill of Rights, 1689,” at http://www.fordham.edu/halsall/mod/1689billofrights.asp (providing its text).
\item \textsuperscript{270} See Granucci, “Nor Cruel and Unusual,” 841-42.
\item \textsuperscript{271} 1 Annals of Cong. 782-83 (1789).
\item \textsuperscript{272} Granucci, “Nor Cruel and Unusual,” 840.
\item \textsuperscript{273} 1 Annals of Cong. 782; see also Granucci, “Nor Cruel and Unusual,” 842.
\end{itemize}
individuals—including Mr. George Mason, drafter of its progenitor, the Virginia Declaration of Rights—interpreted the phrase as undoubtedly incorporating a prohibition of torture, a perspective that would be soundly embraced in later years.

What remained unclear, however, was whether recognition of the clause’s violation would be based on the severity of an offense, or the disproportion between an offense and its punishment. Later analyses by the United States Supreme Court took a broad view, suggesting both were covered, and that the scope of the prohibition should be understood as “keep[ing] pace with the increasing enlightenment of public opinion.”

The Fifth and Fourteenth Amendments are additional sources of the prohibition against torture and cruel and unusual punishment. While the Eighth Amendment deals directly with barbarous and excessive punishments—as similarly prohibited by the English Bill of Rights—the Fifth Amendment’s due process provisions more clearly reflect the Magna Carta. Originally signed in June 1215 as a means to secure promises between England’s medieval barons and King John, the Magna Carta has been interpreted as a tool through which the barons attempted to prevent King John from abusing his power and inflicting needless suffering on the people of England. According to one of its embedded promises, “No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” That declaration, along with the proclamation that “to no one will we sell, to no one will we deny or delay, right or justice,” have been interpreted as precursors to the Fifth Amendment’s promise that “no person shall … be deprived of life, liberty, or property, without due process of law.” Collectively, this Amendment and the Fourteenth Amendment, which extends the Fifth Amendment’s federal due process obligations to states, provide an important foundation for the generally accepted understanding that any punishment or related deprivation of liberty must be free from excessiveness and barbarousness, and be legally justified.

So what exactly is the U.S. Constitutional standard today, as established by subsequent case law? Ultimately, there are two. The first, at least with regard to the intersection of the Fifth

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274 Several states adopted the wording in their own declarations prior to its use in the U.S. Constitution.
275 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 111, 452 (2d ed. 1881).
276 Granucci, “Nor Cruel and Unusual,” 842.
277 See generally, ibid.
279 “What is Cruel and Unusual Punishment?,” 24 Harv. L. Rev. 54, 55 (1910). As noted in the review, “excessive punishment may be quite as bad as punishment cruel in its very nature.” Ibid.
280 Granucci has observed that in Great Britain in 1689 (when the English Bill of Rights was being adopted), there was a generally adopted policy that it was not the barbarousness of an offense that was objectionable, but its excessiveness.
and Eighth Amendments, is whether a contested state action “shocks the conscience.” In the context of Guantánamo, this standard would be employed in 2002 by the U.S. Office of Legal Counsel in its drafting of a key set of memos that were designed to analyze whether proposed CIA interrogation tactics would violate the United States’ legal obligations under Article 16 of the Convention Against Torture. Behaviors that have been found to shock the conscience have included such practices as “police action that consisted of pumping the stomach of a suspect,” as well as “shocking [prisoners] with electric currents, asphyxiating them short of death, intentionally exposing them to undue heat or cold, and inflicting psychological pain;” depriving prisoners of food and warmth; “deliberate indifference to the serious medical needs of prisoners;” and solitary confinement in a strip cell.

The second standard arises in the context of Eighth Amendment domestic prison cases, specifically conditions of confinement challenges. Most federal courts have considered the right to be free from cruel and unusual punishment in prison under a “totality of the circumstances” analysis, also known as a “totality of conditions” approach. The “totality of conditions” approach is used where “the overall conditions of confinement in a penal institution, rather than a discrete condition or practice, are allegedly what make the confinement unconstitutional.” The Supreme Court has expressly established that “prison conditions, alone or in combination, may amount to cruel and unusual punishment.” However, several courts have established that a totality of conditions approach is not appropriate when the various forms of alleged ill-treatment can be found to violate the Eighth Amendment on their own. Interestingly, “several courts have expressly held or recognized that the totality of conditions at a penal institution can constitute cruel and unusual punishment even if no single condition is in itself unconstitutional.” However, a few courts disagree, holding that aggregating conditions cannot create unconstitutionality; at least one of the offending conditions must be unconstitutional by itself.

As for how to interpret the totality of conditions standard, the District Court of New Hampshire has found that when the “cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of inmates, the court must conclude that the conditions violate the Constitution.” However, another court, the District of Connecticut, has established that there is no “static test” for determining that prison treatment has been cruel and unusual. Thus, the bottom line in Eighth Amendment prison cases is that

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283 Rochin v. California, 342 U.S. 165, 172 (1952) (as described in Fiss, supra note 10, at *1 n.8).
287 Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).
289 Ibid. (citing Rhodes v. Chaman, 452 U.S. 337 (1981)).
although courts are supposed to use the same “totality of conditions” or “totality of circumstances” standard, those standards can mean very different things in different courts. Despite this ambiguity, and despite the fact that these standards relate to prison conditions and not treatment more generally, they have their counterpart in the totality of circumstances test employed internationally.

Both U.S. standards, are, however, based in domestic law. It wouldn’t be until the 1990s, when a united international stance against torture and other cruelty was re-ignited, triggered by global horror at reports of genocide and other mass crimes leaking from the Balkans and Rwanda, that the United States would finally get around to adopting its own internationally-based condemnation of torture. That definition was borrowed from the Convention Against Torture, and ultimately reflected in various U.S. statutes.²⁹⁴

Per Article 1 of the Convention, torture is

any 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 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.²⁹⁵

As explained earlier, the Convention does not define cruel, inhuman and degrading treatment: it states only that such acts “which do not amount to torture” are subject to similar prohibitions as torture when “committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁹⁶

When the United States Senate ratified the Convention in 1994, the Senate qualified this definition to restrict what practices the United States would consider unlawful. First, the United States stated that the intent required by the Convention could not be understood as a general intent to use certain abusive interrogation techniques, but “must be specifically intended to inflict severe physical or mental pain or suffering”²⁹⁷ and thus to have a particular purpose. Without a specific intent to inflict severe pain and suffering, individuals’ actions, no matter how horrific, could not be considered torture.

In its 1994 reservation, the United States also narrowed the definition of mental torture. Such torture was limited to psychological suffering that is “prolonged” and accompanied by one of four predicate acts: “the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or

²⁹⁵ CAT, art. 1.
²⁹⁶ CAT, art. 16, para. 1.
²⁹⁷ U.S. Reservation to CAT.
application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.”

While the Senate argued these limitations were needed to ensure that the United States’ obligations under the Convention would be no less restrictive than U.S. standards, in practice they created a vagueness the U.S. Department of Justice (DOJ) would later exploit in a series of memos popularly known as the “Torture Memos,” by constructing a definition of torture much narrower than any previously recognized in domestic or international law. The impact of the post-9/11 political environment, and that environment’s impact on the evolution of the law—including how it resulted in the further narrowing of interpretations of cruel, inhuman and degrading treatment—is described in chapter three.

C. Major Issues That Emerge From These Histories

Many of the struggles to define and interpret the prohibitions against torture and cruel, inhuman and degrading treatment—whether domestic or international—center on two themes: how broadly or narrowly these prohibitions should be interpreted, and (relatedly) whether judges should embrace a subjective or objective approach.

As for the breadth of the prohibitions, many scholars have come to regard the difference between torture and cruel, inhuman or degrading treatment as one of degree, not kind, with torture constituting “an aggravated form of inhuman treatment.” The distinction between categories has similarly been deemed to reflect a “progression of severity from degrading treatment, through inhumane treatment, to torture [that] creates a hierarchy of harms with torture as the most egregious.” As noted by Eric Stover and Elena Nightingale, “[i]t can be argued, for example, that one blow to a detainee’s body should be considered ‘ill-treatment,’ while continued beatings ... constitute ‘torture.’”

Others, however, have emphasized the purposive element of torture as the distinguishing element between torture and inhuman treatment, which tends to narrow the torture prohibition. Still others have argued that the cumulative nature of the abusive environment must be considered, a type of “totality of the circumstances” approach that tends to broaden it.

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298 U.S. Reservation to CAT.
299 See, e.g., Koenig et al, “The Cumulative Effect,” 152. See also United Nations Committee Against Torture, “Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America,” CAT/C/48/Add.3, June 29, 2005 (discussing the United States’ claim that the purpose behind the reservations was not to contravene the Convention, but to clarify the “vague and ambiguous nature of the term ‘degrading treatment’”). Ibid., 42-43 ¶ 147.
301 Miller, Defining Torture, 9.
304 See, e.g., Koenig et al, “The Cumulative Effect.”

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As explained in Part I, the authors of the Convention Against Torture had intended a broad interpretation, hoping that state signatories would extend the treaty’s protections to cover a wide array of potential abuses. Experience had demonstrated “that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent ill-treatment.” 305

While it is clear that a broad interpretation underscores both the Court’s and the Declaration of Human Rights’ establishment—and was meant to include the diversity of horrors to which the victims of World War II were exposed as well as later “innovations”—whether a subjective or objective approach was intended remains unclear. The subjective / objective debate was never explicitly addressed in the Declaration. However, that may be due to the fact that in the wake of World War II (as, for example, with the establishment of the English Bill of Rights in the wake of the Bloody Assizes) those subjective and objective understandings may have overlapped to a much greater degree than they do today, when wars are typically not universal, and technological advancements have placed much of the world community far from sites of conflict.

When the Declaration’s prohibition against torture and other cruel, inhuman and degrading treatment was originally being phrased, nations across the globe were waking up to the array of institutional abuses that had occurred during the world’s “greatest” war. Indeed, most of those countries had been intimately impacted by the atrocities—both physical and psychological. Psychologists, such as Bettelheim and Frankl, were released from Nazi concentration camps and almost immediately began publishing their experiences, as well as their insights into the physical and psychological nature of institutional violence; 306 governments were gathering the stories of victims in overwhelming numbers and learning of the terrors they had experienced. Thus, the subjective understanding of cruel, inhuman and degrading treatment was salient in a way that it no longer would be when the jurisprudence of torture and cruel, inhuman and degrading treatment was being expounded—decades later—in the 1960s-1990s. Conflicts in the Balkans and Rwanda, especially, were far more regionally bounded than those of World War II, and thus outside the full political, social and operational understandings of the international judges asked to determine the character of torture and other cruel, inhuman and degrading treatment. Indeed, most international judges were foreign to the conflicts, and neither spoke the languages—nor fully understood the cultures—of the perpetrators or victims.

In addition to broader debates around subjectivity/objectivity and narrowness/breadth, courts have tended to consider four, and in some cases five, overlapping factors when determining whether various state practices should be considered torture, or cruel, inhuman or degrading treatment. Those have included 1) the severity of the treatment, 2) the intent or purpose underlying the act (for example, whether the intent was to inflict pain or suffering), 3) its official character (whether, for example, it was committed by or with the consent of

acquiescence of a public official), 4) the nature of the act or acts, and 5) “whether the harm resulted from an otherwise lawful sanction.”

The severity of treatment, however, has been the factor on which most courts have predominantly relied. This factor necessarily implicates the tension touched on above regarding whether to look to subjective or objective criteria to measure severity. In the Ireland case, the European Court implicitly emphasized, when considering the severity of treatment to which detainees had been subjected, an “objective” interpretation of the prohibition, embedding a bias toward objective analyses in later cases. As explained above, the Court failed to call witnesses, relying instead on outmoded “stereotypes” of physically brutal forms of torture to determine whether various practices were torture or inhuman or degrading. However, such an approach is problematic because it threatens to overlook the predominately psychological turn in interrogation methods that has occurred during the twentieth century.

Other institutions, such as the African Commission on Human and Peoples’ Rights and the Inter-American Commission, have embraced some subjective criteria, such as the “physical or mental effects” of the acts under consideration, as well as “in some cases, the victim’s age, sex and state of health” to measure severity. The Yugoslavia Tribunal, in expounding on the objective versus subjective debate, has similarly declared that, “[i]n assessing the seriousness of any mistreatment, the objective severity of the harm inflicted must be considered, including the nature, purpose and consistency of the acts committed. Subjective criteria, such as the physical or mental condition of the victim, the effect of the treatment and, in some cases, factors such as the victim’s age, sex, state of health and position of inferiority will also be relevant in assessing the gravity of the harm.”

These conceptions of “subjective,” however, are problematic because they only focus on demographic criteria and not victims’ experiences. As Chris Ingelse presciently explains,

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307 Cullen, “Defining Torture,” 32-34; David Weissbrodt and Cheryl Heilman, “Defining Torture and Cruel, Inhuman and Degrading Treatment,” 29 L. & Ineq. 343, 376 (2011). As noted elsewhere, the factors that are considered will vary depending on the source of the definition of torture and cruel, inhuman or degrading treatment that is being applied: for example, the approach to torture that has evolved in the international humanitarian legal framework at the ICTY differs from the international criminal legal approach: the ICTY no longer requires the involvement of an official for a finding that an act constituted torture. See the Kunarac case; see also, Cullen, “Defining Torture,” 34 n.38.


310 Prosecutor v. Brdjanin, Case No. IT-99-36-T, Trial Chamber Judgment (ICTY 2004), at ¶ 484.
only the victim himself can bear witness to the pain and its intensity. The effect that the action has on the victim is also determinative for the question as to whether torture has occurred. The intention of the person inflicting the pain is, at least for the subjective perception of its intensity, irrelevant.\(^{311}\)

And as Cullen concurs,

> Although the term severe is vague and open to interpretation, to include a specific threshold of pain or suffering in the definition would arguably result in an excessive limitation on its application. The experience of the victim is of primary consideration in determining acts that constitutes torture. Exclusive use of objective criteria … overlooks the fact that pain and suffering are fundamentally subjective.\(^{312}\)

Historic conceptions of the U.S. Constitution support the argument that a broader notion of subjectivity should be reintegrated into international and domestic law. The Eighth Amendment has sometimes been interpreted as needing to take into consideration subjective factors such as culture. For example, a 1910 article in the Harvard Law Review explains that

> in determining whether a punishment is cruel and unusual, courts have considered not only the kind and degree of punishment and the magnitude of the crime, but the special conditions in a particular locality, and even the customs and beliefs of a particular class of individuals; so regulation that the hair of every prisoner should be cut to a uniform length of one inch would be a cruel and unusual punishment if enforced against a Chinaman with a queue.\(^{313}\)

More recent jurisprudence has tended to parallel international law, however, limiting the subjective factors that might be considered, especially in condition of confinement cases. In 1994 in *Farmer v. Brennan*,\(^{314}\) for example, the Supreme Court established a two-prong test for determining whether an applicant’s suffering had been met with “deliberate indifference” by prison personnel (a standard initially set in *Estelle v. Gamble*\(^{315}\)). There, the Court declared that any “deprivation must be, objectively, sufficiently serious,” such that it poses a serious risk of harm.\(^{316}\) Second, the Court employed a subjective intent requirement that has been described as a modified recklessness standard. To satisfy that prong, a prison official “must both be aware of the facts from which the inference can be drawn that a substantial risk of harm exists, and he must also draw the inference.”\(^{317}\)

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\(^{312}\) Cullen, “Defining Torture,” 33.

\(^{313}\) Note, “What is Cruel and Unusual Punishment,” 24 Harv. L. Rev. 54, 56 (1910) (citing, for this last example, Ho Ah Kow v. Nunan, 5 Sawy. (U.S.) 552).

\(^{314}\) 511 U.S. 825 (1994).

\(^{315}\) 429 U.S. 97, 102 (1976).

\(^{316}\) 511 U.S. at 834.

\(^{317}\) 511 U.S. at 837.
While U.S. jurisprudence has thus incorporated both objective and subjective considerations to Eighth Amendment conditions of confinement cases, the subjective component has increasingly come to focus only on the intention of the alleged perpetrator, not the subjective experiences of the alleged victim.\textsuperscript{318} Such a limited notion of subjectivity has increasingly been tied to an “intent-based” approach to the law, as emphasized by the United States’ 1994 reservation to the Convention Against Torture, further squeezing out room for considering victims’ voices. This is problematic for several reasons. As law professor Priscilla Ocen has pointed out:

First, the text of the Eighth Amendment does not call for a demonstration of intentionality. Second, the intent-based standard in conditions of confinement cases incentivizes ignorance of threats of harm to prisoners on the part of guards and prison officials. Third, the Estelle-Farmer test adopts a perpetrator perspective that is overly deferential to prison administrators. Fourth, the test largely insulates high-ranking policy makers given its focus on individual intent. Fifth, the individualistic, intent-based standard elides any consideration of the historical, gendered or racialized context out of which prison practices arise.\textsuperscript{319}

While the perpetrator’s state of mind is certainly relevant for criminal liability (the mens rea), I argue that the victim’s experience is also relevant for determinations of 1) whether a criminal act has occurred (the actus reas), and 2) the relative severity of that crime for sentencing purposes.

At bottom, while the Convention Against Torture gave state signatories the right to interpret the Convention’s provisions in light of their domestic laws and statutes, it did not entitle them to look for ways to authorize abuse or evade legal accountability. Unfortunately, however, over-reliance on an “objective” consideration of torture, cruel, inhuman and degrading treatment and a subjective consideration that focuses only on perpetrators or demographics, although politically expedient, does just that.

D. Conclusion

In summary, in the absence of specific standards, all of the court determinations mentioned above have been predominately fact- as opposed to standards-based, have failed to adequately distinguish between cruel, inhuman and degrading forms of treatment, or have embraced a predominately objective conception of severity over a truly subjective one. While several courts have claimed to employ a “totality of the circumstances” standard that considers all of the facts of a case, such a standard is so broad it threatens to fail to discriminate between treatment that is physically cruel versus inhuman or degrading—the latter being the provisions that most rely on subjective considerations. Thus, such approaches tend to overlook particular forms of abuse such as predominately psychological harms and physical harms that leave few marks. Such harms are important for courts to acknowledge if they hope to recognize the ways in which detainees experience institutional violence—a policy goal that was, perhaps, far more self-evident in the late 1940s, than today.

\textsuperscript{318} For an overview of some of the criticisms of this subjective component of the deliberate indifference test, see, e.g., Priscilla A. Ocen, “Punishing Pregnancy: Race, Incarceration and the Shackling of Pregnant Prisoners,” 163-168 (draft copy on file with the author).

\textsuperscript{319} Ibid., 163-64.
III. The Impact of Post-9/11 Politics on Detainee Treatment and Related Laws

“[Y]ou have to understand that from the beginning Guantánamo was meant to be a big secret, but it got out.”\(^{320}\)

As the preceding chapter suggests, historic interpretations of the legal prohibitions against torture, cruel, inhuman and degrading treatment have relied on both law and politics. Thus, one must understand not only the relevant legal but political histories to grasp the evolution of the jurisprudence relevant to these prohibitions, as well as to see where legal frameworks may have become distorted by political concerns.

This chapter summarizes post-9/11 legal and political developments to 1) further illuminate that history, 2) help explain post-9/11 legal interpretations of torture, cruel, inhuman and degrading treatment, 3) provide context for detainees’ experiences explicated in subsequent chapters, and 4) lay a foundation for the evidence-based approach to interpretations of cruel, inhuman and degrading treatment endorsed in chapter nine.

The horrors of September 11, 2001—which resulted from four coordinated suicide attacks on the United States and culminated in the deaths of thousands of U.S. citizens—remain so salient they need little repeating. Yet the political and legal responses remain relatively opaque, especially their relationship to the broader international context and their impact on the United States’ understanding of the prohibition against cruel, inhuman and degrading treatment and what protections it provides.

President George W. Bush quickly set the tone for the United States’ response to the attacks. Just nine days after they occurred he declared to a joint session of Congress: “Tonight we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.”\(^{321}\) He attributed responsibility for the tragedy to al Qaeda and its leader, Osama bin Laden, describing al Qaeda as a “collection of loosely affiliated terrorist organizations … [that] is to terror what the mafia is to crime.”\(^{322}\) In this speech Bush also proclaimed that “[o]ur war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”\(^{323}\)

In addition to announcing the war on terror, the speech laid the foundation for war in Afghanistan by drawing a connection between the Taliban in Afghanistan and al Qaeda, by suggesting the Taliban were harboring al Qaeda fugitives. The war that commenced between the United States and Afghanistan just a few weeks later—on October 7, 2001—was labeled

\(^{320}\) Interview with former Guantánamo detainee by the Witness to Guantánamo project (2009).


\(^{322}\) Ibid.

\(^{323}\) Ibid.
“Operation Enduring Freedom.”

Ironically, that operation would result in the indefinite detention of hundreds, if not thousands, of men, most of whom would never be charged with wrongdoing.

In November—just one month later and far less publicly—Bush would sign a military order concerning the “Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.” The order declared that non-citizen members of al-Qaida and others suspected of terrorism or supporting terrorism would be “detained at an appropriate location designated by the Secretary Defense,” and tried (if any trial was forthcoming) by a military commission. The commission did not need to be comprised of lawyers, and was exempt from applying either the “ordinary rules of military law … [or] the laws of war.”

Soon after, on January 11, 2002, a first group of detainees from Afghanistan and Pakistan would be flown to the United States’ detention center in Guantánamo Bay, Cuba, where they would be housed in a series of open-air cages collectively known as Camp X-Ray. Just a week after the detainees’ arrival, President Bush determined that their presumed affiliations with terrorism exempted them from the prisoner-of-war protections enshrined in the Geneva Conventions. Most notably, the detainees would fall outside the purview of Common Article 3, which forbids “cruel treatment and torture,” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment.” By late April, they would be moved to a new

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325 As early as 2002, government officials estimated that as many as 95 percent of the detainees being held by the U.S. government had never committed any terrorist act against the United States, but that those detainees had instead been swept up in the tide of post-9/11 fervor. This estimate has been supported by detainee release rates. See, e.g., Jane Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals (New York: Doubleday 2008): 187; Andy Worthington, “Rubbing Salt in Guantánamo’s Wounds: Task Force Announces Indefinite Detentions,” Truthout, Jan. 23, 2010; Fletcher et al, Guantánamo and its Aftermath, 2.
329 Common Article 3, Geneva Conventions.
home at Guantánamo, the recently-constructed, supermaximum facility known as Camp Delta, where they would eventually be joined by hundreds of additional detainees.

During these early months of 2002, as Guantánamo’s physical infrastructure was being expanded to house incoming hordes of “the worst,” attorneys in the government’s Office of Legal Counsel were scrambling to create a legal infrastructure to govern conditions of confinement and interrogation considerations at Guantánamo and other U.S. military detention facilities. Unfortunately, though, as has been established elsewhere, the legal documents that were drafted during this frenzied period appear to have consisted less of an objective overview of the legal options at the government’s disposal, than the construction of a justification for an expanded executive authority, including an authorization to engage in “enhanced” interrogation practices. The phrase “harsh” (or “enhanced”) interrogation would later be exposed by both U.S. government investigators and non-government organizations as a thinly-veiled euphemism for cruel, inhuman and degrading treatment, and possibly torture.

Notoriously, in a 2002 memo, attorney John Yoo and Jay S. Bybee, then director of the Office of Legal Counsel in the United States Department of Justice, asserted that institutionalized abuse does not descend into torture unless such abuse inflicts pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” This standard would exclude all but the most extreme abuse, and would arguably weed out such abuse too late to protect detainees from permanent harm. According to

333 See, e.g., Jameel Jaffer and Amrit Singh, Administration of Torture (Columbia University Press 2007); Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib (HarperCollins 2004).
the memo, “mental torture” would require proof of lasting psychological damage spanning “months or years.” But perhaps most dangerously, torture could only occur where that harm was a “precise objective” of any abusive acts, and not just a by-product of interrogation. As established in one commentary on the memos, the authors “were using the law not as a means to prevent torture and cruel treatment, but as an instrument to expand the permissibility of the acts” in which U.S. interrogators and military officials hoped to engage.336

Lawyers within the Office of Legal Counsel also determined that the U.S. Reservations to the Convention Against Torture effectively barred the Convention from serving as a constraint on the scope of interrogation techniques that could be used against detainees. They argued that only the U.S. Constitution’s Fifth, Eighth and Fourteenth Amendments limited the scope of potential detainee treatment, but then reasoned away their application, leaving Guantánamo essentially “lawless.”337

Their reasoning proceeded as follows: First, they argued the Eighth Amendment does not apply to military detention, only to cases of criminal conviction. Despite the President’s initial rhetoric that the war on terror was analogous to the war on organized crime, the vast majority of detainees were never convicted (let alone charged) with any form of criminal activity. The 14th amendment was also quickly disposed of as relevant only to state, not federal, behavior. As for the 5th Amendment, the Office of Legal Counsel concluded that the interrogation techniques the U.S. government hoped to use (and was, in fact, already using, although the world didn’t know it at the time)338 could never violate the “shock the conscience” standard used to determine violations of the 5th Amendment, because pain was not being inflicted arbitrarily but for a higher good: the protection of the American people.339 In such a way, Steven G. Bradbury, then Principal Deputy Assistant Attorney General for the Office of Legal Counsel, attempted to remove all Constitutional and international barriers to harsh interrogation practices. Simultaneously, he managed to distort all existing understandings of what cruel, inhuman and degrading is and what it purportedly protects.

Philip Zelikow, former executive director of the 9/11 Commission, has pointed out one of the inherent problems underlying Bradbury’s arguments. In a critique of Bradbury’s legal reasoning,340 he states that “[t]he [Office of Legal Counsel] holds, rightly, that the United States

337 Ibid.
338 See Jason Leopold and Jeffrey Kaye, “Guidebook to False Confessions: Key Document John Yoo Used to Draft Torture Memo Released,” Truthout, April 3, 2012 (discussing the Pre-Academic Laboratory (PREAL) Operating Instructions, which lays out directions for implementing seven of the ten tactics discussed in the Torture Memo drafted by John Yoo, and signed by Jay Bybee, both with the Justice Department Office of Legal Counsel).
complies with the international standard if it complies with the comparable body of constitutional prohibitions in U.S. law (the 5th, 8th, and 14th amendments).” He then explains that the underlying absurdity of the administration’s position [however] can be summarized this way. Once you get to a substantive compliance analysis for ‘cruel, inhuman, and degrading’ you get the position that the substantive standard is the same as it is in analogous U.S. constitutional law. So the [Office of Legal Counsel] must [be able to] argue, in effect, that the methods and the conditions of confinement in the CIA program could constitutionally be inflicted on American citizens in a county jail.341

Since those memos were first leaked to the public in 2004, they (and their authors) have been soundly criticized, at times excoriated, by both the international and domestic legal communities. On the one hand, the United States has repeatedly said that it defines cruel, inhuman and degrading treatment as cruel and unusual punishment to ensure that the U.S. interpretation of the prohibition of torture is as comprehensive as the international standard, if not more so.342 On the other hand, the U.S. has narrowed the prohibition to only those who have been convicted of a crime—not those being held in preventative detention. Thus, by simply refraining from charging detainees with criminal activity and prohibiting their ability to challenge their detention per the due process clause of the 5th Amendment, they arguably became free to do with detainees whatever they wanted. Because of this reasoning, many of the memos’ authors have been the subject of subsequent lawsuits that allege the authors to be the legal architects of torture.343 While the Bush administration ultimately withdrew the memo in December 2004 in the face of sharp public condemnation, the memo that replaced it offered little to deter to the CIA’s continued use of harsh interrogation practices, since it did nothing to restrict the techniques the earlier memo had approved.344

While the first of these memos were being drafted in early 2002, a number of NGOs—led by the Center for Constitutional Rights—began filing habeas corpus petitions345 in federal court

341 Ibid.
345 The “writ” of habeas corpus is a longstanding legal action that is used to challenge the legality of an individual’s detention. Per Martin Kelly, the writ is “a judicial mandate requiring that a prisoner be brought before [a] court to determine whether [a] government has the right to continue detaining them.” “Definition of Habeas Corpus,” About.com, at http://americanhistory.about.com/od/americanhistoryterms/g/d_habeascorpus.htm. The United
to challenge the U.S. government’s indefinite imprisonment of detainees without access to legal counsel, a trial, or official charges. The first two cases—Rasul v. Bush and Habib v. Bush—were quietly dismissed by a district court, which alleged it did not have jurisdiction over the cases because Guantánamo is not a sovereign territory of the United States. In 2003, however, the cases were granted certiorari by the United States Supreme Court.

While the Court was debating these cases, all hell broke lose—and the apparent stakes rose significantly—when revelation of the abuse of detainees in military custody at Abu Ghraib exploded across the media. The Taguba Report, an investigation conducted by Major General Antonio Taguba on behalf of the United States Army, as well as reports on ABC’s news program 60 Minutes and in the New Yorker magazine, revealed that interrogators had been engaging in practices that the world had long considered torture. Taguba revealed that he had uncovered “amply supported evidence” of coercive practices, including forcing naked detainees to wear women’s underwear; forcing groups of male detainees to masturbate themselves while being photographed and videotaped; positioning a naked male detainee on a box with a sandbag on his head and “attaching wires to his … penis to simulate electric torture,” pouring phosphorous liquid on detainees; as well as “credible” evidence of guards threatening detainees with rape and sodomizing at least one detainee with “a chemical light and perhaps a broomstick.”

On June 28, 2004, just two short months after these abuses came to light, the Court ruled that the detainees could bring habeas claims in federal courts. This decision set off a vigorous

States Supreme Court finally determined that Guantánamo detainees are eligible to assert the right of habeas corpus in federal courts in the landmark case Boumediene v. Bush, 553 U.S. 723 (2008), however it has been used for centuries to prevent arbitrary state constraints on individuals’ liberty interests. See, e.g, Boumediene v. Bush, 553 U.S. 723 (2008) (discussing the international and domestic history of the write of habeas corpus).


60 Minutes, ABC News, April 28, 2004. For an interesting overview of the role that 60 Minutes played in publicizing the scandal (as well as the media more generally), see Sherry Ricchiardi, “Missed Signals: Why did it take so long for the news media to break the story of prisoner abuse at Abu Ghraib?,” American Journalism Review, at http://www.ajr.org/article.asp?id=3716.


tug-of-war between Congress and the Supreme Court over whether the military or the federal court system should have jurisdiction over the detention of Guantánamo detainees.

Congress immediately began scrambling to loudly and publicly reassert the United States’ condemnation of torture, cruel, inhuman and degrading treatment, while quietly figuring out how to mitigate the federal courts’ newly-confirmed authority to place parameters on detainee treatment. This effort culminated in passage of the Detainee Treatment Act of 2005 (DTA).352 Led by Senator McCain—a former torture victim and vocal opponent of torture—the Act sought to assert “a blanket prohibition on the use of cruel, inhuman and degrading treatment” in light of controversial debates then-raging around the definition of torture.353 Specifically, the DTA declared that

no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment … [which] means the cruel, unusual, an inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.354

However, despite these lofty pronouncements, the DTA was effectively gutted during the drafting process. In an effort led by Dick Cheney, the final version of the Act reflected a forced compromise, including an exemption for the CIA and a clause that purported to strip the federal courts of jurisdiction over Guantánamo-related cases.355 As would be noted by the Washington Advocacy Director for Human Rights Watch Tom Malinowski regarding the final draft, “With the McCain amendment, Congress has clearly said that anyone who authorizes or engaged in cruel techniques like waterboarding is violating the law. But the … amendment leaves Guantánamo detainees no legal recourse if they are, in fact, tortured or mistreated.”356

Meanwhile, the international Commission Against Torture was drafting a review of the United States’ responses to concerns the Commission had raised regarding allegations of torture and other forms of cruel, inhuman and degrading treatment emanating from the United States. In its review, ultimately released in the spring of 2006, the Commission first commended the United States for “the State party’s clarification that the statement of the United States President on signing the Detainee Treatment Act on 30 December 2005 is not to be interpreted as a derogation by the President from the absolute prohibition of torture.”357 The Commission also noted “with satisfaction” the “part of the Detainee Treatment Act of 2005 which prohibits cruel, inhuman or degrading treatment and punishment of any person, regardless of nationality or physical location, in the custody or under the physical control of the State party,” as well as

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adoption of new National Detention Standards which aimed to set minimum standards for detention facilities that hold Department of Homeland Security detainees.\textsuperscript{358}

However, the Commission also underscored several continuing concerns. First was the fact that the United States had never created a federal crime prohibiting torture other than sections 2340 and 2340a of the United States Code, which strictly limited federal jurisdiction over acts of torture to extraterritorial cases (by placing detainees in Cuba, the United States argued, no one could be prosecuted for torture since Guantánamo was under the United States’ jurisdiction and thus not extraterritorial; later, however, the government would argue that no officials could be held responsible for torture per the U.S. Constitution because Guantánamo was a foreign territory).\textsuperscript{359} The Commission further noted that the government’s new definition of psychological torture was inconsistent with the Convention Against Torture, which does not require a showing of prolonged harm. They also chastised the United States for having alleged that the Convention Against Torture does not apply to armed conflicts, noting that the Convention applies at all times and in all places.\textsuperscript{360} Finally, the Commission reiterated that the practice of holding individuals indefinitely without charge—as was occurring at Guantánamo—constitutes a per se violation of the Convention.\textsuperscript{361}

Meanwhile, on the domestic front, the back-and-forth between the Supreme Court and Congress was heating up. That battle predominately focused on the proviso of the Detainee Treatment Act that attempted to bar detainees from bringing habeas claims in federal courts and thereby challenge their detentions.\textsuperscript{362} On June 29, 2006, the Supreme Court issued its next relevant decision, \textit{Hamdan v. Rumsfeld},\textsuperscript{363} declaring that Congress did not have authority to strip the Supreme Court of jurisdiction via the Detainee Treatment Act and proclaiming that military commissions were insufficient alternatives to federal trials because (as then organized) they violated the Uniform Code of Military Justice and Common Article 3 of the four Geneva Conventions.

In direct response to this decision, Congress geared up to pass yet another act, the United States Military Commissions Act of 2006 (MCA). This new effort to ensure that detainees would be barred from federal courts was led by Senators Warner and Graham, and largely supported by Senators Sessions, Cornyn, Bond, Reed and Kyl. Opposing their position, and supporting habeas, were Senators Bingamen, Specter, Leahy, Feingold and Feinstein.\textsuperscript{364}

A review of the congressional debates that took place in late September 2006 reveals that Congress relied on twelve main arguments to support their denial of habeas. First was the

\textsuperscript{358} Ibid.
\textsuperscript{360} “Report of the Committee Against Torture,” 69.
\textsuperscript{361} Ibid., 71.
\textsuperscript{362} See ibid., 72.
\textsuperscript{363} 548 U.S. 557 (2006). The Court had also decided Hamdi v. Rumsfeld, 542 U.S. 507, in 2004; that case provided the right of U.S. citizens to bring habeas claims and thereby challenge their status as an enemy combatant before a judge. Because the vast majority of detainees, unlike Hamdi, are not U.S. citizens, I do not address this case here.
\textsuperscript{364} Thee conclusions are based on the MCA’s legislative history. See SCOR-2006-09-27 (Sept. 27, 2006); SCOR-2006-09-28 (Sept. 28, 2006).
argument that detainees are such “heinous individuals” and pose such an unparalleled threat to the United States that they should not be permitted access to federal courts. Second, it was posited that detainees were “enemy combatants” who could be held indefinitely since not privy to protections provided by international and domestic law: thus, what good would habeas do if the United States could hold them indefinitely, anyway? Third, and relatedly, these were not criminals (to whom habeas applies), but enemy combatants (to whom habeas does not apply). Fourth, permitting habeas would lead to unnecessary, expensive and frivolous litigation. Fifth, permitting habeas would undermine interrogation and other military efforts, thereby proving a threat to national security. Sixth, permitting habeas “aids the enemy.” Seventh, to permit habeas is to be “soft” on terror (and thus, implicitly, naïve). Eighth, permitting habeas would be tantamount to allowing terrorists to sue the United States’ military personnel, and which of those two groups should the U.S. be supporting? Ninth, military courts are better equipped than civilian courts to determine whether a suspect is a combatant. Tenth, the detention of detainees is not a constitutional issue but a statutory one, and thus can be determined by Congress, not courts. Eleventh, combat status review tribunal hearings provide “more” protection than the Geneva conventions require, thus habeas hearings are unnecessary and excessive. And finally, the Supreme Court’s habeas rulings only apply to U.S. citizens; therefore Congress can not be overruled if it denies habeas to non-citizen detainees.

Throughout the debates, there was a clear concern with further assertions of authority by the Supreme Court. The wording of the Act that ultimately resulted from these debates incorporated Common Article 3 of the Geneva Conventions, and thus explicitly reiterated the international ban on cruel, inhuman and degrading treatment, a clear nod to Constitutional concerns. However, it simultaneously allowed the President to define and apply Article 3 as he saw fit; it also retroactively granted immunity to any individuals who had tortured detainees (a major concern in the aftermath of Abu Ghraib), and attempted to nullify any outstanding and/or future habeas petitions. As explained by Andy Worthington, one of the world’s most vocal critics of the United States’ legal maneuverings during this time, “[a]nother way of putting it would be that Bush passed legislation that confirmed that if a U.S. representative tortured someone but said that he was only trying to get information, it wasn’t actually torture.” The Act was signed into law by President Bush on October 17, 2006.

Almost immediately, additional challenges flooded the federal courts. By 2008, the Supreme Court had an opportunity to consider the legality of the new Act and whether it could be used to deny detainees the ability to bring habeas claims. On June 12, 2008, in Boumediene v. Bush, the Supreme Court declared the Act to be unconstitutional, asserting that fundamental rights guaranteed by the U.S. Constitution extend to detainees despite their non-citizenship. The Court also emphasized that the United States has “de facto” (albeit not “de jure”) sovereignty over Guantánamo, to establish that U.S. law applies within the territory. The majority opinion,

365 Ibid.
366 See Worthington, Guantánamo Files, 289.
367 Ibid.
369 The Supreme Court’s determination concords with the Commission Against Torture’s earlier determination that the Convention’s terms extend to all geographic spaces within a state’s “de facto effective control.”
drafted by Justice Kennedy, contains a remarkably detailed overview of the relationship between the Magna Carta, the history of habeas corpus, and the United States Constitution, to support the conclusion that if Congress suspends the right of habeas, it must offer an adequate substitute that provides a meaningful opportunity to challenge detainment. The Court concluded that neither the Detainee Treatment Act of 2005 nor the MCA of 2006 were sufficient to do so.

On June 17, just five days after the Supreme Court announced its Boumediene decision, the Senate Armed Services Committee commenced a hearing into the origins of the aggressive interrogation techniques that the world now knew the U.S. had been using against detainees in custody in Iraq, Afghanistan, and Guantánamo. Senator Carl Levin, who headed the committee, said in his opening statement, “Were these actions the result of a few bad apples acting on their own? It would be a lot easier to accept if it were. But that’s not the case. The truth is that senior officials in the United States government sought information on aggressive techniques, twisted the law to create the appearance of their legality, and authorized their use against detainees.” As he explained, “[these] hearings will explore part of the story: how it came about that techniques, called SERE resistance training techniques, which are used to teach American soldiers to resist abusive interrogations by enemies that refuse to follow the Geneva Conventions, were turned on their head and sanctioned by Department of Defense officials for use offensively against detainees.” During the course of the hearings, it was revealed that such techniques had been detailed in a memo from Joint Personnel Recovery Agency Chief of Staff Daniel J. Baumgartner, Jr., Lt. Col., United States Air Force, in a July 2002 memo describing “Physical Pressures used in Resistance Training and Against American Prisoners and Detainees.” The memo was apparently prepared in response to a request for

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553 U.S. at 739-746.
553 U.S. 723.
SERE stands for Survival, Evasion, Resistance, Escape. SERE training is designed to teach U.S. military personnel and others how to endure torture and other forms of cruel, inhuman and degrading treatment. The tactics that are the focus of such training derive in part from a series of documents that originated during the cold war, including overviews of various Communist Control Techniques (as published in a study from 1956), “Biderman’s Principles” (detailed in a 1957 study), and the CIA’s infamous Kubark Manual (dated July 1963). All of these documents are available in the Archives of Torturing Democracy, at http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/theme.html
information on defenses against particularly brutal techniques that had been successfully used against Americans, which could be “reverse engineered” so that Americans could use them on detainees. In addition to providing an overview of the techniques typically taught to “high-risk-of-capture” personnel to teach them how to resist such extreme interrogation, including torture, the memo’s author offered continued exploitation assistance to government organizations tasked with obtaining intelligence from detainees.

A government trip report from September 2002 further establishes that a number of high ranking government officials, including the acting general commander of the CIA, had toured Guantánamo and received briefings on Intel successes, challenges, techniques and future plans. However, it was minutes from a meeting held on October 2, 2002 that proved especially scandalous during the 2009 hearings. A series of email exchanges from 2002 reveals that the minutes (along with an overview of the proposed interrogation methods) were sent to Mark Fallon, Deputy Commander of the Department of Defense Criminal Investigation Task Force. He responded with a sharply worded warning that the 170 interrogation strategies considered during that meeting were likely “the stuff Congressional hearings are made of.”376

The minutes include Lt. Col. Diane Beaver of the Army’s Judge Advocate General Corp’s now-infamous comment about possibly needing to curb the harsher tactics “while [the International Committee for the Red Cross] is around,” suggesting a general awareness of their likely violation of international and domestic law. Finally, the minutes reveal that the use of further techniques had been debated, including an extreme form of sleep deprivation, which they establish was being used in Bagram but “officially … not happening.”377 During the meeting, the group debated whether the Convention Against Torture would be violated by the proposed tactics, discussed the possibility of the CIA not being subject to the same constraints as the military, and brainstormed possible other techniques, including the use of truth serum.378

The hearings also reveal a later exchange in which Michael Dunlavy, head of U.S. anti-terror intelligence, requested approval to use the proposed interrogation techniques, and a memo from Beaver—which has since been determined to include faulty legal advice—concluding that use of the aggressive interrogation techniques would not violate federal law. This exchange was followed by yet another flurry of memos—most notably authored by the Chief Legal Advisor for the Department of Defense Criminal Investigation Task Force and (in a second memo) the Office of the Army General Counsel—which documented their respective “conclusion” and “concerns” that the techniques would be considered cruel and unusual or inhumane treatment or punishment, and thus would violate the Constitution. Despite these warnings, however, these memos would culminate in a now notorious document dated November 27, 2002, which was sent from Department of Defense General Counsel William Haynes to then-Secretary of Defense Donald Rumsfeld, recommending blanket approval of most of the techniques—approval that Rumsfeld would officially grant with his signature on December 2, 2002.379

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378 Ibid.
379 All of these documents can be found on Senator Carl Levin’s website at http://www.levin.senate.gov/newsroom/press/release/?id=588c53ab-61a2-435e-97a4-2413cc86b678. Many are also available in Laurel E. Fletcher and Eric Stover, The Guantánamo
As these hearings were being conducted in September 2009, Congress continued its scramble to figure out how to keep Guantánamo-related cases out of federal courts despite Boumediene. By late October 2009 Congress had passed, and the relatively new President Barack Obama signed, a second Military Commissions Act, which sought to restructure the military commissions so that they would pass Constitutional muster, and reinstate military commissions as the forum for hearing detainees’ cases.

While, on one hand, the version of the Act that resulted in late 2009 excluded statements secured through torture or other cruel, inhuman and degrading treatment in commission hearings in conformity with international law, on the other Congress simultaneously “empowered the Secretary of Defense to enact rules permitting admission of coerced statements and hearsay evidence,” in direct contravention of the rights usually recognized by such commissions. Perhaps most importantly, the Act allowed for appeals to the U.S. Court of Military Commission Review, then the federal appeals court in Washington, and ultimately the United States Supreme Court. But in addition to providing jurisdiction over many standard war crimes, it also attempted to create several new crimes that would be applied retroactively (much as had occurred with Crimes Against Humanity in the wake of World War II), including “material support for terrorism.” This new crime would conceivably (and controversially) enable prosecutions even where evidence was relatively weak.

While the revised Act better reconciled military objectives and concerns with Constitutional ones than earlier endeavors, a second measure—this one proposed as part of the $600 billion plus National Defense Authorization Act—would follow closely on its heels. Democracy Now has explained that this measure was designed to “effectively extend the definition of what is considered the U.S. military’s battlefield to anywhere in the world, even the United States,” and permit the indefinite detention of anyone, from anywhere.

The proposed measure created an unusual series of alliances and oppositions, which—oddly enough—crossed party lines. For example, “one of the Senate’s most conservative members,” Rand Paul (R-Ky), went on record in opposition to the measure, stating “I’m very, very concerned about having U.S. citizens sent to Guantánamo Bay for indefinite detention.”

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382 Ibid.

interpreted by one critic, “Paul’s top complaint is that a terrorism suspect would get just one hearing where the military could assert that the person is a suspected terrorist—and then they could be locked up for life, without ever formally being charged. The only safety valve is a waiver from the secretary of defense.”\(^{384}\)

Conversely, another Republican, Senator Graham, came out as one of the measure’s biggest proponents. He declared:

The enemy is all over the world. Here at home. And when people take up arms against the United States and are captured within the United States, why should we not be able to use our military and intelligence community to question that person as to what they know about enemy activity? … They should not be read their Miranda Rights. They should not be given a lawyer. They should be held humanely in military custody and interrogated about why they joined al Qaeda and what they were going to do to all of us.\(^{385}\)

Although the White House initially threatened to veto the Act should it pass, President Obama signed the National Defense Authorization Act as his last official act of business for 2011.\(^{386}\) Although President Obama had signed an Executive Order on his second day in office that required Guantánamo’s closure before the end of 2008,\(^{387}\) fewer than four years later (and concurrent with Guantánamo’s ten-year anniversary), Guantánamo and the practice of indefinite detention had not been shut down, but had become a permanent feature of the American legal landscape.

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While this back-and-forth was taking place, handfuls of men were quietly being released from Guantánamo. And a small contingent of researchers and reporters were fanning out across the globe, eager to collect their stories and learn what all of the fuss surrounding the torture memos, habeas corpus, and NGO activism had really been about.

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\(^{385}\) McAuliff and Bendery, “Senate Votes.”


IV. Descending into the “Worst”: A Series of Realist and Confessional Tales

It’s lunchtime on a weekday in September 2008, I’m in my second year of the Jurisprudence and Social Policy Ph.D. Program at Berkeley Law, and I’m sitting in a restaurant on Shattuck Avenue in Berkeley, California. Peter Jan Honigsberg, a law professor from the University of San Francisco, sits across from me in a leather jacket and newsboy cap. He has asked me to lunch to talk about collaborating on a possible project. As our food arrives, he explains that he’s investigating the feasibility of starting a truth commission to explore culpability for the alleged abuse of Guantánamo detainees, and is wondering if I would be interested in coming on board to help manage the project. I am simultaneously flattered and floored. I tentatively agree, and we begin to discuss the possibility of basing my looming dissertation on some aspect of this work.

While a truth commission never develops, I will end up spending the next two years helping Honigsberg develop the “Witness to Guantánamo Project,” an endeavor intended to create a permanent record of detainees’ experiences at Guantánamo through a series of in-depth, filmed interviews. The purpose underlying this project will be to document detainees’ stories for use by journalists, human rights organizations, academics, students and others, as well as provide a forum through which former detainees can communicate their experiences to the public. I will dedicate hundreds of hours to coordinating the project during its first two years. Several of the interviews that result will form the basis of this dissertation.

* * *

This chapter provides an overview of the methodology underlying my dissertation. Part II describes the two projects that produced the interviews on which this dissertation is based. Part III provides background on Guantánamo as a place, and on the people who have been held there. Part IV provides an overview of the interview populations, study design, and analysis, including the coding scheme and study limitations. The chapter ends with “two confessional tales,” stories that aim to clarify any biases I may have brought to my analysis.

A. Interview Methodology: A Tale of Two Projects

The interviews that form the heart of this dissertation were collected as part of two separate projects: one at the University of San Francisco (the Witness to Guantánamo Project) and a second at the University of California, Berkeley. The goal of both projects was the same: to educate the public about detainee abuse, and mobilize pressure to encourage accountability for any wrongs that may have been committed. Because my exposure and access to the stories told by former detainees through the Witness to Guantánamo Project initially motivated my dissertation, I describe that project first.

i. The Witness to Guantánamo Project
The Witness to Guantánamo project was founded by Peter Jan Honigsberg in late 2008 to create a permanent record of detainees’ experiences through a series of filmed interviews with men who had been held at Guantánamo. Honigsberg hired me at the project’s inception to serve as the project’s program manager. During its first two years, Honigsberg and I were responsible for designing the project and coordinating the interviews.

Sixteen of the interviews featured in this dissertation were produced by that project. Interviews were conducted in Albania, Bermuda, Bosnia, France, Germany, Great Britain, Kuwait and Palau. Securing the interviews was a challenging process, and depended on the facilitation of an extensive network of attorneys and organizations. This network was comprised of several leading Constitutional scholars, attorneys and activists, several of whom would join the project’s advisory board, including Michael Ratner, President of the Center for Constitutional Rights; Clive Stafford Smith, Legal Director of Reprieve; Laurel Fletcher, director of the International Human Rights Law Clinic at the University of California, Berkeley, School of Law; Candace Gorman, a civil rights attorney and creator of the Guantánamo Blog; and Erwin Chemerinsky, Dean of U.C. Irvine Law School. Access was also facilitated through non-government organizations that provided extensive assistance locating and contacting former detainees, along with translators and others who have worked in Guantánamo or otherwise interfaced with detainees.

While our original intent was to conduct at least 100 interviews with former detainees, legal cases that were brought against U.S. officials by former detainees in increasing numbers mid-project caused many potential interviewees to cancel their scheduled interviews. That and a number of related and unfortunate circumstances meant that I was not able to personally conduct these despite my having researched their whereabouts, drafted the questionnaires, fronted the expense affiliated with sending several research teams overseas, spoken with former detainees and their representatives by phone, and coordinated many of the meetings.

Despite this, the fact that all of the interviews were filmed mitigated some of the problems associated with not being present and enabled a consideration of former detainees’ physical reactions to questions and other visual evidence that provided clues to their interpretations of their experiences. Honigsberg generously forwarded DVD copies of sixteen interviews for my use. One interview in French strained my minimal translation skills. While dozens of additional interviews have since been completed, temporal and logistical constraints limited the number that was available for analysis in time to be included in my dissertation. Because I was not permitted to send the interviews out for translating or transcribing (a decision that was made by the director mid-project), I spent hundreds of hours reviewing the films— which averaged two hours in length—taking detailed notes and transcribing relevant portions to create written documents for further review. I then compiled all of my notes and transcriptions and prepared them for coding.

Interview questions were based on a semi-structured, open-ended questionnaire that Honigsberg and I drafted early in Witness to Guantánamo’s development (a copy is included in

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388 Midway through the project, I was informed that I was not allowed to send the clips out to be translated or transcribed.
389 The list of former detainees and non-detainees who have been interviewed is available on the Project website at http://witnessstoguantanamo.com.
the dissertation’s appendix). Questions were designed to elicit former detainees’ stories about: 1) the institutional practices and behaviors that former detainees considered the most difficult to endure; 2) the ways in which former detainees resisted power operationalized by institutional actors within the facility; 3) former detainees’ daily, routine interactions with institutional actors; and 4) the ways in which former detainees communicated with one another—especially instances of and perceptions of social support—and the effects of their communications. Basic demographic information, such as each respondent’s race, religion, age, place of origin, marital and parental status, pre- and post-Guantánamo occupations, place of capture, place of resettlement, and dates of confinement were also solicited, so that narrative responses could be analyzed based on a number of demographic factors.

Questions relating to which institutional practices were most difficult to endure and why were designed to elucidate how former detainees defined and gave meaning to their treatment, including whether cultural and identity-based frames were employed, and whether any abuse that occurred was predominately physical and/or psychological in nature. When drafting the questionnaire, we refrained from asking about torture directly in order to avoid triggering stereotypes in informant responses, and elicit more nuanced perspectives as to how former detainees perceived cruelty within the prison context.

ii. The U.C. Berkeley Project

This dissertation is also based on a second, more comprehensive set of interviews, which was generously made available by Laurel E. Fletcher, director of U.C. Berkeley’s International Human Rights Law Clinic, and Eric Stover, director of U.C. Berkeley’s Human Rights Center. The earlier of the two projects, it produced 62 of the interviews I analyzed. This study’s objective was to “record the experiences of [former Guantánamo detainees], assess their treatment in detention, and explore how the conditions of their incarceration affected their subsequent re-integration with their families and communities.”

390 According to its website, Berkeley Law’s human rights clinic (IHRLC) pursues “a dual mission: promoting justice at home and abroad and training attorneys for a changing profession. IHRLC marshals the resources of the faculty and students of UC Berkeley to advance the struggle for human rights on behalf of individuals and marginalized communities. It clarifies complex issues, develops innovative policy solutions, and engages in vigorous advocacy. At the same time, IHRLC prepares graduates for an increasingly diverse, competitive, and international legal profession.”

391 Berkeley Law’s human rights center is institutionally and conceptually distinct from the clinic, even though the two organizations sometimes collaborate on projects of mutual concern. The center is committed to “pursuing justice through science and law.” Its efforts tend to be less doctrinally focused and more social science research oriented than that of the clinic. However, both organizations aspire to impact policy, and their methodologies frequently overlap.

A team compiled by Fletcher and Stover gathered the sixty-two interviews in nine countries. I was brought on board mid-project as a graduate student researcher to support the study’s legal and empirical analysis. The interviews were coded and analyzed, and the data from that analysis was shared in a report and a book documenting the experiences of former detainees.

Fletcher and Stover generously granted me access to all of the U.C. Berkeley interviews for use with my dissertation. Per the U.C. Berkeley human subjects protocol, however, they were unable to provide an electronic copy of the transcripts. Instead, I was permitted to take notes from the hard copies of the interviews and re-type relevant passages into a series of notes. Because the protocol required that the notes only be accessed at U.C. Berkeley’s Human Rights Center or International Human Rights Law Clinic, this meant I spent hundreds of hours over the better part of a year reviewing the interview transcripts in the Clinic offices. This access was approved by Laurel E. Fletcher (the Clinic’s director) and Roxanna Altholz (the Clinic’s associate director), both of whom generously opened the Clinic to my use.

### iii. Data Overlaps

Because of my affiliation with both the Witness to Guantánamo project and the U.C. Berkeley project, I was able to ensure that the men interviewed through the Witness to Guantánamo project were asked similar questions to those used by U.C. Berkeley researchers. This permitted a significant degree of consistency among the data that was collected, and helped ensure that the questions that were asked were relevant to my research interests.

Several people have asked why I didn’t rely only on the U.C. Berkeley interviews as the basis for my dissertation since they comprise the overwhelming majority. There are four reasons. First, because the Witness to Guantánamo interviews were conducted during a later period than the U.C. Berkeley interviews, they include the experiences of men who were held at Guantánamo longer than those interviewed by U.C. Berkeley researchers and/or were released at later dates, adding to the diversity of experiences available for analysis. Second, by gathering additional interviews, I was able to base my dissertation on the experiences of approximately ten percent of the men who were held at Guantánamo—as opposed to a smaller percentage—and thus I hope to have captured a more representative range of experiences than otherwise. Third, I was able to participate in the Witness to Guantánamo project at a much earlier stage than the U.C. Berkeley project—its inception—which meant that I was more intimately involved with the process of accessing former detainees. My tasks included coordinating a significant percentage of the first thirty interviews; locating former detainees in far-flung reaches of the world; and communicating directly with activists, academics, lawyers, and former detainees. Through these activities, I gained additional contextual understanding regarding the diversity of former detainees’ concerns and post-release experiences.

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393 The specific countries must be kept confidential per IRB requirements to protect the identities of those detainees who have been released to countries with few of their peers.

394 Fletcher et al, Guantánamo and its Aftermath.
Finally, unlike the Berkeley interviews, which were confidential, the Witness to Guantánamo interviews were filmed to create a permanent public record of human rights abuses, which permitted me a more intimate glimpse into the interviews themselves.395

B. Guantánamo: The Place and the People

i. The Place: The United States Naval Base at Guantánamo Bay, Cuba

Guantánamo Bay is the largest harbor on the southeast side of the island of Cuba. Twelve miles long and six miles across, the bay is surrounded by steep, green hills to the east and south, and mountains to the north. Hot, humid weather is punctuated by rain in summer, which disappears in winter.396

The United States’ relationship with this “land among rivers”397 began more than a century ago, but in the context of a very different war than the war on terror. Located four hundred miles from the mainland United States, the territory that currently houses detainees was first acquired by the United States in 1898 when the U.S. took control of Cuba from Spain during the Spanish-American War. Five years later, the United States secured a “perpetual” lease for that land from the Cuban government, a lease that was initially valued at a rate of “2,000 gold coins per year.”398 That lease has continued in some form ever since, its most recent modifications having occurred in 1934.399

The naval base on the island is the United States’ oldest existing base outside of the United States, and the only located in a communist country.400 A two-mile wide bay divides the surrounding land into two distinct areas, with an airfield on the “leeward” side and a main base on the “windward” side.401

Comprised of 45 square miles, the base includes Camp America, which has been described as a “1950s style enclave where U.S. soldiers live, and which offers drive-in movies, cheap restaurants, and the blessed relief of air conditioning.”402 Sometimes called the “Pearl

401 Ibid.
Harbor” of the east, the economy of nearby Guantánamo city depends on sugar production and military spillover.

The base has had several functions over the last hundred plus years. First a coaling station, facilities on the base expanded significantly in the years around World War II. Since Cuba’s 1959 revolution— which precipitated angry cries from the new government to return the land to Cuban control— Cuba has considered the United States an illegal occupier that continues its residency on the base in violation of Cuban sovereignty.403

Prior to its post-9/11 function as a detention facility, the base was used to hold Haitian and Cuban refugees. However, a 1993 district court decision declared that purpose unconstitutional, ending that practice.404 In 1996, then-President Clinton signed a law that modified the United States’ treaty with Cuba to offer an end to the naval base’s existence when “Cuba has a government that Washington approves of.”405 Meanwhile, the United States continues to pay its purported lease each year with checks that the Cuban government refuses to cash.406

On January 11, 2002, the first 20 detainees arrived at the Guantánamo Bay naval camp. One report declares their official price of admission to have been the following: a foreign nationality, al-Qaida training, and having commanded at least 300 personnel.407 These first detainees were initially housed in Camp X-Ray, temporary housing comprised of a series of open-air cages topped with corrugated metal roofs.408 However, the number of detainees swelled quickly, straining X-Ray’s capacity. The camp could hold only 320 men, so construction rapidly began on Camp Delta, a larger and more permanent facility that could house nearly 2,000 people.409 By February 2002, construction for the new camp had begun on an old gunnery range located a mere 100 yards from the Caribbean.410 By April 28, 2002, Camp Delta opened, and the first 300 detainees were transferred. By the end of the next day, transfer of all detainees was complete, and Camp X-Ray closed.

Operating under the somewhat-ironic motto “honor bound to defend freedom,”411 Camp Delta is comprised of seven detention camps, which are numbered by the order in which they were built. Three of the camps (1, 2 and 3) are maximum-security facilities that can collectively house 800 detainees in solitary confinement. Camp 4 is organized “dormitory fashion” with up to ten detainees in a room; it typically houses compliant prisoners and/or those cleared for release. Camps 5 and 6 are more “permanent” than the others, and modeled after high-security prisons in the United States. Constructed of steel and concrete, the entrance to these camps is separate from the rest of Camp Delta.

404 Ibid.
405 Ibid.
406 Ibid.
408 See, e.g., Fletcher et al, Guantánamo and its Aftermath, 32.
409 “Guantánamo Bay – Camp Delta,” GlobalSecurity.org
410 Horrock and Iqbal, “Waiting for Gitmo.”
Then there are the named camps: Camp Echo, which has been described as “a collection of shacks,” initially housed detainees earmarked for prosecution. Another Camp, “Iguana,” was originally designated for juveniles, although it has subsequently been reassigned to house detainees who have been classified “no longer an enemy combatant.” This camp has historically received the highest marks from detainees, boasting views of the water, relatively decent food, an outside area, and a television for watching movies. By contrast, Camp 7—the final numbered camp—is believed to have housed a small collection of detainees who were transferred from CIA custody in extreme isolation. A “secret” camp or “dark site,” its precise location has never been disclosed.

ii. The People

A total of 779 men have been held at Guantánamo. The year 2003 witnessed the highest population recorded at any one time, with 680 detainees. By October 2008, a relatively paltry 255 remained. And by 2012, the ten-year anniversary of detainees’ first arrival, 171 men remained, 89 of whom had been cleared for release but not let go.

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412 Laurel Fletcher et al, Guantánamo and its Aftermath, 33. In 2013, a minor scandal erupted when it was discovered that Camp Echo—which was provided as a place for defense attorneys to consult with their clients—was bugged, allowing for a potential “echo” of everything that was said. See, e.g., Carol Rosenberg, “Attorney-client meeting room was bugged, Navy lawyer testifies at Guantánamo,” Miami Herald, Feb. 12, 2013.

413 Fletcher et al, Guantánamo and its Aftermath, 33-34.


Numbers represent the total recorded detainee population at Guantánamo as of January of each year. The data in this chart was compiled from several sources: The New York Times’ “Guantánamo Docket,”⁴¹⁶ the U.C. Berkeley report “Guantánamo and its Aftermath,”⁴¹⁷ and a series of U.S. Department of Defense press releases.⁴¹⁸

According to a combination of government records and sleuthing by non-government organizations, of the total population, 221 were nationals of Afghanistan, 140 were from Saudi Arabia, 110 hailed from Yemen, and another 70 came from Pakistan.⁴¹⁹ While they originated from 46 different countries, the vast majority were captured in Afghanistan or Pakistan, sold to the United States, detained in military facilities in Afghanistan, and then transferred to Guantánamo. Those who were eventually let go were released due to the United States’ inability to link them to the terrorism of which they were initially suspected. Indeed, early into the war on terror, U.S. officials acknowledged that as many as 94 percent of the men at Guantánamo should never have been there.⁴²⁰

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⁴¹⁷ Fletcher et al, Guantánamo and its Aftermath, 30.
⁴²⁰ Mayer, The Dark Side, 187.
So how, if so innocent, did these men end up in U.S. custody? Most appear to have come to the United States’ attention as a result of bounties offered in exchange for “terrorists.” These bounties were advertised via leaflets dropped throughout the region. According to numerous sources, the United States paid $5,000 for alleged terrorism supporters, an amount that swelled for men who spoke English or were specifically “wanted.” By May 2012, the United States had paid more than $100 million to approximately 70 people for information related to “alleged terrorists.” While fruitful for motivating leads, such bounties have resulted in what has been called an “unscrupulous dragnet,” one that resulted in the detention “of thousands of people, many of whom it appears had no connection to Al Qaeda or the Taliban and/or posed no threat to U.S. security”—or at best had questionable links to those organizations—a wrong the U.S. failed to rectify due to inadequate screening.

Probably thanks to the temptation of such enormous sums of money, many of the men captured by non-Americans were “strangers” traveling through Afghanistan or Pakistan who were easy targets for quick payouts. Alternately, when captured locally, many suspect they were “sold” by rivals, who not only eliminated the presence of longstanding enemies but sometimes further profited by stealing coveted land or cattle that were left behind. Finally, for those captured by Americans, the most common explanation has been one of mistaken identity. While a small handful of former detainees appear to have worked for the Taliban, this has usually been credited by interviewees as due to an inability to pay the bribes the then-powerful Taliban demanded for recusal from military service; any ideological affinity has typically been disavowed.

C. The Study

i. An Introduction to the Interviewees

I slip a DVD into my laptop. On that DVD is an interview with a former Guantánamo detainee that was taped a few weeks earlier by the Witness to Guantánamo project. My computer screen fills with the face of a young man named Anwar. Anwar’s expression seems carefully controlled as the camera adjusts and he waits to be questioned. A closely cropped beard frames his young, full face and generous lips. In his early twenties, he has been out of

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421 See, e.g., Fletcher et al, Guantánamo and its Aftermath. For an overview of the U.S. bounty program that has been created to encourage information about terrorists, see the United States’ Rewards for Justice program website, at http://www.rewardsforjustice.net.
422 Ibid.
424 Fletcher et al, Guantánamo and its Aftermath, 2.
425 For example, per records maintained by the United States State Department, in the fiscal year 2009 Pakistan had a 14 percent unemployment rate and a per capita GDP of $2,600. Afghanistan, for the same year, had an unemployment rate of 35 percent and a per capita GDP of $900. These figures compare with the United States’ 2012 unemployment rate of approximately 8 percent and a per capita GDP of almost $50,000.
426 All interviewees’ names have been replaced with pseudonyms.
Guantánamo—a place he entered in his teens—for four years. He and his American interviewer are face-to-face in a building somewhere in Southern Europe, far from his homeland in East Turkestan. The interview Anwar is about to give will become one of dozens that researchers are gathering to reveal the experiences of the men who have been held at, and subsequently released from, Guantánamo.

As the interview begins, Anwar speaking softly in Uighur, I imagine his emotions are raw, despite his studied expression. Not only do the questions hover, like flies, around some of the most difficult moments of his life, but the very act of having his life’s story interrogated by an American researcher must have an eerie parallel to his questioning in detention.

Slowly, though, Anwar begins to relax, his face growing more expressive. Sometimes he glowers, head down, as his translator speaks about the beatings Anwar endured and others he witnessed. Other times, his face cracks into a smile, almost as if he cannot restrain himself from grinning. Anwar seems most pleased when he discusses those times he successfully challenged his guards, small victories he carved from the overbearing control of incarceration.

As Anwar speaks, I increasingly realize how young he is, how vulnerable he seems. This reaction is strongest when, an hour and a half into the interview, he begins talking about a friend he made in detention, a “Yemenese guy” named “Yasser,” who taught him Arabic. He explains how Yasser, also a teenager, had given Anwar his home phone number so that Anwar could call Yasser’s family if Anwar was released first. Yasser knew that Anwar could never return to his native East Turkestan because of the risk that Anwar would be tortured or killed by the Chinese government: Anwar’s people, the Uighurs, have long fought China’s occupation of their territory. Yasser assured Anwar his family would help him.

Anwar pauses, then explains how once he was finally released, he couldn’t call Yasser’s family right away. Soon after, he learned Yasser was dead. While the U.S. government reported the death as a suicide, Anwar claims his friend was even more of a devout Muslim than he was, and thus even more ideologically opposed to taking his own life. The assumption that lingers in the air, unspoken, is that the U.S. government either caused or allowed his friend to die.

As the interview winds down, Anwar backtracks to reveal how he came to be at Guantánamo in the first place. His father had decided to send one of his children to the United States for an education. Relatives had successfully relocated their families that way, providing them with a chance for a better life. The middle child of seven, Anwar was the obvious choice: his older brothers had already settled into their adult lives; the others were too young. Anwar was just graduating high school, an ideal age to pursue his studies overseas.

However, the American education he received would prove quite different than the one he or his father had imagined. Anwar was en route to the United States, traveling through tribal provinces outside of Western China, when he and a friend were detained by Shiite Muslims, who transferred them to Pakistani forces. A guard later told him that the Pakistanis sold him for $5,000 to U.S. operatives, who took him to Kandahar Air Force Base in Afghanistan. There, he was held for five months before being transferred to the U.S. Naval Base at Guantánamo Bay, where he would struggle to make a new home in a “little cage” he initially mistook for a toilet.

Many former detainees who arrived at Guantánamo in early 2002 have described what it was like to live in the open air cages that comprised Camp X-Ray. Buffeted by rain and seared by the sun, they often shared their confines with rats and other creatures that slipped through the
camp’s chain-link walls. While most interviewees deplored the cages and their lack of protection and privacy, others retained their harshest criticism for a newer facility, Camp Delta, which opened (and to which they were transferred) a few months later. Camp X-Rays’ opposite extreme, once in the super-maximum security facility detainees were cut off from all living creatures, including each other, by thick concrete walls. The lack of windows and incessant fluorescent light rendered it impossible to tell night from day.

When asked how he endured his three years there, much of it spent in isolation, Anwar answers:

Our religion teaches us how to be patient when you face difficulties … the many people there including myself, if we didn’t believe in Islam, if the religion didn’t give us the patience— it was very difficult to deal with. The difficulties that we have faced in Guantánamo—I know that in my religion I cannot commit suicide because I will be punished in the next life…. In our religion it is forbidden to kill ourselves …. So that was the only reason that I didn’t. I just stayed patient, kept waiting on, kept waiting to be free.

The many men, like Anwar, whose stories form the heart of this dissertation hail from more than a dozen countries, although several demographic similarities underlie their differences. All identify as Muslim. Almost all are or were married (at least 72 percent), although several no longer live with their wives post-release, especially if relocated to a country other than their home. Approximately 70 percent are fathers. Most painfully for many of the men, Guantánamo left the vast majority of their collective 218 children—as well as numerous wives and elderly mothers—without a provider.

The individuals who were interviewed for this study tend to come from one of three cultural groups, broadly defined. These three groups include 1) men from Afghanistan (34 interviews), 2) men from Western Europe (18 interviews), and 3) men who identify as Uighur, most of whom hail from East Turkestan in Western China (16 interviews).

Three other groups were represented at Guantánamo in relatively significant numbers. However, their voices and perspectives are largely unrepresented in this dissertation because of difficulties locating and accessing them for interviews. These men hail from Saudi Arabia, Pakistan, and Yemen. This omission introduces an important bias to this dissertation. Because these three countries are believed to house the greatest concentration of al Qaeda operatives, and

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427 According to at least one source, the prisoners were kept in open-air cages strategically: so that they could be seen at all times. “Guantánamo Bay History,” CBCNEWS, May 21, 2009.

428 Interviewees mention being or having been married in 56 of the 78 interviews. However, six additional interviews are ambiguous as to whether the individual was or had ever been married, so the total could actually be quite higher. Of those who had been married, one interviewee said that his wife and son had died when he was arrested (although he has subsequently remarried); another said his wife had died in the last couple of months; at least two other interviewees gave their marital status as divorced; and another stated that he is separated.

429 Children are mentioned in 55 of the 78 interviews. Most interviewees stated the number of children they had; on the rare occasion that a precise number was not given, I counted the number of children as “1” in order to ascertain a minimum.

thus detainees from these countries may have been more likely to be presumed al Qaeda members than others, it is probable they had somewhat different experiences from men who have been more accessible post-release. Their treatment may well have been more severe than that of the men who have been released into or are from relatively “friendly” countries with the United States. Consequently, future research is sorely needed into the experiences of the men from these countries, and how their experiences varied from those of the men whom researchers have been able to contact.

Importantly, the three categories of men who were interviewed tended to have somewhat different experiences leading into, in and post captivity. For men from Afghanistan, local rivalries seem to have played a crucial role in their capture. The experiences and backgrounds of these men, however, vary considerably. While many Afghani interviewees reported being uneducated (17 of the 34, or 50 percent), others reported high levels of education (21 percent reported a 12th grade education or higher) and/or claimed to have previously held prestigious government or military positions. Reported pre-Guantánamo positions were fairly diverse. While the majority of the interviewees said they had previously been farmers, shopkeepers, construction workers or taxi drivers, others claimed to have been a government official, police chief, doctor, military logistics officer, military commander, district chief, employee of Afghanistan’s Ministry of Education, accountant and humanitarian. Three reported having worked in the medical field, while one reported having a law degree.

While this population appears to have significant variability in terms of its psychological and social well-being post-detainment, on average these men seemed to have had the easiest time being embraced by their communities once they returned. However, a disproportionate number returned home to find love ones had died (24 percent),431 or their property had been sold, stolen or destroyed (76 percent)—phenomena that seem especially plausible in light of the ongoing conflict in Afghanistan, its relative poverty, and resulting corruption.433

The men who came from various countries in Western Europe—such as Great Britain, France and Germany—tended to be picked up while traveling through Afghanistan on holiday or on humanitarian or other work-related purposes. Once captured, their experiences differed slightly from other detainees because of the languages they spoke. Many understood English (indeed, several were British citizens), a fact that would prove both an advantage and disadvantage: a disadvantage because any “betrayal” of the United States was perceived as even greater than if it had come from a non-Westerner, but an advantage because of the valuable knowledge that came from understanding what prison personnel said to detainees, and to each other. It was also an advantage because of the greater difficulty American guards seem to have had dehumanizing individuals with whom they could communicate, and with whom they shared relatively similar cultural backgrounds. Consequently, members of this population were most likely to report having developed somewhat positive relationships with select guards.

A total of twenty-two Uighurs, of whom Anwar is one, also ended up at Guantánamo. Sixteen of the interviews on which this dissertation relies were with men who identify as Uighur.

431 Eight out of twenty-four.
432 Twenty-six out of thirty-four.
Ironically, while the United States seems to have realized that these men were innocent of wrongdoing even before their transfer to Cuba, their release has taken disproportionately long. Indeed, at the time of this writing three Uighurs remain in Guantánamo, with little likelihood of release in the near future. Yet it is the Uighurs who have particularly engendered sympathy with government and military personnel, activists, lawyers, and the general public, in part because of their historic, longstanding persecution by the Chinese government, and their unfortunate capture by the United States—likely due to simply having been in the “wrong place at the wrong time.” Many report having traveled to or through nearby Afghanistan to find jobs and opportunities to better the lives of their families back home. Strangers who were dependent on local generosity as they traveled—especially once they fled Afghanistan for Pakistan to escape U.S. bombs—they became ready targets for those hoping to cash in on the U.S. bounty program, and relatively easy to sell to the Americans, who knew little about Uighurs, their culture or history.

One reporter summarizes the story of how they came to be at Guantánamo as follows: “After fleeing China because of that government’s abuse of the Uighur Muslim minority, the Uighurs arrived in Afghanistan, but they ran to Pakistan in late 2001 after a U.S. bombing raid destroyed the camp where they were staying.” There, they were quickly picked up by Pakistani officers and locals—who seem to have been handsomely paid—then turned over to the United States. Even though many Uighur interviewees report having been told almost immediately that a mistake had been made and that the U.S. government recognized they were “innocent,” instead of being let go they were sent to Guantánamo as purported “enemy combatants.” Meanwhile, the Bush administration refused to publicly acknowledge that the Uighurs had no known connection to Al Qaeda and posed no threat to the U.S.

When, a few years in, the Uighurs were ordered released by a federal court, the United States found itself in a quandary: international law prohibits the transfer of detainees to countries where they are likely to be tortured or killed. Because of the probability of this occurring should they be returned to China—which considers them dissidents—the United States had to scramble to find third countries that would accept them. Reluctant to admit any mistake, and thus to confirm these men’s innocence, most countries—including the U.S.—found this politically impossible. In addition, many nations hoped to avoid China’s ire should they provide the Uighurs with safe haven. However, rumored payouts and diplomatic favors eventually resulted in the transfer of a handful to Albania in 2006, and others more recently to Bermuda (2009), Palau (2009), Switzerland (2010) and El Salvador (2012). Despite their release, however, their distress continues due to their relocation far from others who share their native language and

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434 Ibid.
culture, and their inability (in many cases) to ever reunite with their families. As declared in one news clip, “The saga of the Uighur detainees has been marked by unlucky turns.”

Despite the differences between these three groups’ experiences, what has proven similar is the extreme difficulty that all former detainees have had recovering their lives. Almost none have managed to secure a job. This has made it difficult, if not impossible, for them to rebuild their lives and provide for themselves and their families. And almost all continue to suffer the “mark of Guantánamo,” a stigma about who they are that continues to impact their social experiences.

I am often asked why so many men agreed to speak to American researchers after facing such distress in American hands. While some interviewees suggest they participated to build a record to support hoped-for future reparations, most spoke of the need to educate the public about their innocence; reveal what occurred at Guantánamo and U.S.-run prisons in Afghanistan for historical purposes; or illuminate injustices committed by the United States government. Many also expressed the hope that their words would positively impact the conditions and situation of the men they left behind, as well as future policy decisions. As one man eloquently stated in response to this question, "If you are holding a tree, even on the day of judgment you need to plant the tree for future generations."

ii. The Coding Scheme

All interviews were coded using the qualitative software program Atlas.ti. My predominant interest in coding was identifying those institutional practices former detainees reported as “the worst.” Consequently, I coded answers to questions relating to 1) what institutional practices respondents identified as the most “difficult” to endure; 2) why each respondent felt a particular incident was his worst experience (especially noting cultural and other identity-based frames that may have contributed to that determination, as well as whether such abuse was physically or psychologically oriented); 3) how respondents collectively and/or individually resisted institutional exercises of power (including whether former detainees’ stories of resistance mapped onto other story-based typologies); and 4) interactions between detainees and with other institutional actors. I also made sure to code for demographic differences between populations, to see if any patterns emerged based on national origin, religion, period of time in detainment, and other markers, as well as for the location in which each episode of

437 Editorial Board, “Two Uighurs.”
438 Most interviewees were provided with no money upon their release other than a small stipend (generally $40 or so) given to them by the Red Cross or other non-government organizations.
439 See Fletcher et al, Guantánamo and its Aftermath.
440 A similar practice was used by Wolff and Shi in a random-sample study of 7,000 male inmates to investigate their experience of prison-related physical and sexual assault. Wolff and Shi’s survey probed subjects for “the victimization incident that ‘bothered’ the inmate the most,” then eliciting additional information about the context and results of that particular incident. Nancy Wolff and Jing Shi, “Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath,” 15 Journal Correct Health Care 58-82 (2009): 5.
perceived abuse occurred (for example, whether it took place in Afghanistan or Pakistan, in Guantánamo, or post-incarceration).

In this research, asking former detainees about their “worst” treatment served as a proxy to help ensure that any treatment discussed would meet some kind of an admittedly-fuzzy severity standard. This provided a starting place to begin identify lay interpretations of torture and cruel, inhuman and degrading treatment. It also helped ensure that I could get at how they defined “worst,” instead of how the law or I might define this term. While certainly not ideal, this seemed somewhat acceptable as a starting place since numerous researchers have established the relative severity of treatment experienced by former Guantánamo detainees: copious governmental and non-governmental reports have documented the harshness and probable illegality of the detainees’ treatment, as have several books authored by scholars, former military personnel, psychologists, former detainees, their translators, and their lawyers. While treatment was not experienced as horrific across the board (a handful of former detainees even described their time in Guantánamo as “not bad”), a brief description of the treatment they experienced illustrates its general severity. For example, most former detainees reported having been subjected to beatings, cavity searches and forced nudity, practices that represent just the tip of the iceberg as to their physical treatment at Guantánamo, and before that in prisons at Kandahar and/or Bagram Air Force bases in Afghanistan. It should also be noted that one of the few former detainees who said most adamantly that his treatment at Kandahar was “not bad,” when...
asked later about the worst thing that happened to him at Kandahar, replied “Nah, I don’t want to say anything about those things. The same thing that happened to other prisoners happened to me.” This suggests that his treatment may have been far more severe than he initially implied, and that he just didn’t want to talk about it—particularly with American interviewers.

I did not rely just on the answer to that specific question, however, when coding. Frequently, an interviewee would detail "another worst thing" later in the interview, and I would include that as well, meaning that the total number of worst experiences exceeds the number of interviewees. A related issue is that several detainees relayed their worst experience not only in Guantánamo, but also in Kandahar and Bagram. I also included those “worst experiences” in my analysis. This is potentially problematic since the nature of the treatment in Guantánamo appears to have differed somewhat from treatment in Afghanistan. Several former detainees have noted that Guantánamo was particularly abusive psychologically, while Afghanistan-based detention centers seemed to rely on more physical abuse. For example, fairly typical was the response of a former detainee (“Atash”445) who responded that his worst experience in Bagram was "biting by the [military] dogs" and not being permitted to sleep for thirteen days, while his worst experience in Guantánamo was an insult to his religion (prompting resistance in the form of a fifteen-day hunger strike and a suicide attempt). However, I felt both contexts were important to analyze in part because of that difference; I deal with that in this paper by identifying when a response relates to treatment in a U.S. military prison in Afghanistan, as opposed to Cuba.

Thus, the prison context itself appears to moderate what is reported as the “worst” prison-based treatment. For example, while one context might be more oriented toward physical abuse, another might be oriented toward psychological abuse, underscoring and further suggesting the contextual nature of interpretations of cruelty. This raises an issue regarding how prison routines and practices matter for what gets labeled as the very “worst” treatment, an issue that warrants further research and explanation.

Ultimately, I decided it was important to address prisoners’ worst experiences from all of the prisons to which they were subjected because none of the men who were interviewed spent time only at Guantánamo—all were imprisoned in at least one other location. This means their detention-related experience was not just limited to their treatment in Guantánamo, but arguably began much earlier. Several scholars—including myself, in a paper co-authored with Stover and Fletcher446—have begun to note the cumulative nature of prisoners’ interpretations of prison treatment, a phenomenon that I touch on briefly in this dissertation. Increasingly, human rights, humanitarian and legal communities are recognizing that institutional practices that might not seem very severe on their own (such as forced standing or allowing for minimal sleep) can add up to an overall experience of extreme duress, especially over time. While this phenomenon has primarily been discussed in the context of multiple forms of punishment within a single institution, I would argue that the experience may also be cumulative across institutions. This is evident from the stories told by former detainees: in several instances, when asked to describe their worst experience at Guantánamo, interviewees would jump to earlier experiences in Kandahar or Bagram, or move back and forth between the two. This suggests that while

445 All names have been replaced with pseudonyms.
446 Koenig et al., “The Cumulative Effect.”
individual episodes of cruelty could be recalled, those episodes informed and built upon (and were connected emotionally and/or rationally) to those that took place in other locales.

There is another limitation to this study that is perhaps more difficult than the challenges of disentangling worst experiences, however. In addition to the obvious limitations of utilizing a non-random, snowball sample of interviews—especially the impossibility of confidently extending the experiences of those interviewed across the entire population of former detainees—there is some overlap among the men who were interviewed through U.C. Berkeley and those who were interviewed through the Witness to Guantánamo project. Unfortunately, precisely where that overlap occurs cannot be ascertained, since the U.C. Berkeley study was blind in the sense that no identifying data was collected or retained, which could have enabled matching. Thus, this dissertation is based on seventy-eight interviews, but almost certainly reflects the experiences of fewer than seventy-eight men. This overlap is most likely with interviewees residing in four Western countries. Based on the location of the interviews and overlaps with demographic and other information shared during the interviews, a relatively reliable estimate is that the seventy-eight interviews were conducted with seventy men.

However, because of a lack of certainty as to the precise overlap, counts have often had to be provided in terms of interviews, not interviewees. To counter this limitation, I have made sure to provide minimums whenever appropriate: for example, in ascertaining how many men were imprisoned post-Guantánamo, I have been careful to say “at least X number” had such an experience instead of the high represented by the total number of interviews in which that phenomenon appears, when there is potential for overlap.447

iii. Themes that Emerged During Coding

When I finished coding the 78 interviews, I found I had created a total of 251 codes representing 4303 quotations, an average of just over 17 quotations per code. When I looked to see which had emerged as most prevalent, I was surprised to see four codes (themes) clustered at the top, each tied to more than 200 quotations.

These four are particularly revealing of former detainees’ struggle to make sense of their time at and after Guantánamo. At a minimum, they reveal what former detainees most hoped to communicate during their interviews, and possibly with the world.

The most prevalent, representing a startling 258 quotations, was one I labeled “identity.” It was used to mark whenever an interviewee engaged in “identity talk,” a phenomenon that has been tied to a practice known as “impression management.” As noted by Snow and Bedford, “identity work”—communications directed at managing individuals’ impressions of the speaker—“is an interactional accomplishment that is socially constructed, interpreted, and

447 I have been able to match most of the interviews with a very high level of confidence based on identifying information, such as reported birthdate, home town, ISN number, dates of capture and release, etc. However, there are a few that are still questionable, since, for example, several people from the same home town were captured and released on the same date. While I can make informed guesses as to the probable match, because I can’t do this consistently, I felt it was safer to analyze responses based on the interviews, not on the individual, although this is clearly not ideal.
communicated via words, deeds, and images.”\textsuperscript{448} Examining such identity talk enables researchers to analyze how definitions of situations, as well as other meanings, are socially constituted.\textsuperscript{449} This emerged when former detainees’ repeatedly stressed their innocence or otherwise communicated positive character traits (such as hard work or patience) that seemed designed to counter their stereotype as the “worst of the worst.”

The prevalence with which this theme emerged strongly suggests that much of what was going on in the 78 interviews was some form of impression management; and because the identities former detainees suggested about themselves were mostly positive ones, they were probably consciously or subconsciously intended to counter the United States’ framing of former detainees as “the worst” of humanity. It also suggests former detainees used the interviews to try to “salvage the self,” that is to distance themselves from the demeaning social contexts, roles and identities with which they have become associated.\textsuperscript{450} Finally, it suggests the extent to which their struggle—both during detainment and afterwards—has implicated their self- and social-identities.

The second most prevalent code, at 255 quotations, was “resistance.” This code was used to indicate any time an interviewee talked about having resisted some aspect of his capture or imprisonment, such as refusing to eat to protest his poor treatment by guards or refusing to speak during interrogations. The frequency with which this theme appeared may be unsurprising given the expansive identity work that seems to have taken place during the interviews. If the struggle both in and after Guantánamo was about identity, then resistance to treatment as the “very worst”—the identity projected upon them—would be similarly prevalent. The frequency of this theme further implies the critical role that resistance to penalty may play in preserving detainees’ physical and mental well-being, both in and out of prison.

The third most prevalent code, at 219 quotations, was titled “court process / legality.” This code was used to mark each place in an interview where an interviewee discussed 1) the legality or illegality of his confinement; 2) engaging in a court or court-like process designed to determine his culpability; or 3) being denied from doing so. This theme may have emerged so frequently for a number of reasons. First, one of the most challenging phenomena for many interviewees was the indefiniteness of their detention, and the perceived lack of any fair process through which to establish their innocence. Indeed, the battle that raged in U.S. federal courts regarding Guantánamo detainees focused not on torture, but precisely this issue: whether detainees could assert habeas claims in Article 3 courts and thus challenge the permissibility of their detention. Second, because interviewees were communicating about their time in a facility that is ideologically linked to law and legal processes—a prison—it makes sense that concerns with law and legality would dominate.

The fourth most prevalent code, one that seems intimately related to the other three, was “innocence.” The 209 quotations attached to this code signify each time an interviewee told a story—or otherwise framed himself—as innocent of any terrorist acts. Like resistance, this

\textsuperscript{449} Hunt and Benford, “Identity Talk,” 491-92.
theme seems particularly tied to identity, and the need to counter the U.S. government’s projection of these men as hardened terrorists.

Additional results from the coding process, and the insights they birthed, are shared in subsequent chapters. A complete list of codes can be found in the appendix.

iv. Inductive Analysis

This is ultimately an inductive study. While analyzing former detainees’ interviews, I began noticing a pattern: my coding resulted in various groupings of institutional practices that were especially despised, each of which seemed to readily correspond with common understandings of physical cruelty, being treated as something less than human (such as an animal or object), or as otherwise having a degraded status. These categories seemed suspiciously analogous to cruel, inhuman and degrading treatment, a prohibition I had heard of but never studied. To my surprise, many detainees professed that physical cruelty—marked predominately by beatings—was not what they considered the worst of their treatment. Instead, what interviewees named as particularly horrific were practices that ignored their humanity—that they were human beings, to whom certain forms of treatment are (in)appropriate. Ultimately, the institutional practices that former detainees frequently decried as the worst tended to fall into two categories: those practices that suggested guards, interpreters and other institutional actors regarded them as “nonhuman” (which seemed related to “inhuman”), and those that denigrated their status (which seemed related to “degrading”).

This somewhat surprising finding inspired me to begin researching the origin of the phrase “cruel, inhuman and degrading,” and the introduction of each term into international jurisprudence to better understand what experiences and/or practices the prohibition was designed to reflect. This finding also motivated my secondary research into the legislative history of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (“Torture Convention”) back to its borrowing of the phrase from the Declaration of Human Rights (“Declaration”), and from there, back to the borrowing of each of these terms from various national Constitutions, reports solicited by the United Nations, and other original sources. In total, in my attempt to reconstruct the drafting process, I reviewed thousands of pages of original source materials that had been documented by the United Nations, including official summaries of drafting meetings and related reports, including some that have never been published. I also reviewed books written by and about John Humphrey—the author of the Declaration’s first draft—as well as his personal diaries, to see if I could find additional clues as to why these particular terms had been employed in the Declaration of Human Rights.

This archival research was supplemented by extensive review of contemporary news and media sources related to detainees and related policies and practices. This included electronic and print news clippings covering the period of September 2001 through March 2013, with an emphasis on stories recorded in the New York Times, New Yorker, New York Review of Books,

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451 At last one commentator has noted that this finding could be due to ex ante versus ex poste reasoning, meaning that physical abuse could have been worse in the moment, but not upon later reflection. I cannot rule out this possibility. Regardless, however, the interviews I studied strongly suggest that inhuman and degrading harms tend to stick with released detainees, and thus these harms may be especially pervasive.
Washington Post, and Los Angeles Times, as well as military publications and Department of Defense web sites that document Guantánamo-related policy and practices.

Congressional reports and government memoranda also provided a valuable source of documentary data. This category includes reports on detainee treatment issued by the FBI, the Department of Justice, and documents provided in conjunction with the Senate Armed Services Committee hearings, which investigated the influence of SERE resistance training techniques on interrogation practices, and transcripts from relevant Congressional hearings.

Human rights reports that recorded detainees’ experiences between 2001 and 2012 were another key source of information. These reports were drafted by a number of non-government organizations—including the International Committee of the Red Cross, Physicians for Human Rights, Amnesty International, the Center for Constitutional Rights, Human Rights Watch, and U.C. Berkeley’s Human Rights Center and International Human Rights Law Clinic.

Books written by former detainees, their attorneys and legal scholars between 2001 and 2012 also provided critical background and depth regarding detainees’ experiences and the legal battle to ensure habeas rights for those who were institutionalized.

Finally, I combed domestic and international cases relevant to cruel, inhuman and degrading treatment, as well as key statutes, treaties and their legislative histories. Jurisprudence included United States Supreme Court cases (and their historic precedents), which determined the habeas rights of Guantánamo detainees, as well as international cases from the European Court of Human Rights, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, among others. Statutory and treaty-based law, and their legislative histories, covered the timeframe from 1945 to 2012.

Such materials ultimately enabled an analysis of the ways in which former detainees’ perceptions of institutional violence map onto international and domestic laws designed to limit and prevent cruel, inhuman and degrading treatment.

v. Analytical Limitations

Despite the potential for significant gains in understanding former detainees’ experiences, this study—like all studies—suffers from several limitations in addition to those noted above. Most obviously, all findings are necessarily limited to the interview sample, which was not random and therefore cannot be considered representative of the entire population of men who have been held at Guantánamo. A sample of convenience, interviews from both the U.C. Berkeley and Witness to Guantánamo projects were restricted to men currently located in countries accessible to Americans, and to individuals who could be located and were willing to speak with American researchers.

The last qualification—a willingness to speak—may indicate a selection bias in favor of those who perceived a personal or social benefit to taking part in an interview. Notably, those men who were willing to be interviewed may differ in significant ways from those who are not, especially in terms of their ability to cope psychologically, economically and physically post-detention. These men may have also received less harsh treatment than the population that was not interviewed, and/or may have been inherently more able to cope with abusive treatment in prison. However, because this study considers how detainees interpreted their treatment, the relative severity of their treatment and ability to cope should have little impact on the ultimate formation of a victim-centered approach to understandings of torture and cruel, inhuman and
degrading treatment. This also suggests the stories that were collected may have, if anything, erred on the side of being relatively benign, and thus treatment experienced by the broader prison population may have been even more extreme, and therefore even more likely to have been experienced as cruel, inhuman or degrading.

The sensitive nature of many of the questions may have also biased responses; some topics, such as questions about sexual violence, may have been particularly unlikely to generate truthful responses. This may have been exacerbated by a gender dynamic between interviewer and interviewee. For example, male interviewees may have been less likely to reveal stories of sexual abuse to female interviewers. Of course, the opposite is also possible.

Relatedly, a fear of stigma or embarrassment may have further inhibited candor. In addition, the possibility of currently or potentially engaging in legal action against the United States in relation to the interviewee’s detention may have created motivations to not answer certain questions or to not answer them truthfully.

Another potential limitation arises from the fact that the interviews were conducted in diverse languages, and thus frequently relied on translation, either in the field or post-interview. Notably, the use of translators can pose significant challenges, since translators may not only misunderstand or fail to translate certain concepts, but may bring their own reactions and filters to their work (see, e.g., Berk-Seligson 1990). Thus, whenever possible I tried to keep notes as to translators’ identities, such as their relationship with interviewees, their cultural and national backgrounds, and other demographic and experiential information that may have impacted the ways in which interviewees’ communications are interpreted.

These limitations are countered to some degree by an attempt to triangulate findings from the interviews with outside documentation, including news, nongovernmental, and government reports. In addition, as noted above, this study is concerned less with the accuracy of experiences reported by former detainees, than meaning-making by those individuals. The ‘literal truth’ of what they experienced is therefore less critical to the overall purpose of this research than the stories each interviewee chose to share with his interviewers, how he chose to frame those stories, and the experiences he positioned as particularly important. However, there are times when former detainees’ stories are taken as factual, for example when the information that is communicated seems like an important starting place for later research.

D. Confessional Tales

Finally, a personal bias may have colored my data interpretation, one I failed to recognize until this project was underway. I offer the following “confessional tales” solely to illuminate this possibility.

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John Van Maanen, Tales of the Field: On Writing Ethnography (University of Chicago Press 1988). As explained by Calvin Morrill, such tales “convey a sense of [the researcher’s] personal experiences and feelings in the field” to alert readers to potential interpretive problems that may have colored one’s findings. As Morrill notes, much interpretive, qualitative research cannot “represent a phenomenon under study exactly ‘right’ without any personal or contextual biases. The most one can hope for is a ‘close approximation of the empirical world. [Thus,] crucial to this effort are systematic methods and a delineation about how the authorial self forms a part of...
Sociologist Erving Goffman recognized decades ago in his classic book, *Asylums*, that all total institutions—of which hospitals and prisons are paradigmatic—have a certain feature in common: they attempt to control, completely, the lives and identities of their inmates, to break them down and remake them.\(^{453}\) When I first started working on this dissertation, I failed to make a connection between my research and my personal history. But as I dove into the interview transcripts, I shuddered as I repeatedly encountered phenomena that echoed a part of my life I thought I had buried long ago. The resemblances were, at times, uncanny, and provided empirical proof (at least in my own mind) that Goffman’s recognition of a commonality between institutions was correct.

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When I was fourteen, I was institutionalized. It happened just after eleven a.m. on a Tuesday. I was in my high school cafeteria, rehearsing for my first high school play, when a shadow darkened the doorway. I looked up with a start to see my father, formal in his dark suit. Quietly and in shock I rose, and mumbled a soft apology to the director as I followed him out.

The walk to the car was eerily silent; my father told me only to “get in” as he slid into the driver’s seat. We drove for several minutes before I finally spoke. “Where are we going?” I asked. “To the hospital,” he answered. From that point forward, all that could be heard was the car’s motor and the abnormally loud crunch of my paper bag I was holding, as I slowly brought tiny bits of tuna fish sandwich to my lips. I was anorexic, and for all I knew, I was about to die.

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What does this have to do with Guantánamo, and the ways in which detainees give meaning to the institutional violence they experience? What could possibly be similar about the experiences of a young anorexic girl confined to a hospital in California during the 1980s and men being held in military captivity in Cuba or Afghanistan during the 21st century?

First, the approaches to our treatment were strangely linked: in both my case and that of former detainees, the predominant methodology underlying captivity was to break down the individual, teach him that he has no control, that it is the institution that is in charge. Once the individual is “broken,” the theory goes, he can be built back up into someone who will comply utterly with the institution’s demands.

Some of the means of breaking were also similar: like many detainees, I was plucked from my everyday life without warning and placed in semi-isolation. Once my father checked me into the hospital and left, I would be permitted no contact with family or friends or even other patients until that “privilege” had been “earned.” I was subject to a strict reward system (known in prison parlance as the earning of “comfort items”). First, everything is stripped away, including all private possessions and all contact with the outside world. I was informed that if I did what I was told, I could recover rights that in my previous “world” I would have taken for granted. The first reward I earned was possession of a few pieces of scrap paper and a stub of

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\(^{453}\) Goffman, *Asylums*. 

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pencil; that paper and that pencil, for the duration of my confinement, would be almost as dear to me as my own life.

The humiliation also took familiar forms. I was not allowed to use a bathroom, but had to defecate and urinate into a container in my room, in full view of the visiting public, and especially the nurses—nurses who were as resentful they had to “babysit” this function as I was demoralized to experience it. Sometimes they let the waste linger in my room for hours, a quiet punishment, the sight and smell a constant reminder of my degradation. Lights flooded my room 24 hours a day; I would shield my eyes at night with my arm, but inevitably if and when I drifted off, I would shift, and the light would stream back in. Exhaustion was constant.

Also, like many of the detainees who have since been released from Guantánamo, I was accused of “crimes” I had not committed; much of my treatment (the lack of privacy, the 24 hour surveillance) was due to the institution’s belief that I was using drugs and vomiting up my food, neither of which was, or had ever been, true, and was later repudiated. This lent a sharp injustice to my treatment, an anger that alternated with shock.

The threat of death was constant, albeit not due to abuse. Indeed, it was a sub Türk to everything I experienced. I still vividly recall the cold, abrupt words of the doctor when I arrived: “Do you realize that you could drop dead at any moment? You must do everything we say if you want to live. Everything.” From that point forward, every beat of my heart was terrifying, precious. I can remember the girl in the corner room next to mine; several times a day, she would roll an IV cart down the hall outside my door, traversing the world of “real people” (the world outside our isolated rooms) with small, shuffling steps, so often that I felt that I knew her, although we never spoke. Then one day, I heard the nurses yell “code blue, code blue!,” saw the medical team race down the hall past my room, toward hers. I stared out the observation window from my usual spot in the center of my hospital bed, the bed so hard that it left a string of blue and yellow bruises that ran like perverse pearls up and down my hips, as they rushed her past me on a cart. I remember her long brown hair dangling off the side of the cart alongside her arm. I will never forget the bright red blood that trickled down that arm and off the tips of her fingers. To this day, I do not know if she lived or died. I do know that she never returned.

My motivation to select this project as my dissertation, was, I now realize, in part a personal one. In addition to wanting to give voice to the girl who lived in that hospital room so many years ago—to shed light on the ways in which institutionally-driven humiliation chips away at one’s soul in ways that are, too often, indescribable—I hoped to illuminate the larger social processes and effects experienced both by prisoners and their families.

The humiliation at the heart of abusive institutional treatment can be difficult to describe. Even more difficult to describe can be the radiating effects of that treatment, across time and space and persons. This dissertation’s chapter on social death aims to get at the ways in which institutional abuse echoes throughout the lives of some former detainees, and can continue to haunt the families for whom that individual may have been, at one point, a member of the “disappeared.” It was an intimate understanding of what it is like to have one’s loved one vanish from the face of the earth, stemming from a second personal event, that further honed my sensitivity to the rippling and radiating effects of institutional power.

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In July 1995, a significant sum of money disappeared from the bank at which my then-fiancé worked. Eight days later, on my birthday, he would agree to an early morning meeting with the FBI to tell them what he knew about the money’s disappearance. He estimated that their meeting would take no longer than an hour. When he failed to respond to my phone calls later that afternoon, failed to come home that evening, failed to pick up my mother at the airport (who was flying in to visit us), it was as if he had evaporated. Late that night, after I had made several frantic calls to try to find him and learned only that he had never returned to work after leaving to meet with the FBI, I received a call of my own: I did not recognize the voice on the other end, a voice that croaked like one returned from the dead, “Alexa, they think I did it.”

Although they released him later that same day—after subjecting him to a classic good guy / bad guy routine and a lie detector test they told him he had failed—for months afterwards, I would wake in the night and run, wrapped in a bathrobe, down into the garage beneath our apartment complex to frantically search our car, certain that my fiancé was being framed. Something in him and me changed forever that afternoon, despite the fact that a powerful lawyer eventually forced the FBI to back off. To think that his interrogation was a mere thirteen hours, less than a full day, was incongruent with our experience—it was a day that would reverberate across our lives for years.

For my younger sister, Sara, it was I who once “disappeared.” When my father dropped me in the hospital for treatment for anorexia, she felt as though I had vanished from the earth. The indefiniteness of my hospitalization was especially difficult for her to understand. As Mollica has written (albeit about much more extreme situations), when a loved one disappears, lingering is “the need of the living to have the disappeared continue to exist in the minds of family members …” Each night, as my twelve-year-old sister set the table, she would insist on making a place for me—a placemat, a plate, a napkin, a fork, a knife and a cup—a setting for a ghost who might never return. In the hospital, I was similarly aware of the death-like space that I had entered. Cut off from the world, I felt my own absence acutely. My family, my friends, that reality continued, while I lingered in a little space locked away from the places that had previously provided the contours of my existence.

I bring up these experiences only so that any biases in my analysis might be detected and allowed for: I have no doubt that they exist. One of the most obvious is that I would impose my personal sense of what I found oppressive about confinement upon my interpretation of former detainees’ narratives. That is mediated here, somewhat, by the quantitative and qualitative methods I employ. Offering counts and descriptions regarding what practices interviewees reported as the worst may ideally be used to counter my personal impressions.

Ultimately, I can hope only that any such biases are offset by a heightened insight into what it can be like to live inside an institution, and how practices that seem insignificant to the world at large can take on an alternative and heightened meaning.

“Suffering is individual.” Yes, but it is also common. In relaying stories from 78 interviews with men who have been released from Guantánamo, I have endeavored to get at that commonality, the ways in which institutions are experienced by those who haunt their halls.

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455 To the best of my knowledge—certainly for years afterward—the case was never resolved and the money never found.
456 Ibid., 78.
Despite its limitations, the unique data set on which this dissertation relies permits a first systematic, qualitative, cross-cultural examination of detainees’ perceptions of cruel, inhuman and degrading treatment given the types of abuse they experienced at the hands of their captors (psychological, physical and symbolic) and the cultural and identity-based frames they employ. This exploratory study potentially contributes to 1) empirical victimology studies, especially investigations into the meaning, experience and lay definitions of torture; 2) sociological studies of total institutions, including how individuals respond to, experience and shape their social environments within such contexts;457 and 3) socio-legal, story-based approaches to legal consciousness and resistance,458 as well as the potential relevance of human experience to law.

457 Goffman, Asylums; Foucault, Discipline and Punish.
458 Ewick and Silbey, Common Place of Law; Ewick and Silvey, “Narrating Social Structure;” Morrill et al, “Telling Tales in School;” Engel and Munger, Rights of Inclusion; Maynard and Musheno, Cops, Teachers, Counselors.
“I think they wanted … to show they were totally in control, that they were the boss, that we were nothing. And also they wanted to humiliate us … The beatings after a while you don't even feel them, you no longer feel the pain because there's so much. They step on your hand if they—you don't feel that. But on the other hand, if they put you naked in front of other people, if they put things up your ass, what they want to do is to destroy your dignity and to tell you you’re just animals. We are human beings, but you’re just animals.”

V. The “Worst”: A Closer Look at Cruel, Inhuman and Degrading Treatment

As established in preceding chapters, international law has long prohibited the cruel, inhuman and degrading treatment of detainees and other prisoners, a prohibition that has been embraced to varying degrees by many domestic legal systems, including that of the United States. However, despite this prohibition, there is tremendous confusion around what cruel, inhuman and degrading treatment is – in large part because this phrase has no set definition in international law. At best, courts have found particular behaviors to be cruel, inhuman and/or degrading. Yet merely identifying various institutional practices as illegally cruel is a relatively weak way to draw the parameters around a forbidden set of behaviors, since the outline of such a prohibition can only become clear once the entire range of possible acts has been considered.

This approach is also problematic because, “[a]s the precedents build up, we replace vague evaluative terms with lists of practices that are prohibited, practices that can then be identified descriptively rather than by evaluative reasoning [such that] in time, the list usurps the standard.” Instead of courts being guided by a standard that can be applied to a wide range of atrocities, “the [specific] list becomes the effective norm.”

Gail Norton, an expert on the laws of torture (the most extreme form of cruel, inhuman and degrading treatment), has similarly noted the problem that comes from a lack of clear definitions. She has observed with regard to torture that “the lack of a single definition [can] cause confusion and disagreement.” This is true, as well, of cruel, inhuman and degrading treatment. As she has reasoned, having clear definitions can aid considerably the ability of the international community to pressure offending governments to refrain from abusive practices and

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461 Waldron, “Cruel, Inhuman and Degrading.”
462 Ibid., 8.
463 Ibid., 8.
464 Gail Miller, Defining Torture 45 (Benjamin N. Cardozo School of Law Florsheimer Center for Constitutional Democracy).
hold perpetrators accountable. While she believes a crude definition of torture, at least, can be shaped from the relevant international law, she also explains that the definition that emerges has too many “ambiguous terms that must be clarified,” permitting misinterpretations that “allow too many horrific acts to escape [its parameters].” This problem of “ambiguous terms” is certainly one that also applies to cruel, inhuman and degrading treatment.

In addition to the lack of any clear definition, a second problem has hampered courts’ ability to adequately recognize and address the full scope of wrongs that could (and arguably should) be recognized as cruel, inhuman or degrading: some courts have chosen to lump the three terms together, even referring to them by way of a single acronym (“CID”). However, this “lumped together” approach has significant weaknesses: according to fundamental common law principles of statutory interpretation, when different terms are used in legal documents that relate "to a similar subject matter," those different words are to be interpreted as having different meanings in lieu of legislative pronouncements to the contrary. This is supported by a similar principle, which establishes that "each word of a statute is to be accorded meaning." By not treating each word as distinct, courts may fail to recognize institutional practices as dignitarian harms the prohibition was designed to address.

What is known is that the distinctions between “torture” and “cruel,” “inhuman” and “degrading” treatment have often been kept purposely vague with the hope that the scope of their application would be “interpreted so as to extend the widest possible protection against abuses, whether physical or mental.” At least with regard to the Convention Against Torture, the prohibition’s authors wanted state signatories to extend the treaty’s protections to cover a wide array of potential abuses, largely because experience had demonstrated “that the conditions that give rise to ill-treatment frequently facilitate torture and therefore the measures required to

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465 Ibid.
466 Ibid., 5.
469 For the counter argument that prohibitions against torture and other forms of cruel, inhuman and degrading treatment might be interpreted more broadly if the various terms are not distinguished, see Anthony Cullen, “Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights,” 34 Cal. W. Int’l L.J. 29, 44-46 (2008). In this article, Cullen notes that the Human Rights Committee has tended to interpret the prohibition, as found in Article 7 of the ICCPR, as a single, relatively broad concept. Ibid., 45. Thus, torture versus inhuman versus degrading treatment are not distinguished from one another; instead, the Committee either finds that Article 7 has been violated, or that is has not. However, while the expediency of such an approach is apparent, failing to acknowledge the variety of conduct that such an approach might mask threatens overlooking a wide variety of conduct that might be experienced as impermissibly onerous by victims, yet remain unrecognized by those in power.
prevent torture must be applied to prevent ill-treatment.”

Although the Convention gave state signatories the right to interpret the Convention’s provisions in light of their domestic laws and statutes, it did not entitle them to look for ways to authorize abuse or evade legal accountability.

While this approach—refusing to define the terms in order to permit the widest possible interpretation—is certainly laudable, it necessarily fails if all that courts recognize is treatment that might be widely conceived of as cruel, and if inhuman and degrading treatment becomes “lumped out” of those institutional practices recognized by courts. Indeed, as has been noted in the context of abuse, but seems equally relevant to torture and other forms of cruel, inhuman or degrading treatment:

An accurate classification … is important not just to give victims a voice, not only to break down stereotypes, and not merely to accurately record the picture.

Language in general and legal language in particular “reinforces certain world views and understandings of events …. Through its definitions and the way it talks about events, law has the power to silence alternative meanings—to suppress other stories.”

As established in chapter two, a third tactic courts have used to interpret the prohibition against cruel, inhuman and degrading treatment is to conceive of each term as one component along a sliding scale of severity, a scale that ranges from torture and/or cruel treatment at one extreme, through inhuman treatment, to institutional practices that are considered “merely” degrading. Interviews with former detainees suggest that such an approach is also less than satisfactory. While perceiving of each term as representing a different degree of violence may get around "fundamental principles of construction" problems, such a perception also allows for indeterminacy regarding the boundaries around prohibited behavior.

Further, on what basis are judgments made as to whether specific acts are cruel, inhuman or degrading? Judges’ gut instincts? Or does this analysis consider the perspective of prisoners themselves? If the legal standard presumes perceptions on the part of the recipient, it is imperative to determine, empirically, how detainees perceive various institutional acts to analyze whether the prohibition is addressing those practices that recipients most decry. Finally, as has been pointed out by others, it is somewhat concerning that the “sliding scale” interpretation has been more of a default position taken by various courts, than a well thought out, reasoned approach.

A fourth possible tactic for identifying practices as cruel, inhuman and/or degrading 1) in an ad hoc manner, 2) as one “thing” (CID), or 3) as components along a spectrum—the path that has not been taken—is one that assumes that each of the words “cruel, inhuman and degrading” actually means something, and that these meanings can (and should) be ascertained. The legal philosopher Jeremy Waldron has adopted this perspective. In a key article on the topic, he concludes that each of the three terms should be understood as representing a particular category

of threats. Through his philosophical analysis of each of the terms, he concludes that cruel treatment should be understood (and is often understood) as that which focuses on pain and distress. By contrast, inhuman treatment tends to be more “dignitarian” in its approach. This category embraces those detainment-related practices that prevent victims from continuing the basic elements of human functioning, for example, obliterating their capacity for self-control, rational thought, self care, speaking ability, and so on. Finally, degrading treatment should be understood as prohibiting such prison-based practices as those which attempt to “tak[e] someone down a notch or two in [a] hierarchy.” He identifies and describes four types of outrages to dignity that might be thought of as “species” of degradation: 1) bestialization, 2) instrumentalization, 3) infantilization, and 4) demonization. These roughly equate to 1) treating humans like animals, 2) treating humans as “mere means” in the Kantian sense, 3) treating detainees like infants (for example, forcing detainees to relieve themselves in their clothing), and 4) treating someone as if “simply a vile embodiment of evil.”

Like Waldron, I believe that each term has "work … to do." Importantly, though, Waldron and I have taken different routes towards reaching that conclusion: while he has analyzed the issue philosophically, my approach has been predominately empirical, taking into consideration the experiences of former detainees as communicated through their stories. In this chapter, I extend his typology of cruel, inhuman and degrading treatment based on my empirical findings. However, this chapter also emphasizes the social psychological processes that undergird cruel, inhuman and degrading treatment as diverse prison-based phenomena. Each of these three categories of treatment relate to denials of social identity and status, social contact, and routine senses of time and morality, presenting a view of cruel, inhuman and degrading treatment that relates to the social psychology of those who suffer such treatment. This enables an expanded understanding of these terms while focusing them on the experiences of victims, rather than the perspective of perpetrators or legal actors. Ultimately and importantly, such a victim-centered approach creates room for the law to be more responsive to the lived needs and experiences of victims.

In this chapter, I report my findings as a first step toward developing an empirically-informed approach to interpreting legal prohibitions against cruel, inhuman and degrading treatment. Looking to the experiences of former detainees concords with the burgeoning practice, both internationally and domestically, to listen more closely to the voices of victims and to integrate such voices into attempts to interpret and address violations of international and domestic criminal law. Such an approach also concords with the history of the prohibition, as

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475 Waldron, Cruel, Inhuman and Degrading,” 36.
476 Ibid., 39.
478 In Law and Society in Transition: Toward Responsive Law (Transaction Publishers 2001), Philippe Nonet and Philip Selznick present a developmental typology of law as repressive, autonomous and, finally, responsive. Unlike the first and second types of law—in which law operates first as a repressive form of command and then as a specialized field somewhat removed from the everyday workings of society—in this third stage, law and politics are united, enabling law to become especially sensitive (“responsive”) to concrete problems in society.
479 See, for example, the unprecedented embrace of victim participation at both the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia.
initially included in the Declaration Against Human Rights: as established in chapter two, the
drafting of that prohibition appears to have been informed by, and intended to address, real-
world experiences. Both wrongs and harms (practices and their interpretations) have changed,
but the law hasn’t kept up. Thus, in order to satisfy the objective of addressing real-world
phenomena, it is critical to integrate insights from victims’ experiences in order to understand
what those real-world phenomena are.

Ultimately, based on the stories told by former detainees, I argue that courts and scholars
have failed to adequately conceptualize the prohibitions against cruel, inhuman and degrading
treatment, mistakenly lumping inhuman and degrading treatment into cruelty. Because of this
blurring of the distinction between cruel, inhuman and degrading treatment, the scope of the
treatment that is understood to be legally prohibited has been unnecessarily narrowed, permitting
many forms of institutional abuse to remain unrecognized by courts. This narrow approach also
overlooks many forms of institutional treatment that should be prohibited, in part for legal
consistency, and in part to safeguard the wellbeing of prisoners. By drawing on 78 interviews
with former Guantánamo detainees—and comparing existing judicial approaches with detainees’
experiences—I demonstrate that “the worst” prison treatment, for many prisoners, is not physical
cruelty as often assumed, but treatment that can be categorized as inhuman and/or degrading.
Thus, these phenomena are necessarily distinct. In concert with this finding, I make the
normative argument that society’s understanding of the prohibition against cruel, inhuman and
degrading treatment must be refined and reconsidered, if some of the worst prison-based
atrocities are to be avoided.

A. Chapter Methodology

For purposes of this chapter, I coded the 78 interviews with former detainees for those
institutional practices interviewees reported as “the worst.” This was used as a proxy to identify
those practices that were most likely to be considered cruel, inhuman and degrading. While less
than ideal, not asking detainees which practices they considered to be torture and/or cruel,
inhuman and degrading may help avoid eliciting stereotypical responses based on general
assumptions.

Focusing on former detainees’ “worst” treatment also helps ensure that any treatment
discussed meets some kind of an admittedly-fuzzy severity standard. This seems acceptable as a
starting place since numerous government and independent analysts have already established
that the treatment experienced by former Guantánamo detainees was often quite severe: copious
governmental and non-governmental reports have documented the harshness and probable
illegality of their treatment, as have several books authored by scholars, former military
personnel, psychologists, former detainees, their translators, and lawyers. At a minimum,

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480 See, e.g., Antonio M. Taguba, Art. 15-6 Investigations of the 800th Military Police Brigade
Observations of Detainee Interrogations in Guantánamo Bay, Afghanistan, and Iraq (2008)
(“FBI Report”); International Committee of the Red Cross, ICRC Report on the Treatment of
Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and
its Impact (Cambridge, MA: 2008); Laurel Fletcher et al, Guantánamo and its Aftermath: U.S.
those sources establish that many former detainees were subjected to cruel, inhuman and degrading treatment, and possibly torture.

Of course, that does not necessarily mean that the specific individuals who were interviewed were subjected to such treatment. However, a brief description of the treatment experienced by the detainees in this sub-set illustrates how “severe” their treatment became. For example, most former detainees reported some combination of the following: being hung from their wrists, repeatedly beaten, stepped on while lying face down in gravel, and subjected to temperature extremes as well as extreme sleep and sensory deprivation. This list represents just the tip of the iceberg as to detainees’ treatment at Guantánamo, and before that at Kandahar and/or Bagram, the U.S. military prisons in Afghanistan where most detainees were held prior to being shipped to Cuba.

However, many of the detainees professed that physical cruelty—marked predominately by beatings—was not what they considered the worst of their treatment. This concurs with other studies of prison abuse. Ultimately, the institutional practices that former detainees most denounced fell into four categories. The first three were physical abuse (which seemed related to lay conceptions of cruel treatment, including stereotypical characteristics of physical torture); treatment that suggested guards, interpreters and other institutional actors regarded detainees as “nonhuman” (which seemed related to “inhuman” treatment); and treatment that denigrated their self-perceived social status (which seemed related to “degrading treatment”). The fourth category suggests an inability on the part of many former detainees to identify any one event or practice as particularly egregious. These responses generally included comments along the lines of “it was all bad,” or suggested that the small indignities from daily life tended to accumulate. This category supports observations by Basoglu and by Koenig, Fletcher and Stover about the ways in which seemingly “less severe” interrogation- and incarceration-related acts can accumulate into an overall experience of torture, cruel, inhuman and/or degrading treatment.


482 Basoglu, “Multivariate Contextual Analysis.”

This chapter describes the empirical support for my emerging perspective on what the terms “cruel,” “inhuman,” and “degrading” should be understood to encompass. My hope is that these findings will encourage a more precise jurisprudence of cruel, inhuman and degrading treatment, one that better reflects the subjective experience of prisoners.

B. Conceptualizing Cruel, Inhuman and Degrading Treatment from a Detainee-Centered Perspective

As explained above, interviewees’ worst experiences in Guantánamo tended to fall into four categories, which roughly correspond to cruel, inhuman and degrading treatment and a catchall. However, before detailing my empirical findings and typologies relating to each of these categories, a brief overview of practices that former detainees detailed as “good” may be helpful for comparison, and thus shed beneficial light on those practices considered “not good.” Several examples are provided below.
i. Good Treatment

“Good” practices fell into three categories. The first encompassed aspects of or experiences within Guantánamo that were described as positive. The second included aspects of camp life and the camp itself that were characterized as positive. The third described positive interactions with camp personnel.

One of the most prevalent examples of “good” behavior was when personnel deliberately abstained from inflicting harsh treatment. This abstention was often characterized as reflecting an acknowledgment of the detainee’s innocence. As one man explained, “People who were ordinary like me, who they knew weren’t guilty of any crimes, who they knew were innocent, they didn’t really treat us that badly, they didn’t take harsh interrogations with us.”

Characterizations of “good” versus “bad” treatment were highly relative. For example, several detainees described their treatment at Guantánamo as “good” only as compared with their earlier treatment at camps in Afghanistan, such as Bagram and Kandahar. One man stated that at Guantánamo, “our cells were a little bit better than Bagram and sometimes we were allowed to talk to each other,” to explain why he characterized living conditions in Guantánamo as “good.” Perceptions also differed between the camps within Guantánamo. For example, one former detainee reports that while Camp Romeo was “not a good place,” “Camp Four was better than any other places because we ... were receiving enough food and we could talk to the prisoners, we were all together, ... we could offer our prayers. ... We were given white clothes and those clothes, psychologically, were better than those orange clothes.” Another man, also from Afghanistan, agreed that Camp Four was relatively “good”: there, he was “kept with other prisoners in the same cell ... I made friends and we got to chat with each other.” One former detainee, from a different cultural and ethnic background than the others, agreed. He explained that camp four “was really nice. Because of the community living.” Thus, the ability to congregate and interact with other detainees appears to have been critical to positive perceptions, strongly suggesting the importance of social interaction in prison life.

As for “good” personnel, isolated examples peppered the interviews. While many former detainees simply explained that a few soldiers were “not bad,” or said that soldiers in Guantánamo were “good” compared to those in Bagram or Kandahar, others were more specific. One former detainee from Afghanistan explains, “There were a very small number of soldiers who were treating the prisoners well. ... During the last four months, my interrogator was a woman. She was a very good woman. She got really good morals. She gave me really good sandal...
this narrative, despite the fact that the storyteller couldn’t trust his interrogator to tell the truth about her identity, little things like providing basic comforts or reassuring him were enough to move her into the “good” category. The importance of such tiny kindnesses seems to have been significantly magnified by the detention context.

Another former detainee described a woman who once gave him a book to read as having been a “good” interrogator. Overall, female personnel were more likely to be described as good than men. As one man reported, the “female prison personnel was nicer than the male, and there was a woman doctor, military doctor, she was very nice to me and she was respecting me. She was coming to me, she was asking me how was I feeling, and she was giving me some medications … .” And yet another explains how he asked one woman for a piece of paper, and she gave it to him. She made such an impression that he still “remembers her name.” Others noted the “Spanish” soldiers (who wore American suits but spoke Spanish) as especially helpful; they were good because “they did not do anything to harm us.” This former detainee was so impressed, he claims “I even sent a letter about good treatment I received from their soldiers.”

However, not only gender and ethnicity correlated with positive treatment; language and the ability to communicate with prison personnel seems to have impacted treatment and/or perceptions of treatment. Former detainees who spoke English were most likely to report having become something close to friends with one or more guards; a few even mentioned having sought out soldiers who had been kind to them, post-release.

Others noted the helpfulness of time: as the months passed, some soldiers reportedly came to realize that detainees were not “animals and brutes” as they’d been told. Several interviewees tied “good” treatment to behavior that acknowledged their humanity: “They were not treating us initially during the interrogation like human beings but, later, it was fine because they were asking me questions and I was giving answers to their questions. When they learned that I was innocent, then their treatment changes a lot.” Others tied “good” treatment to being permitted to learn the holy Quran during their detainment. Such permission, perhaps, functioned as an implicit acknowledgment of the value of their religion, combatting a “worst” experience—labeled demonization, below—that was comprised of insults to (an implicit devaluation of) their religion.

One man reported that four guards had been nice to him. When pushed to explain, he said,

> There was one of them, he was an old man, he was very old … he said that he was in, he worked in Vietnam something, I don’t know what, I don’t know [if] it’s true or not, that’s what he told me, that he worked in Vietnam and uh, it was like this: every time if the ERF team did something, beat something up, he didn’t enjoy it … and if he deliver our foods, he gave us everything what we should get … [the interviewee describes how other guards on that block would withhold portions of their meals]. He would, he give you your rice, and your bread, and your drink, so he was different, he did his job. So I asked him one day why he’s different, and he start to cry. He said he wants treat people like how he wants to get treated. He said he had a friend in France, he got captured in Vietnam, he got tortured badly,

486 ERF stands for Extreme Reaction Force. The force is a small-scale riot squad that operates in U.S. military prisons to ensure compliance from combative or resistant detainees. The force has also been referred to as an Initial Reaction Force or Internal Reaction Force.
I don’t know if he died or not, I didn’t ask him, and he said he knows very well what means torture. And [pause] so that why he said just I want to treat you guys how I like myself get treated.

Thus, at bottom, good treatment tended to include refraining from physical cruelty; providing small physical comforts; seeming to care about detainees’ feelings and experiences; adhering to detainees’ prison-based rights (such as practicing their religion or providing them their allotted meals); and talking to them as human beings. Ultimately, as one former detainee summed it up, “not every apple is bad.”

The next sections summarize the practices that former detainees reported as their worst treatment and how that contrasts with reports of good treatment. Also discussed are the ways in which those various practices map onto the terms cruel, inhuman and degrading. Because several treaties and related jurisprudence lump inhuman and degrading treatment into cruel treatment, I start with an analysis of those practices that might be conceptualized as inhuman and/or degrading in order to tease out their defining characteristics. Once various “worst” practices are categorized as inhuman and/or degrading, most of what remains from that pool of worst practices is physical abuse, which I discuss as cruelty. The final two remaining categories in that pool are responses reflecting 1) the cumulative nature of their treatment as the “worst” (“all bad”) and 2) nothing having been particularly bad (“not bad”).

ii. Inhuman Treatment

A significant percentage of the treatment that former detainees noted as "their worst" corresponds to a denial of their humanity, a phenomenon often referred to as “dehumanization.” Here, such practices seem implicitly related to what might be understood in law as “inhuman” treatment.

Herbert Kelman, in a classic article on dehumanization, focuses on the conditions that lead good men to inflict unjustified violence. He explains that the weakening of moral restraints against violence tends to result from three interrelated phenomena: authorization, routinization489 and dehumanization. With regard to the third phenomenon, he notes, “to the

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488 Kelman explains that “[t]he structure of an authority situation is such that, at least for many of the participants, the moral principles that generally govern human relationships do not apply. Thus when acts of violence are explicitly ordered, implicitly encouraged, tacitly approved, or at least permitted by legitimate authorities, people’s readiness to commit or condone them is considerably enhanced. The fact that such acts are authorized seems to carry automatic justification for them. … Not only do normal moral principles become inoperative, but … a different kind of morality, linked to the duty to obey superior orders, tends to take over.” Ibid., 38-39.
489 Regarding routinization, Kelman explains that once authorization occurs and a first step has been taken, the individual “is in a new psychological and social situation in which the pressures to continue are quite powerful. … [T]he likelihood of [resistance] cropping up is greatly reduced by processes of routinization—by transforming the action into routine, mechanical, highly programmed operations. Routinization fulfills two functions. First, it reduces the necessity of
extent that the victims are dehumanized, principles of morality no longer apply to them and
moral restraints against killing [or in this case, abuse] are more readily overcome.” Regarding the
process of dehumanization, he explains
to understand the process…we must first ask what it means to perceive another
person as fully human … I would propose that to perceive another as human we
must accord him identity and community, concepts that closely resemble the two
fundamental modalities of existence termed ‘agency’ and ‘communion’ …. To
accord a person identity is to perceive him as an individual, independent and
distinguishable from others, capable of making choices and entitled to live his own
life on the basis of his own goals and values. To accord a person community is to
perceive him—along with one’s self—as part of an interconnected network of
individuals who care for each other, who recognize each other’s individuality, and
who respect each other’s rights. These two features together constitute the basis for
individual worth—for the acceptance of the individual as an end in himself, rather
than a means toward some extraneous end. Individual worth, of necessity, has both
a personal and social referent; it implies that the individual has value and that he is
valued by others. Thus, through the process of dehumanization—the treatment of individuals as not human—what
is threatened is the victim’s personal identity and sense of community. Here, former detainees reported four types of practices that led to a sense of
dehumanization, i.e., being treated as “non-human.” The four included treating detainees 1) as
animals, 2) as numbers, 3) as non-sentient entities (objects), and 4) as entities without need of
social interaction. As evidenced below, each of the four types infringes on a sense of being a
human being (his personal identity) and/or a member of a community, providing empirical
support for both Kelman’s (and, less directly, Waldron’s) theory.

making decisions, thus minimizing occasions in which moral questions may arise. Second, it
makes it easier to avoid the implications of the action since the actor focuses on the details of his
job rather than its meaning.” Ibid., 46.

Kelman pointed out that not only the victim’s identity and sense
of community are threatened, but that of the perpetrator, as well. As he explains, “through his
unquestioning obedience to authority and through the routinization of his job, [the perpetrator] is
deprived of personal agency … In dehumanizing his victims, he loses his capacity to care for
them … . He develops a state of psychic numbing and a sense of detachment which sharply
reduce his capacity to feel. Insofar as he excludes a whole group of people from his network of
shared empathy, his own community becomes more constricted and his sense of involvement in
humankind declines.” Ibid., 51-22.
a. Treatment of Detainees as Animals

In the interviews, former detainees decried many of the ways in which they were treated as animals at Guantánamo, including their confinement in "cages" in Camp X-Ray (which housed the first detainees to arrive at Guantánamo), and the ways in which various government and military personnel would come and "study" them. Some facet of animal-like treatment was denounced in approximately fifty of the seventy-eight interviews and noted as part of the interviewee’s "worst" experience in nine. One detainee, "Salar," particularly described the sense he had of being an exotic animal while confined within the facility:

*Salar:* And then [they] took me to Delta camp.
*Interviewer:* And how was it in Delta camp?
*Salar:* I was, in Delta camp, I was in a cell measured one half meters long and one half meters wide. [There] were about 48 prisoners in one camp. And there was a hole between the cages, and when the Americans would come in they would just look at the prisoners as if someone is walking in a zoo and looking at the animals. And if you saw the situation of the prisoners you would just imagine that if these prisoners were released they would eat all human beings.

*Salar’s* discussion of cages, and the connection he draws between the cages and feeling like he was in a zoo, vividly recalls a sense of being perceived as an animal, a phenomenon Waldron refers to as “bestialization.”492 This communiqué seems to reference a particularly

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vicious beast, especially through the description of outsiders’ imagined impression of the prisoners as creatures that, if released, would “eat all human beings.”

One man explained how in Bagram, he and other detainees would be taken to the toilets twice a week en masse. “Tuesday and Thursday in a grouping system, and they made us all naked in the bathroom. There were some women soldiers, they were looking at us and laughing while we were naked in the bathroom. We were just like monkeys inside the bathrooms.” Thus, if they were not being equated with the most ferocious of animals, they were made to feel like the most comical.

Other former detainees addressed bestialization in the context of what they were given to eat or drink, in such condemnatory references as "the food they wouldn't have even given to an animal." And to explain why, for many detainees, the trip to Guantánamo was one of the worst parts of their experience, one former detainee explained that during transport, military personnel "treated us like cattle, especially like oxen. They've tied and shackled our hands and legs. Our eyes, mouths and ears were closed."

A similar image is conjured by another individual, “Tohti,” when describing his transport in Afghanistan:

[...] the most humiliation I faced in Kandahar was after they brought us on the plane, they connected each other to all of us with a very thin sort of like a wire—kind of strings from our upper arms—and they’re pulling it like a bunch of animals; when they pull, it tightens it and cuts off the blood circulation and the, the arm it basically becomes useless and it’s painful. And then they chained each other, everybody, like a bunch of people to us, [we] can’t look back, don’t really know how many in behind and how many in front of us, and they drag us around, and turning around and making us walk in the squares. And it felt like [we were a] bunch of headless animals and just very very humiliated. And then … they put us on the ground with hands are in a cuff and they shackled up and then they beat us badly and then on top of that the most humiliation was they brought us to this container and they strip us naked and very rudely screaming and punching and punching and taking our records into who’s who and then they brought us to containers and each time when they bring us to the questioning they put our hands and behind shackled up and then would put the bag on our face and we were being treated like not human beings.

Several former detainees reported having been led around in chains that linked them to each other. These chains were controlled by military personnel, making the detainees feel they were being walked on a collective leash.

Such bestialization—including an intent to have detainees feel like animals—seems to have been deliberate. In a 2004 interview with Janis Karpinski, the former commander at Abu Ghraib, Karpinski revealed that Geoffrey Miller—the man who commanded Guantánamo during the period of greatest alleged abuse—once told her that she should treat prisoners like “dogs”

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493 Miller commanded at Guantánamo from November 2002 to August 2003, at which point he was sent to Iraq.
in the sense that “if you allow them to believe at any point that they are more than a dog than you’ve lost control of them.”

For some detainees, descriptions of being treated “like animals” and express references to torture were intertwined. For example, one man from Afghanistan, a former police chief, made this connection explicit when describing his arrival at Kandahar prison:

> We were taken to Kandahar by plane. And again in Kandahar they took off our clothes. They shaved our beards and hairs, head. … We were taken to a tent where there were 17 to 18 people and in that tent … they were … divided into groups of three. And while we were sleeping, during the nights they would attack us and treat us like animals. Fifty to sixty American troops were coming to us while we were sleeping alone with their dogs. And they … just shouted at us. So we were standing our hands on our heads and then they were pointing their guns at us. So they were telling us not to move. And then the soldiers were running at us and they were holding us and threw us to the ground, our face towards the floor. Then they were searching us while we were lying down and the dogs were above us and we were really afraid that the dogs would bite us. And we preferred to be [dead] more than being that tortured.

In this communiqué, the men are sheared like sheep and fear being attacked by dogs like beasts of prey.

The importance of *not* treating detainees as animals, and the possibility that doing so falls somewhere within the prohibition of cruel, inhuman and degrading treatment, has a long history. For example, the Commentary to Article 147 of the Fourth Geneva Convention says that inhuman treatment "could not mean, it seems, solely treatment constituting an attack on physical integrity of health; the aim of the Convention is certainly to grant civilians in enemy hands a protection which will preserve their human dignity and prevent them from being brought *down to the level of animals.*" While this phrase was later used by the Yugoslavia Tribunal in the 1998 *Celebici* case to conclude that inhuman treatment can mean more than just physical injury, the court did not thoroughly consider the ways in which prison-based institutions frequently treat detainees as animals instead of human beings. This sense of being treated like "an animal," however, would certainly have been at the forefront of considerations at the time the Fourth Geneva Convention was adopted in 1949, since its drafters would have recently reviewed and been aware of the treatment of prisoners in World War II concentration camps.

Ultimately, the experience of being treated like an animal and simultaneously "not human," as well as the intimacy between bestialization and an experience of torture, frequently functioned as a component of former detainees’ worst treatment, and was repeatedly decried as an experience that was especially difficult to endure. This makes sense when considering the social psychology of the bestialization process. The act of having one’s human status denied by being treated like an animal suggests incredible powerlessness, invalidation, and an erasure of what makes one human. The process points to losing one’s human capacity and to be, in a sense, thrown out of humanity, to be denied recognition of one’s human identity.

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495 Commentary to article 147 of the Fourth Geneva Convention (emphasis added).

b. Treatment of Detainees as Numbers

The second theme that corresponded to being treated as non-human/inhuman included detainees' institutionally-imposed identity as "mere numbers." Each detainee was assigned an internment serial number ("ISN"), which accompanied him throughout his imprisonment. Guantánamo's standard operating procedures (at least those versions made publicly available through Wikileaks) establish that identifying detainees only by number—never by name—was a deliberate policy used throughout the prison system. For example, the March 2003 SOPs explicitly declare that "[m]ilitary and civilian staff members will address detainees by the detainee's cell number or ISN," effectively eliminating the use of names in order to depersonalize detainees and minimize fraternization between guards and prisoners. This suggests the military’s relative sophistication and understanding of social psychological forces in detention contexts: replacing names with numbers and frequently rotating guards would minimize any potential bonding—let alone any empathic development.

Two interviewees specifically mentioned this identification by number as among their worst experiences. As explained by one man from Western Europe:

_The hardest thing for me was to be [at Guantánamo] and not knowing why …._
_And also they tried to do everything to push our human dignity down, to really push it down. … I had a feeling that this was a totally new situation for [the soldiers] and that they were experimenting on us. They were watching us constantly and noting everything we did. It’s like we were the subject of a scientific study. And we were just a number. We had a number on the back and that’s it. We were known as a number. And that’s very hard._

In this passage, being treated like a number and an animal are intertwined. In addition to his express reference to being known solely as a number, the image he conjures is of lab rats, observed and experimented on. This ties quite closely to the dehumanization processes and experiences described in the previous section.

Another interviewee, also from Western Europe, made even more explicit the link between being “nobody” and “just a number.” When asked to describe his interrogation sessions, he explained,

_Well there was a little bit of both psychological and physical violence. For example they would handcuff me to a pipe somewhere in the room and keep me there for a long time, it was very uncomfortable. One of the guards spoke in French and when [he] dealt me the questions and asked me if I knew al Qaeda, if I knew bin Laden, etcetera, and I would answer no, the interrogator would tell the guard to hit me. They also told me that I was nobody, that nobody knew I was there, that I was just a number, and that’s it._

Some of the stories that focus on numbers suggest a particularly deep struggle around identity, and the authority to forge identity. As shared by one Uighur interviewee, when providing an example of a time he was punished:

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⁴⁹⁷ Headquarters, Joint Task Force-Guantánamo, "Camp Delta Standard Operating Procedures (SOP)," Section V-Detainees, 6-21 Detainee Standards of Conduct, 28 March 2003, at 6-21(a).
I give you one simple example, this is like uh toward the late years after they announced that they are non-enemy combatants, and um they allow us—at beginning they did not allow us to learn a language, and then toward the end they allow people to learn language, and so after requesting repeatedly so many times I got the dictionary, then after I looked at the dictionary learned some vocabularies and then I uh, then I got a English book, a very thin English book, but uh, I would look up each word looking at the dictionary, and trying to learn the meaning, I will read two or three pages in whole week because it takes a lot of time and energy and hard work for me to look up every single word from the dictionary, try to understand what it means and then I had a piece of paper with my ISN number 281 on it, it’s my paper, and in their law and in their rules and regulations I am allowed to have a piece of paper and a pen and write down the words and learn, and every day when I read this—I spent three, four months finishing this one thin English book, and if there are some words I can’t find from the dictionary, I still don’t understand, then I will write that down, then when I go out for walk, then I will look for anybody who can explain to me meaning of that word and then when I come back I try to remember what it is…and come back and I come to my cell block I write down Uighur translation of what it means, so for me this piece of paper that I collected that I [wrote down] a few dozen of words, I spent so much energy on that, that’s my project of learning my, learning English, and then one day when I went out for a walk, when I came back that piece of paper was gone, they take it away from me, so I asked why did you take it away from me? And I want that back. And then they brought it back in front of me and said this piece of paper belonged to somebody else, don’t belong to you. And I said well it has my ISN number, why are you saying it belong to someone else? You are watching me from the camera, I spend last three, four months collecting the vocabulary on this writing it down, you know this, this piece of paper that I created that is mine, that has my ISN number. Then the MP right front of my eye he took a pen and changed 281, which is my ISN number, to 283, and I said 283 is Tarin in Albania, this guy is being released to Albania two, three years ago, how could you put 283 on this? This is mine and you just changed to 283 and you didn’t even change to somebody who is here, you changed to somebody who is released to Albania! Then he changed to five something, just some random number, and I was so upset and I was arguing with them, and they, they said no, this doesn’t belong to you, you took somebody else’s paper without our permission, so they punished me, and it’s in my [permanent record] right now.

In addition to illustrating how arbitrary punishments could be, this passage also suggests an arbitrariness on the part of prison personnel with acknowledging identity, an identity that disproportionately depended on the ISN number one was assigned. Not lost on either the interviewee or the guard was the power of numbers to provide meaning in an institutional bureaucracy such as a prison, or how well prisoners know those numbers. The passage also indicates an effort on the part of the interviewee to maximize agency by challenging the guard’s actions. As noted by Kelman, a key aspect of identity—of

498 Not his real name.
recognizing an individual not as a means but as an “end” in the Kantian sense—requires both his recognition as an individual and an implication that he has a value and is valued by others. By changing the interviewee’s number, the prison guard erases the detainee, his labor disappropriated, his existence inconsequential.

Finally, one passage demonstrates how completely some men began to see themselves as mere numbers, when looking through the eyes of their captors. One interviewee explained that if he asked for water, the soldiers would refuse to give it to him. When he complained to the “guard commander,” the other guards said that he had refused to take his water. When the interviewee protested, the commander reportedly said “I can’t believe you, they say 278 refused, that 278 doesn’t want anything.” It is particularly interesting that the interviewee switches into this third person perspective and references himself as a number considering that this story came up in the context of describing his lowest moment in captivity, a period immediately following a suicide attempt, and a time when he repeatedly told soldiers to take him and “throw [him] into the sea.” The potential erasure of identity via the imposition of a number may mirror the erasure of identity through the metaphysical death of one’s former self, as discussed in the chapter on social death, below.

c. Treatment of Detainees as Non-Sentient Objects (Sensory Deprivation)

“Let’s count up our senses,
One, two, three, four, five,
Hearing, sight, smell, taste and touch,
They make us feel alive.”

Arguably related to the treatment of detainees as numbers was the treatment of detainees as non-sentient objects. This included deliberate efforts on the part of prison personnel to divorce detainees from their senses, effectively isolating detainees not only from others, but from themselves. In this way, they exploited and threatened a near-definitional element of being human, let alone alive: the ability to see, touch, hear, taste and smell various phenomena within one's environment. If detainees as animals were “caged,” these non-sentient objects were “stored.”

500 Supreme Court Justice Brennan has noted the correlation between being treated as a “non human” and the objectification of prisoners. In his concurrence to Furman v. Georgia, he declared, “The primary principle [underlying the Cruel and Unusual Punishments Clause of the Eighth Amendment] is that a punishment must not be so severe as to be degrading to the dignity of human beings. … Pain, certainly, may be a factor in the judgment. … More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. … The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.” Furman v. Georgia, 408 U.S. 238, 271- 73 (1972) (Brennan J., concurring).
Several government and nongovernment reports have detailed the pervasiveness of sensory deprivation, which was used as a tool to both 1) control and 2) "soften up" detainees for interrogation purposes.\(^{501}\) Sensory deprivation took many forms. The first consisted of placing goggles, ear muffs and gloves on detainees so that detainees could not see, hear or touch anything—a form of deprivation that could induce visual, auditory and tactile hallucinations in as few as six hours.\(^{502}\)

Nearly three quarters of the interviews (seventy-four percent) reported some reference to sensory deprivation. Sensory deprivation was commonly used during transport, and was one of the leading contributors to why so many detainees named their flight from Afghanistan to Guantánamo as the very worst of their experiences—in many cases, worse even than the beatings many had just endured in Kandahar or Bagram.

When asked what his worst experience was, one man from Afghanistan replied:

_The worst experience that I remember . . . . It was just when they have taken us from Bagram to Guantánamo and I don’t forget it at all. When I was in such a big grief and pain during my flight. And if I compare it to other punishment that I have been received in Bagram and Guantánamo, I think that it is much more than that._

His narrative captures the broad consensus that the flight from Afghanistan to Guantánamo was especially difficult to endure;\(^{503}\) it was referenced in at least seven interviews as a component of the interviewee’s worst experience and in several more as particularly horrific. There were many reasons why the flight was so challenging: the extreme helplessness that accompanies being kept sightless; the lack of food (even when food was provided, detainees were often bound and/or hooded so they were unable to eat); the often-unnerving experience of hurtling thousands of feet over the earth, in many case for the first time in one’s life; the extreme physical pain of being shackled and unable to move during a long flight; and perhaps most critically, the lack of knowledge of one’s destination, the purpose for the flight, and what would happen upon arrival. These factors accumulated to create an environment of extreme physical and psychological distress.\(^{504}\)

d. Exiling Detainees to Social Islands

An alternate form of sensory deprivation consisted of cutting off prisoners' interactions with other human beings. This practice was especially difficult for detainees, as evidenced by its prompting some of the most extreme examples of resistance, as detailed in chapter eight. Such isolation tended to occur in one of two ways: 1) through solitary confinement, and 2) through the creation of what I refer to as "social islands" (discussed below).


\(^{502}\) Some research suggests hallucinations may be induced in as few as fifteen minutes. See, e.g., O.J. Mason and F. Brady, “The psychotomimetic effects of short-term sensory deprivation,” 197 Journal of Nervous and Mental Disease 783-5 (2009).

\(^{503}\) See Fletcher et al, _Guantánamo and its Aftermath_.

\(^{504}\) For an overview of the toll that such treatment can take on detainees as that treatment accumulates, see Koenig et al, “The Cumulative Effect.”
Across time and space, social interaction has been recognized as fundamental to the human experience. As Aristotle pronounced centuries ago in *Politics* and Baruch Spinoza famously confirmed in *Ethics*, "Man is by nature a social animal." More recently, Atul Gawande has thoughtfully and eloquently inquired into the need of individuals for social contact, and the potential for isolation—specifically the solitary confinement of prisoners—to constitute a form of torture. This perspective that has been validated by Juan E. Mendéz, the U.N. Special Rapporteur on torture, who has concluded that holding individuals in solitary confinement for an indefinite period and/or greater than 15 days constitutes a form of torture. As Gawande has noted, "simply to exist as a normal human being requires interaction with other people."

Describing journalist Terry Anderson's experiences during the seven years that Terry was held hostage by Hezbollah in Lebanon, Gawande reports that after a month in isolation, Terry’s mind went "dead." Gawande also mentions John McCain's experience as a prisoner of war in Vietnam, and his claim that despite the beatings he endured, he considered isolation far worse, as it "crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."

Interestingly, while many detainees hated being put in cages like animals when they first arrived at Guantánamo, others sank into an even deeper despair when they were eventually transferred to Guantánamo's newer, modern-style prison facilitates in Camp Delta. There, the detainees were truly isolated, kept in separate cells round the clock, with no windows and no ability to discern day from night. Several have explained that at least in the cages they were able to see each other and that provided some solace, even if they were forbidden from talking. Ultimately, placing individuals in solitary confinement and isolating them from the social contact so central to the human experience proved to be among the very worst experience for many respondents. Certainly, this finding underscores Kelman’s conclusion that a sense of community—the opposite of isolation or social exclusion—is critical for combatting dehumanization.

A second form of isolation has been largely overlooked in earlier empirical studies, but features prominently in the interviews with former detainees as among the most challenging of their experiences. This form of isolation occurred when detainees were separated from others who shared their culture and spoke a language they could understand, even when they were surrounded by other people. The practice of isolating detainees from others with whom they could identify created social "islands" that were amazingly difficult to endure. While this wasn't a phenomenon that all detainees experienced, among those who did, this proved especially challenging.

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505 Aristotle, *Politics* (c. 328 BC).
508 Ibid.
509 Ibid.
510 Ibid.
511 Camps 5 and 6 were “brick to brick” replicas of supermax facilities in Indiana and Michigan. Jeffrey Toobin, “Camp Justice,” New Yorker, April 14, 2008.
For example, one former detainee ("Atash") talked about being sent to Romeo block within Camp Delta. He was from Afghanistan, but in Romeo he found himself surrounded by Arab detainees, with whom he couldn't communicate. Atash reported that he tried to commit suicide three times during his stay at Guantánamo; his social isolation in Romeo motivated his first attempt.

Particularly interesting about the stories Atash tells are the ways in which the boundaries between social isolation and physical isolation blur. This is particularly evident in the following back-and-forth, which describes the lead-up to his transfer to Romeo:

Atash: [through his translator] And the food wasn't enough for me. One day I asked the soldier [his interrogator] to give me an extra apple but he refused. As a result of refusal I slapped him on [the] face. ... Then they [sent] me as result of my clash with the soldier to Romeo block and I joined … Arab detainees there.

Interviewer: Romeo block? How was that in there?

Atash: [as himself] Same block, it just meant I couldn't speak to anybody.

Atash: [through the translator] He couldn't speak to anybody else. It was like isolation.

Interviewer: He couldn't speak…. Oh I see... solitary.

Atash: [through his translator] They were all—most of them were Arabs and I couldn't talk to them. Then I decided to hang myself.

While some of the confusion about whether Atash was referencing social isolation or physical isolation is due to language barriers between the translator and the interviewer, it seems also reflective of the ways in which cultural and linguistic differences among detainee populations were experienced—as a form of isolation that may have been as oppressive as solitary confinement.

Another former detainee, “Huseyin,” who identifies as a Uighur Muslim, tells a similar story. A relatively mild-mannered man who describes Guantánamo as a “mistake,” and generally refuses to entertain animosity against the U.S. because of the tremendous good that the U.S. has otherwise accomplished in the field of human rights, explains that one of his only acts of resistance came when he found himself the sole Uighur on his block. To overcome his crushing loneliness, he devised a plan to be sent to solitary, since he had noticed that after spending time in the punishment block detainees were generally released to a new location. As explained through his translator:

The Uighur people [were] 22. They were scattered among [the] general public, some of them two, three together maybe, some of them eight, nine together in one block, some of them are three, four together, but he personally, Huseyin himself, for four months he was isolated among … all the Arabs or Afghans, he was the only Uighur. He was far away from everybody else, he didn’t speak any other language but Uighur, so he couldn’t speak to anybody. So … he was in cell block with like 24 people … but he couldn’t communicate with anybody, so he was like, by himself there, so he spent all his time just reading Qu’ran, reading books. If the translator comes he just talk to the translator here and there, otherwise he cannot talk to anybody. And then after four months he was taken to the isolation—for punishment—and then when he came out of that, he was brought closer to other Uighurs.
When pressed about why he was taken to the punishment block, an interesting story of agency arises in the form of resistance:

_Do something bad to them, they will put you in the punishment block…. [T]here was a couple Pakistanis came, like, surrounding to his cell block, [and] using very limited—few—words he picked up … he understood from them that they [had been] in a similar situation, they [had also been] in a very bad cell block. They wanted to move, they kept asking, [the military personnel] wouldn’t move them so they throw water at the MPs or spit on them or something so they put them to punishment block, and then when they came out they brought them here. So he decide to do that. Then one day all night the guards were playing video games very loud, and he asked them please turn it off I cannot sleep, and they kept turning back on and like they kept putting the noise very loud …

At this point in the narration, Huseyin chuckles, breaking into a smile. Throughout the remainder of the story, the translator laughs, as Huseyin continues to grin:

_And then when he was in punishment block, this five days in punishment block, it was miserable actually, because it’s all dark, very cold, and everything is iron, they take everything away, he doesn’t have comfort items … so he has to sleep on top of the iron, he only have his clothes, he doesn’t have blanket on, at night it gets cold, he has to walk all day to keep himself warm if he stops, if he tries to sit, lie down he is freezing. He suffered a lot … these five days, but when he come out of this punishment block, sure enough they moved him next to the Uighurs.

By contrast with the tremendous deprivation experienced by prisoners when they couldn’t communicate with others and the extent to which they would go to relieve the extraordinary pressure of social isolation, being able to speak the language of other detainees and/or military personnel resulted in substantial psychological relief. Speaking English and/or Arabic (the language spoken by the majority of detainees) proved an extremely valuable prison resource. In addition to Huseyin’s relaying of how his ability to pick up a limited amount of information from nearby Pakistanis resulted in his being able to devise a plan to be re-located closer to other Uighurs, many interviewees spoke of the benefits that came from understanding the same language as other prisoners, and of the value of mastering the language of their captors. For example, as noted by Salar when discussing his release from Guantánamo back to Bagram, and then to Afghanistan more generally:

_Salar: _After we were landed in Bagram, we were headed over to Afghan security forces. And after that, we were brought to the Commission of Peace in Kabul ... afterwards, the Red Cross called Mr. Abdul Salam-Zaeef who was the ... ambassador of Afghanistan during the Taliban government in Pakistan.... The Red Cross called him and he came and he took us to his house, and he [had also been] detained in Guantánamo.

_Interviewer: _Oh, this is the same Zaeef …

_Salar: _And he was released before, before us. Maybe a year before us. And he came and took us along with him in Kabul. And Mr. Salam-Zaeef has called to my, to my relatives, and my relatives contacted my family from Dubai, and early in the morning my family was in Kabul and came to see and take me along with them to Paktia
Province.

Interviewer: We heard that Mr. Zaeef was like a leader in Guantánamo of Afghans in Guantánamo.

Salar: This is something unusual in Guantánamo. [Unintelligible] any person who speaks a little bit English, he can be an elder or just, I can't say something for that, the block. Like, responsible….

Interviewer: Yeah…

Salar: …for others in block.

Interviewer: That's what he was?

Salar: But the leadership is not usual in Guantánamo.

Interviewer: Mm-hmm. But Zaeef was …

Salar: And nobody's, and nobody's let do that.

Interviewer: So Zaeef was like the block old—senior.

Salar: Yeah, like... since he could speak a little bit English ....

Interviewer: I see, he could represent people….

Salar: He was the senior of his block, and when [a] hunger strike took place, the officers have urged [him] to go and see all Afghans in Guantánamo Bay, to [get them to] quit, and so he did that.

Interviewer: He did that.

Salar: He came to us and asked us to start eating and drinking.

This passage suggests that some degree of social standing was accorded to detainees who spoke English or other “valuable” languages. Thus, learning languages could be a way to elevate one’s self out of a “degraded” position (thereby combatting degradation) and at the same time combatting dehumanization—as Kelman suggests—by enhancing one’s sense of identity as an individual and as “part of an interconnected network of individuals who care for each other, who recognize each other’s individuality, and who respect each other’s rights,” the very features that “constitute the basis for individual worth.”


513 Avery Gordon has written compellingly about the ways in which perceptions of time can become distorted in prison. For more on this, see Avery F. Gordon, “Some Thoughts on Haunting and Futurity,” 10 Borderlands 1 (2011).

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Former Detainee: When I was taken to the isolation cell I saw that there was a bed, comfort items and a Quran so I became very happy. … I was unable to see anyone while I was kept in the isolation cell. We were given food through a very small window in the door. So from that window I could see
another cell opposite my cell and I was just calling from that window to the other cell, “Who are you brother?” So I was unable to know his language and he was unable to know my language. Then I was saying “Afghan, Arab or Pakistani?” So that he knows, then he was saying, “Chechnya” or some were saying, “Arab.”

Interviewer: After a month were you moved to another camp?
Former Detainee: After a month I was taken to another cell. The cell was covered with bars. I could see the river. I was kept in this cell for three months. I was with Arabs. I could not talk to anyone because I didn’t know anyone’s languages. There were 48 cells in one block. . . . I didn’t know anyone’s language. But there was like 18 to 20 blocks away a Pakistani national … being held in that cell. So I could just, I had learned one sentence like, “How are you?” in Urdu, Pakistani, Urdu. So I was just saying in the morning or shouting at him, “How are you?” And he was shouting at me, “How are you?” After three months I was taken to a cell where I was being kept with Pashtuns, Afghans who were speaking Pashto. So the three months I spent with Arabs lasted as if I spent like three years. But the 18 months, I don’t know how the 18 months passed because I was able to talk to them and speak with them.

Thus, being able to communicate with others seems to have greatly relieved the psychological burden of prison by helping time along and embedding detainees in a community through which their individual worth could be recognized.

Conversely, Tohti, a man who identifies as Uighur, stressed a lack of facility with languages as a potential barrier to making friends, both with other prisoners and with guards: “No, I can’t make friends from the [military] personnel, but among prisoners we are just close with Uighur people. And with the others we don’t know the language, I didn’t speak any other language so couldn’t really talk to anybody, couldn’t make friends without having, being able to speak.”

One man from Afghanistan was explicit about the disadvantage that came with only speaking his native language. Now a relatively strong English speaker, he shared the following story to explain why he was sent to a punishment block:

Former Detainee: [T]here was a misunderstanding because we were not knowing [English]. Because when they were asking us “come here,” we were not able to understand their language. We’re not going, we’re not obeying our order and they [decided] we should be punished. It was bad there is somebody doesn’t know someone’s English language.

Interviewer: What about the other punishment blocks you were taken to? Why were you taken to those?
Former Detainee: Again it was the language problem when we were not understanding each one’s language, then they were just—
for punishment, they were sending us to those punishment blocks.

This issue of language extended to the European prisoners as well, as portrayed by a former detainee from France when discussing what helped him survive his two and a half years in prison. He noted the incredible importance of social contact and communication to endurance, and the ways in which language facilitated that process. In describing what helped him survive his time in Guantánamo he explained,

Well first of all there was the mail I was receiving from my family … because through this mail I knew that they knew I was there. And knowing I was there and knowing that I was alive, I knew that the Americans could not just get rid of me, because people knew where I was. So that … was a source of hope for me. And another thing that helped me is that I … tried to learn Arabic, the Arabic language. Because it was the common language of most of the detainees and we could communicate between us in Arabic, and this really, we could help each other as much as possible.

Thus, an ability to communicate with others—either detainees or military personnel—had significant ramifications for social standing and the ability to meet various social and physical needs. It also reminded detainees of their ties to broader communities, those outside Guantánamo. In the absence of that, prisoners found themselves stranded on social islands that were almost as isolating and hope-destroying as the real thing.

Another, related “worst” experience was the indefiniteness of their detention, which also treated detainees as without (and without need of) human relationships and ignored the intense psychological need to plan for one’s future. While this issue is discussed in more detail in chapter seven, which addresses social death, it is worth noting that not knowing when one would be released was—almost overwhelmingly—the worst aspect of many detainees’ experience. At one point, the fact of indefinite detention inspired a mass hunger strike, in which as many as 200 prisoners refused food. While almost all interviewees indicated this indefiniteness as especially challenging, in six interviews, former detainees noted the lack of any release date as the single hardest reality to endure. As shared by one man from Western Europe when asked about his worst experience:

The hardest thing for me was to be there and not knowing why, not knowing how long I was going to be, I never killed anybody, I never caused anybody to lose a drop of blood, and I was there, and I had no idea why or for how long or when I was going to be released. That was the hardest thing. Not knowing.

This reflection is echoed in a similar response from an interviewee who hails from a different part of western Europe:

Former Detainee: I couldn't really pick out an experience at all, “this” was the worst. The whole thing was bad. ... But I think the most worst I would say is probably not knowing. You can get beaten up and get used to it. Like for two and a half years I got beat. So your body becomes actually like used to it. You know, it's like if I'm going to beat somebody up every single

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day and that person knows I'm going to beat him up, his body. It's like a boxer, for example. When he goes to fight in the ring, he knows physically, he's mentally prepared that, you know what he's going to get beaten up. He's probably going to end up with a broken nose. Black eyes. Broken ribs. He knows that and he takes that chance and goes in the ring. He's physically prepared. It's the same when you get tortured. You know this guy's going to torture you every single day. And your body, and your mind becomes used to that kind of abuse. And it just becomes normal to you. It becomes the norm. Do you get it?

Interviewer: Yeah, yeah.

Former Detainee: So I kind of adapted to it. The beatings. The physical beatings. It just became like part of me. You know, "We're going to beat you today, sorry." You know. I think the worst was not knowing. You know like being in Guantánamo and not knowing, you know, why you're there, or when you can go home.

Whereas beatings, therefore, could become “normalized” and thus dealt with as an unpleasant yet anticipated part of the prison experience—even become part of what gave one an identity in prison (becoming “part of” them)—what could never be normalized was the uncertainty of one’s release.

Indeed, the indefiniteness of the duration of one’s absence from one’s former life was repeatedly and deliberately emphasized by the institution. For example, one practice employed by the military was tacking up huge posters that featured pictures of daily life outside Guantánamo—a daily life that these men were missing, desperately, and to which they feared they would never return. One poster, for example, showed a father holding the hand of his small daughter, underscored by the question "where will you be when she gets married?" The not-so-subtle message conveyed by these posters was that detainees must comply with the institution’s requirements if they ever hoped to see their children grow to adulthood, and to impress upon them the fact that the military had complete and total control over their future. In fact, many detainees missed critical family milestones while detained: the birth of children, the death of one or more of their parents, the murder of a sibling, or the mental, physical or economic collapse of their spouse. That many of the detainees had been wrongly accused made such indefinite detention especially Kafka-esque.

iii. Degrading Treatment

Former detainees also decried various institutional practices that seem to correspond to lay understandings of degrading treatment. Elaine Webster has written in some detail about degradation as it relates to human rights abuses, conceptualizing it as a violation of human
dignity, and specifically one that relates to humiliation, autonomy and rank. While she distinguishes between feeling degraded (the subjective) and being degraded (the objective), my focus is on the “feeling” side, with the hope that it might provide an important counterpart to judicial interpretations of degradation as a “social fact.” Indeed, while Webster prioritizes the objective perspective, she acknowledges the importance of both perspectives, noting that case law has, in some contexts, found it sufficient that an individual be humiliated “in his / her own eyes.”

The reported “worst” practices that seemed to correspond to degradation generally fell into one of four categories, suggesting these categories may be (non-exclusively) relevant to analyses into whether degradation has occurred. The four categories include 1) infantilization, 3) demonization, 3) feminization, and 4) sexual abuse. The practices that fell into these categories are described below.

Categories of degrading treatment that were reported as the respondent’s “worst” experience, broken out by facility (reported in absolute numbers)

<table>
<thead>
<tr>
<th>Category</th>
<th>Guantanamo</th>
<th>Kandahar</th>
<th>Bagram</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infantilization</td>
<td>10</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Demonization</td>
<td>15</td>
<td>8</td>
<td>7</td>
</tr>
<tr>
<td>Feminization</td>
<td>4</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Sexual Violence</td>
<td>7</td>
<td>6</td>
<td>8</td>
</tr>
</tbody>
</table>

a. Infantilization

Waldron has noted that infantilization is a “type of degradation,” one that relates to “the special dignity associated with human adulthood.” Infantilization occurred at Guantánamo, Kandahar and Bagram in many ways. For example, the U.S. government often put adult diapers

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516 Webster, “Degradation,” 75 (citing Tyner v. United Kingdom, ¶ 32).
517 Feminization occurs when “[r]egardless of the actual gender of the perpetrator or victim, the characteristic of masculinity is attributed to the perpetrator and femininity to the victim.” Sivakumaran, “Sexual Violence Against Men,” 271.
on men in transport, or denied them access to a bathroom while chained so that they were forced to defecate and urinate on themselves, like infants. Detainees were also sometimes force-fed when refusing to break hunger strikes, a practice that has been repeatedly denounced in international human rights and humanitarian circles as degrading, and thus as both illegal and impermissible. This may be considered infantilization in the sense that young children are generally provided very little control over what, when and whether to eat: practices such as requiring children to sit at a table until they finish their vegetables or requiring them to complete dinner before having dessert is an assertion of authority by their parents. The intravenous feeding of prisoners, as well as the feeding of prisoners through tubes forcefully inserted down their throats or into their noses, represents this dominance taken to its extreme.

Similarly, requiring detainees to strip, particularly in front of both male and female soldiers, challenges norms that require adults to be nude only in the presence of members of the same sex, with the exception of romantic partners; conversely, young children (including boys) are frequently undressed in the presence of typically-female caregivers. However, importantly, such practices are, in many ways, NOT about treating someone like an infant, but about exploiting adult sensibilities. It is because detainees are adults that they are humiliated by these acts; for very young children, such practices as being undressed or required to eat would rarely if ever trigger a sense of shame. Notably, the dignitary interest implicated is very different when one is a child versus an adult – that difference is precisely what is exploited through such practices, when those practices are conducted with the intent to trigger a sense of shame.

In total, almost ten percent of interviewees describe being naked in front of soldiers as among their very worst treatment while at Guantánamo (worse than beatings, worse than isolation). In almost every interview, forced nudity is mentioned as a particularly upsetting practice, even when it is not described as the worst.

As one man shared through his translator:

When I [was] first brought to Guantánamo, right after we got off the plane, and they were in-processing us before they took us to our cell blocks, front of twenty, thirty people, they forced to, uh, did they forcefully get us naked. There’s female guards there, twenty, thirty people standing there watching us, and then they just cut off all clothes with the scissors, and they just made us naked. And I asked him how did you feel about that? And he says um, he said it is the worst feel ever a man can experience, and in our culture, in our religion, the men are very private, your private parts, you don’t get naked in front of anybody, you don’t show private parts to anybody, and the—you are forcefully being naked in front of twenty, thirty people, standing there, watching you, you are naked, and that is the worst feeling ever, you, you feel like you want to die, but you can’t die, and they ... you feel like nothing, you just feel so lost, so small, so terrible.

As suggested above, in addition to the general degradation experienced with infantilization, this is an area in which cultural norms about the appropriateness of cross-gender nudity may particularly mitigate or aggravate the harm that is experienced more generally. Thus, it can challenge perceptions of identity not only in terms of one’s status as an adult, but as an adult who is part of a particular cultural and religious community.

b. Demonization

Many forms of treatment seem to have been experienced as demonization and thus also as degrading, specifically the treatment of detainees as if "simply a vile embodiment of evil." While Waldron has also noted demonization as a form of degradation, what forms does demonization take?

Possible examples of demonization manifested in interviews with former Guantánamo detainees in two ways: 1) through frequent assertions in those interviews that the individual was innocent (as if to combat the stereotype that he is a monster, including repudiation of his treatment as a hardened criminal despite never having been adjudicated as such), and 2) detention-based stories describing abuse of the Qu'ran and denigration of (including interruption of) detainees' religious practices.

As for the first, in every almost every interview conducted with former detainees interviewees mention their innocence, decrying the fact that they were treated as “the worst of the worst” despite never having been found guilty of a crime. Significant identity work can be observed in these narratives. For example, when asked if an interviewee ever saw a lawyer, the following back-and-forth ensued:

Interviewee: No I didn't have a lawyer there.
Interviewer: Did he go in front of the …
Interviewee: [Interrupting] I did not have a lawyer because I was not a criminal, I didn't have any crimes, so a lawyer must be for those who are criminals!

This is the second time in two pages that he stresses his innocence—the fact that he is not a criminal—suggesting the importance to him that he distance himself from his imposed identity as the “worst.”

As for the second form of demonization, a refusal to recognize deeply held religious norms, the military’s abuse of detainees’ religious practices spurred more outrage—and more resistance to institutional rules—than any other insult. Refusing to permit detainees to pray, interrupting prayers, desecrating the Qu’ran, and failing to provide Muslim detainees with a means to know what time of day it was and therefore whether it was time to pray, represented an explicit attempt to assert the dominance of the prison over prisoners, and strongly held cultural norms. At one point, guards’ blatant disrespect for prisoners’ request that they not touch the Qu’ran resulted in one of two mass hunger strikes at the prison, as discussed in more detail in chapter eight. Not only did such insults seem attempts to discount their religion, but came dangerously close to conflating the Muslim faith with terrorism.

In his discussion of demonization, Waldron suggests that humiliation may be the common emotional underpinning of various forms of degradation. However, in the context of Guantánamo the feeling that seemed to be triggered more than any other was anger, which manifested as verbal and physical protest against attempts to “demonize” one’s identity by imposing the labels of “criminal” or “terrorist.”

\[520\] Waldron, “Cruel, Inhuman and Degrading,” 38.

\[521\] The prevalance of anger instead of humiliation may have resulted from detainees’ interpretation of the motives behind such practices. While purely speculative, it is possible that
c. Feminization

Another form of abuse that could reasonably be construed as degrading was the "wrong-gendered" treatment of male prisoners.

In the context of Guantánamo and the military prisons in Afghanistan, this involved humiliating male prisoners using symbols of the female gender. For many of the men, the majority of whom identified as Muslim, the violation of gender norms proved especially difficult to endure. Because women in most—if not all—societies have a legacy of being perceived as "lower status" than men, this largely-symbolic tactic may appropriately be categorized as degrading. Requiring prisoners to wear women's underwear, including forcing prisoners to wear bras on their heads, is upsetting precisely because such practices are used to degrade men into the status of women—or even worse, as a caricature of women—and thus a particularly sexualized understanding of womanhood.

As described in further detail in chapter six, which addresses sexual violence, some former detainees told stories that directly relayed the sense that they were treated or would be treated as women, and thus as inferior. As one man from Turkey explains, he was not permitted to ask questions of his interrogators:

*During my first interrogation, I asked this question and he said “let me tell you a story.” He underlined this is only a story. He said “do you know what the Chinese people do to their wives in the ancient times? The Chinese, in order to keep their wives at home, would cut their feet and hang them up on the ceiling.” The lesson I derived from this story is that we are their wives. “We can cut your feet and hang to the ceiling and no one would ask us any questions.” So we didn’t ask anymore.*

Only a few prisoners reported experiencing wrong-gendered treatment, yet when it occurred, the resulting outrage was significant. As several researchers have concluded, "men are even more likely to conform to social pressures around masculinity than women as to femininity norms," with gender expectations operating in a largely hegemonic fashion. Goffman has noted the ways in which individuals display elements of their identity through their interactions with others, engaging in a "range of activities…to create, present, and sustain [their] personal identities," including their identities as men. In Guantánamo, as well as in Kandahar and Bagram, the detainees' ability to "display and enact their conceptions of gender and sexuality," and thus to engage in such identity work, were profoundly disrupted. While prison life generally constrains male prisoners' ability to display their masculinity (for example, by eliminating any

guards may have had a number of reasons for interfering with or denigrating detainees’ religious practices, including following written or unwritten institutional practices, boredom, rewards from other personnel, and/or control. Also important to think about were what incentives guards may have had to keep everything calm and quiet, versus upsetting detainees.

522 Brian C. Kelly, "Narrating Masculinity: Gender, Identity Work, and Heterosexual Male Sex Stories" (working draft 2007).


524 Kelly, “Narrating Masculinity.”
choice of dress, facial hair, and certain forms of interaction), this occurs in an especially extreme way when institutional actors not only limit prisoners' traditional masculinity displays, but actively impose symbols of femininity. Notably, the government's own reports have revealed several instances of this, suggesting it is perhaps not so rare a practice as has been reported.

d. Sexual Violence

A related category of degrading treatment is sexual abuse, including rape. As Lara Stemple has noted, “Often, the sexual penetration that a victim has experienced is associated with femininity and homosexuality, thereby itself operating as a threat to his conceptualization of his own “manhood.””\(^{525}\) In concordance with the significant media attention given to the sexual abuse of detainees at Abu Ghraib (which inspired investigations into sexual abuse allegations at other U.S. political-military prisons), 54 percent of the interviewees made some reference to sexual violence, with sexual violence defined quite broadly.\(^{526}\) In thirty-six percent of the interviews, some form of sexual violence (including forced nudity) is referenced as or as part of the interviewee’s very worst detainment experience. While these percentages may seem small, the extent to which sexual violence took place is extraordinarily hard to measure due to the very common reluctance of individuals—and especially men—to discuss such topics. This phenomenon is analyzed in greater depth in chapter six. For purposes of this chapter, it is important to note that sexual violence occurred, that it was experienced as degrading,\(^{527}\) and that it comprised a small but significant percentage of stories used to describe detainees’ very worst experience.


\(^{527}\) Catherine MacKinnon and Andrea Dworkin have both described the ways in which pornography and other forms of sexual violence objectify women and thereby dehumanizes them. See, e.g., Catherine A. MacKinnon and Andrea Dworkin, “Model Antipornography Civil-Rights Ordinance,” 1992, at http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppD.htm. It is probably that sexual violence against men also operates to objectify and dehumanize, albeit with different social consequences and meanings. For a more thorough discussion of this, please see Chapter 5 of this dissertation.
iv. Cruel Treatment

The “worst practices” that remained after the categories above were compiled were almost exclusively examples of physical abuse. This lends credence to Waldron’s interpretation of cruel treatment as physical. While a detailed analysis of physical cruelty is certainly worthwhile, a close analysis is beyond the scope of this chapter, which primarily focuses on what existing jurisprudence and societal stereotypes have missed. Physical cruelty tends to be the form of institutional abuse most recognized by courts and torture experts, probably because it most closely corresponds with Western, lay conceptions of torture and other interrogation-related violence. Indeed, when developing the “harsh interrogation plan” that came to be utilized at Guantánamo, military experts explicitly referenced the then-popular television show “24,” which became known for depicting physical abuse as a particularly effective interrogation tactic.

While this chapter is mostly concerned with the ways in which inhuman and degrading treatment are distinct from cruel treatment (and thus from physical abuse), it is important to note that a small handful of interviews included physical practices as among the worst aspect of imprisonment. This percent is higher when discussing Kandahar and Bagram prisons in Afghanistan, and lower for Guantánamo. In fact, only four out of seventy-five quotations detailing former detainees’ worst experiences at Guantánamo (five percent) include physical violence, such as beatings, among the interviewee’s “worst” experience at Guantánamo. And in two of those four cases, those worst experiences refer to watching others being beaten. Only one interviewee reported physical violence against himself as part of his worst experience at Guantánamo; this individual described having been beaten and then having his head thrust in a toilet.

By contrast with Guantánamo, eight out of thirty quotations referencing Kandahar mention physical violence—specifically beatings, including one so severe that the respondent lost his teeth—as part of a worst experience. This variability was not only quantitative but qualitative, and corresponds to the observation of some detainees that harsh treatment in the military prisons in Afghanistan tended to be physically oriented, while at Guantánamo, it was mostly psychological.

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529 For purposes of comparison—and clarity—these counts reflect only physical beatings. Other arguably “physical” phenomena, such as being subjected to temperature extremes or being in pain due to the withholding of medical treatment, were not included. These counts also only include beatings that were referenced in the context of responding to a query regarding an interviewee’s “worst” experience. Other beatings—those not counted among a respondent’s “worst” experience—were not included here.

530 This included preparation for the flight from Kandahar to Guantánamo.

For example, one former detainee from Europe says of his time at Kandahar: "There are many, there are many people got killed under torture. The guy [I described earlier] wasn’t the only one I saw that got killed. There was also another one at Kandahar, um, they covered his head with a blanket, and they kicked, uh, they kicked his head, until he died. … It was another one. … There are so many that got killed under torture… there are so many people that got killed, nobody knows about them, so, but it is also very difficult for Amnesty [International], or for lawyers to go behind those things, it’s, it’s very difficult. But if somebody could bring those things [to] light … [O]f course it’s important for their families if they, if they’re missing a family member, they don’t know if he’s still alive or in prison … . [I]f somebody can say [to] them he got killed and you don’t need to wait, he’s not coming home, that is important for the families."

Another former detainee’s pre-Guantánamo recollection is similarly disturbing. He explained: "There was … [a] guy hanging in front of me [by his wrists]. … On the first day … I could see he was moving and people were going over and talking to him or trying to talk to him. But the other days I never saw him moving again. Nobody went to him to take him down or to talk to him. He was hanging 24 hours with no break. … He was dead now. I could see it on his body, on his face. … I think he was beaten up very badly before. I couldn’t recognize his face. … I was sure I could be the next one, because it is a place with no rules."

When extreme physical violence was mentioned in the context of Guantánamo, it was usually discussed in relation to beatings conducted by Extreme Reaction Force (ERF) teams, as opposed to during interrogations. A former detainee from Afghanistan recalls how a young Arab prisoner, who was about 17 or 18 years old, one day refused to be interrogated. He kept asking “What do you want to do with me? You have imprisoned me so I am in prison.” When the soldiers told him to go with them for interrogation, he declared “I have been arrested, I have been innocent, they have arrested me illegally and why are they just asking me questions? I have been arrested, I was a Muslim. So just let me be in the prison.” A short time later, the interviewee explains, approximately ten soldiers dressed in “armored clothes” flooded the boy’s cell and beat him until he was bruised and bloody. The boy was then tied to a stretcher and taken to a hospital. The interviewee never saw the boy again.

Notably, mentions of physical versus psychological harms were higher among some cultural groups than others. For example, Uighur males mentioned physical violence as among the worst treatment at Guantánamo at a much lower rate (0%) than men from Europe (25%), Afghanistan (15%) or various Arab countries (14%), and “degrading” treatment as the worst at a much higher rate (64% versus 25% for interviewees from Europe, 31% for men from Afghanistan, and 43% for men from Arab countries).

This disparity may be due to one of two things, either together or in isolation: first, it is possible that Uighur detainees were subjected to less physical violence than European, Afghani or Arab detainees. Alternately (or in concert), it is possible that cultural conceptions of cruelty differ and that Uighur detainees were less likely to consider physical abuse as more egregious.

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532 Many of these examples included watching others being beaten and being unable to help—not having physical cruelty performed on one’s self.
than degradation. As noted by one man from an Arab country who cited being naked around other men in the showers as his worst experience at Guantánamo, “Maybe for Europeans and Westerners it’s fine, but for us Arabs and Muslims, we are not used to that … it just did not cross my mind before that I will be in such a situation.” He explained that such practices constitute “complete humiliation … to our religion, traditions, and things that are related to our ideology and values.” This can be contrasted with comments from an interviewee from Western Europe who stated, “the physical abuse was probably the worst. Physical, you know. Because obviously if someone humiliates you, he's not really causing you pain except for, you know, you're just embarrassed, you know. But when someone's like, if I had a choice to be humiliated or beaten up to hell, then I’d rather get humiliated rather than getting beaten to death. That's the option I would choose, you know.” The reasons for such disparities would be helpful to tease out in future studies.

The “Worst” at Guantánamo by Cultural Group and Type of Treatment

*Numbers reflect percentage of respondents, within each cultural group, whose “worst” experiences in Guantánamo fell into each category of treatment.*
The “Worst” at Guantánamo by Type of Treatment and Cultural Group

Numbers reflect percentage of respondents, within each cultural group, whose “worst” experiences in Guantánamo fell into each category of treatment.

C. Discussion

The findings presented above have numerous implications.

First, they suggest that it is important to think about multi-culturalism when assessing proposed standards for inhuman and degrading treatment, especially since inhuman and degrading treatment are largely international concepts designed to be applied in an international context. The need for cultural considerations is strongly suggested by differing perceptions of the “worst” institutional treatment by various cultural groups—whether that worst treatment is physical or psychological—as well as differing understandings of the social norms that various practices infringe.

One of the world’s great experts on the Declaration of Human Rights (the legal authority that originated the phrase cruel, inhuman and degrading)—Johannes Morsink—has pointed out that the United Nations Human Rights Commission tasked with drafting the Declaration of Human Rights was warned by the American Anthropological Association “to be extremely careful so as not to recommend merely Western values to the rest of the world”—something it appears the AAA strongly believed could not be avoided.\(^{533}\) While, in the end, “thirty-seven of the [United Nation’s] member nations stood in the Judeo-Christian tradition, eleven in the

Islamic, six in the Marxist, and four in the Buddhist,” suggesting diverse perspectives informed the Declaration’s drafting, many commentators believe that Western values and traditions predominated in the final draft. Interestingly, however, while eight nations abstained from voting on that final version (including the USSR, UKSSR, BSSR, Yugoslavia, Poland, South Africa, and Saudi Arabia), none voted against it.

Waldron has noted that one possibility for explaining the Declaration’s broad support—despite the suspected western bias—“is that each nation thought itself entitled to read Article 7 in accordance with its own moral traditions.” This concords with the apparent American approach, whereby the United States simply defined the prohibition against cruel, inhuman and degrading treatment as its Eighth Amendment prohibition against cruel and unusual punishment, when faced with the question of whether to ratify the Convention. By doing so, it attempted to align the international law with the domestic.

While it is certainly possible that some cruel, inhuman and degrading practices “transcend” culture—are abhorred by all cultural groups—why they are experienced as wrong may be culturally contingent. In addition, there may be practices that are considered cruel, inhuman or degrading by particular cultural groups (or subsets of those groups) but not by others. Abdullahi Ahmend An-Na’im, an Islamic scholar who has been active in his support of the Declaration and its interpretation in a manner that limits its Western bias, has argued for the importance of considering culture when determining whether treatment is inhuman or degrading.

However, his seminal article focuses on a scenario in which outsiders condemn a culture for the forms of punishment it employs domestically. He raises the example of cutting off the hand of a thief; while many western nations would readily condemn this practice as torture, he complicates this perspective by asking, what if the punishment is only utilized with the full protection of due process, on individuals for whom it is the only acceptable punishment, without which those individuals can never believe themselves redeemed in the eyes of God? While it might be wrong to take the hand of one who does not so believe, is it right for the West to ban a practice that provides the sole potential for the spiritual salvation of the convicted? Of course, this issue becomes even more complicated when these questions are extended beyond a consideration of the practices of one country on its own citizens, to practices inflicted by the inhabitants of one nation on those of others, as occurred at Guantánamo, where predominantly non-Muslim, American soldiers were responsible for the day-to-day treatment of mostly Middle Eastern, exclusively Muslim prisoners. Further complicating that already complex scenario, Guantánamo’s prison population was comprised of individuals who were citizens of dozens of different countries.

Unfortunately, the existence of cultural “gaps” between prisoners and captors may have exacerbated the inhuman and degrading treatment of detainees. As has been noted by several

534 Ibid., 21.
535 Ibid., 21.
537 Ibid.
538 Fletcher et al, Guantánamo and its Aftermath, 34.
scholars, most notably Eric Stover and Elena Nightingale, practices that are experienced as torture by some populations may not be experienced as such by others. Thus, while wrong-gendered treatment and cross-gender nudity may have been experienced as relatively benign by many American males, such practices may have been experienced as torture by those prisoners who adhered to particularly stringent gender norms. Thus, since the captors were predominately non-Muslim Americans and the prisoners were predominately non-American Muslims, cultural differences may have facilitated the captors' psychological ability to engage in inhuman and degrading tactics, while exacerbating the prisoners’ experience of the inhuman or degrading nature of these practices.

One example of the ways in which culture and context may have mediated both guards’ treatment of prisoners and prisoners’ experiences comes from the Uighurs, who reported degrading treatment at a significantly higher rate than cruel or inhuman treatment. While they reported no physical beatings and just over ten percent reported treatment that might be considered inhuman, more than 60 percent of interviews included stories of treatment that might be classified as degrading. Interestingly, the percentages across cruel, inhuman and degrading treatment were much “flatter” for other cultural groups. Why? Perhaps this can be explained in part because of the United States’ relatively early recognition that the Uighurs were not terrorists, which may have eliminated the “justification” on the part of some guards to engage in physical violence. It may also have been harder for guards to treat the Uighurs as nonhumans, again because of the conceptual difficulty of characterizing them as “beasts” or “criminals” instead of people, because of their apparent innocence. However, religion is one thing the Uighurs did have in common with other detainees, so insults to religion—demonization of that religion—may have still been relevant to their cultural group. In addition, a few Uighurs spoke of their incarceration as a “mistake” and lauded the United States’ history of furthering human rights to suggest their incarceration was an anomaly—thus, they may have been less likely than other groups to rebel physically against their incarceration, triggering relatively less physical abuse in response.

Conversely, former detainees from the West reported the highest level of physical cruelty. This suggests a couple of possibilities. The first is that they were subjected to the most physical abuse. Many former detainees who spoke English reported that guards responded in a manner that was particularly harsh when they discovered Westerners among the detainee population, as if the “betrayal” of their fellow Westerners was particularly egregious. However, it could also be that for western detainees, physical abuse was salient in a way that inhuman and degrading treatment was not—that per their cultural backgrounds, the worst things human beings could do to one another were physical, not psychological. While a full analysis of this issue is beyond the scope of this chapter, this is overdue for careful exploration.

Second, the findings above suggest a need to carefully consider the relationships between the organizational structures and contexts of specific prisons, and prisoners’ experiences. For example, what about the prisons themselves might explain the particularly high rates of demonization reported as the worst treatment at Guantánamo (18 interviews), as opposed to

Here, a closer examination into the ethnic and cultural backgrounds of prison guards might be helpful: for example, if there was a relatively high Muslim guard population in Afghanistan, that might explain why demonization of one’s religion was less likely to occur in Bagram and Kandahar, as opposed to Cuba. Particularly stunning differences are also evident with regard to the inhuman treatment of detainees as without need of social relationships: such practices were reported as the worst treatment at Guantánamo in 19 interviews, as opposed to six interviews referencing Bagram, and one interview referencing Kandahar. Could it be that the length of time during which detainees were held at Guantánamo (for years) versus prisons in Afghanistan (months) meant that there was more time for the social placement of detainees within the prisons to become salient? Or was it something about the prison architecture that exacerbated the sense of social isolation at Guantánamo? Or about prison practices, such as a greater propensity to hold detainees in collective cells in Afghanistan as opposed to individual ones in Cuba? These are also questions worthy of further exploration.

Third, as has been recognized by Waldron in his attempts to lay a foundation for a more effective understanding of cruel, inhuman and degrading treatment, another key issue is whether each prohibition (cruel, inhuman, or degrading) should be considered perpetrator- or victim-oriented, or a combination of the two. As noted above, “inhuman” has typically been perceived by courts as a term used to describe a perpetrator’s acts, and not the victim’s experiences. Waldron points to the dictionary definition of the adjective “inhuman” to explain this: there, inhuman is described as “not having the qualities proper or natural to a human being; especially destitute of natural kindness or pity; brutal, unfeeling, cruel.”

Based on the interviews described above, I conclude, as he has, that there is more to the definition of "inhuman": that inhuman can (and should) also relate to the experience of the alleged victim and thus better correspond to victim-centered versus perpetrator-centered (what he calls “agent-centered”) meanings of the term. The importance—and appropriateness—of incorporating prisoners’ perspectives into the law’s comprehension of inhuman treatment is further underscored by the fact that drafters of the 1948 Declaration of Human Rights intended to protect future victims against the types of abuses that had just been experienced by victims of the Nazi regime. At the time of the Declaration’s drafting, those experiences were fresh in the minds of the world community, which had recently—either through media reporting, court

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540 Several scholars have noticed the impact of various institutional factors on prisoners’ experiences. Kitty Calavita and Valerie Jenness, for example, explain that “microinstitutional trajectories of prisons, which correlate with the historical moment in which a prison opened, the physical design of a prison, the mission of the prison, and other institutional factors, shape the types of experiences people have while incarcerated,” although those differences tend to “generate differences in magnitude, not in kind.” “Inside the Pyramid of Disputes: Naming Problems and Filing Grievances in California Prisons,” 60 Social Problems 50-80, 55 (2013) (citing Candace Kruttschnitt and Rosemary Garner’s 2005 comparison of two California women’s prisons).


542 Because much of the struggle between victim-perpetrator was over agency—who had it and who didn’t—it seems best to avoid using the term “agent-centered” to reference a focus on the perpetrator.

543 See, e.g., Morsink, Universal Declaration.
testimony, or by being there—experienced the devastation wrought by Nazis, the their collaborators, the Japanese, and others.

i. Implications for Inhuman Treatment

Engaging with a victim-centered approach—and by no means rejecting the simultaneous utility of a perpetrator-centered perspective—Waldron has explained that he would create the following standard for inhuman treatment:

I think that “inhuman treatment” in the victim-oriented sense refers to treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning. These are elements like self-control, rational thought, care of self, ability to speak and converse, and so on. Any such list will reflect what we value about elementary human functioning, and so of course it will be contestable. … Treatment may be described as inhuman if it fails in sensitivity to the most basic needs and rhythms of a human life: the need to sleep, to defecate or urinate, the need for daylight and exercise, and perhaps even the need for human company.\(^544\)

While Waldron does not create a typology of potentially inhuman practices (as he later does for degrading), his approach to inhuman treatment as those practices that ignore the "basic needs and rhythms of a human life" certainly reflects much of the treatment that both former Nazi-era and Guantánamo-era detainees have described as egregious. Copious human rights and government reports have documented, for example, the pervasiveness of sleep deprivation at Guantánamo, how detainees were deprived of sunlight for extended periods of time, and how many suffered extreme forms of social and physical isolation.

As described above, several former detainees’ stories coalesced around a sense of being treated as “not human.” These stories can be compared to Waldron’s proposed standard for inhuman treatment, as “treatment which cannot be endured in a way that enables the person suffering it to continue the basic elements of human functioning.” This suggests a denial of agency is at the core of inhuman treatment. It also explains why resistance to prison practices—as an exercise of a detainee’s capacity for agency—may be a relatively common response to inhuman treatment, or at least more of a response to inhuman than to cruel or degrading treatment.

The interviews also suggest that isolating prisoners from others constitutes an especially important facet of inhuman treatment, based on prisoners’ stressing isolation as among the most difficult aspects of their imprisonment. This supports Kelman’s theory that dehumanization is realized in part by refusing to perceive an individual as part of a community: “an interconnected network of individuals who care for each other, … recognize each other as individuals, and … respect each other’s rights.”\(^545\)

The interviews suggest that the variety of ways in which prisons cut off human company may be under-recognized: not only solitary confinement is implicated but the creation of “social islands” on populated prison blocks. Importantly, this finding may have implications that extend beyond prisons to other total institutions—for example, hospitals—where the absence of a

\(^{544}\) Waldron, “Cruel, Inhuman and Degrading,” 35.

common language and other mechanisms relied upon to facilitate human interaction may exacerbate a sense of being alone, even when one is surrounded by people.

In conclusion, bestialization, demonization, treating detainees as numbers, treating detainees as (non-sentient) objects, and isolation (in all its manifestations) likely comprise a non-exclusive typology that may prove useful for courts tasked with identifying inhuman treatment.

ii. Implications for Degrading Treatment

Waldron has explained that "degrading" can similarly have a perpetrator-driven meaning and a victim-driven meaning, although he concludes that “degrading is mostly a victim-impact term.”

In his article, Waldron uses a dictionary to create an initial working understanding of degradation: specifically, he explains that to degrade is “to reduce from a higher to a lower rank, to depose from … a position of honour or estimation,”

to “tak[e] someone down a notch or two in [a] hierarchy.” He also notes that “the human species has a rank that is much higher than any other natural species—higher than the animals, a little lower than the angels—by virtue of our reason and our moral powers.

Based on this understanding, and as mentioned earlier, he has proposed a four-part typology of “outrages to dignity,” which includes 1) bestialization, 2) instrumentalization, 3) infantilization, and 4) demonization. These roughly equate to 1) treating humans like animals, 2) treating humans as “mere means” in the Kantian sense (which he particularly links to sexual abuse), 3) treating detainees like infants (for example, by forcing detainees to relieve themselves in their clothing) and 4) treating someone as if “simply a vile embodiment of evil.”

As evidenced above, my empirical findings support Waldron's philosophical conception of degrading treatment as implicating processes of infantilization and demonization. While I predominately conceive of bestialization as "inhuman treatment," not necessarily as degrading, there is no reason that treating people like animals might not violate the prohibition against both inhuman and degrading treatment. Indeed, many courts have recognized the ability for a single "act" to violate more than one legal prohibition. Thus, it might well be appropriate to consider the extent to which detainees were subjected to bestialization when analyzing whether institutional treatment was inhuman and when analyzing whether it was degrading.

To Waldron's examples, I would add that wrong-gendered treatment, or “feminization,” is another possible means by which the status of male prisoners may be degraded, especially since this treatment provoked some of the strongest reactions both from prisoners and from society at large. For example, in the context of Abu Ghraib, particularly notable were pictures, reports and artistic renderings of the abuses perpetrated against detainees that included forcing male detainees to wear female underwear. Indeed, this became a means to try to break the will

546 Ibid.
547 Ibid.
548 Ibid., 36.
549 Ibid., 37.
550 Ibid., 39.
551 The extent to which exploiting symbols of femininity might similarly degrade women is beyond the scope of this chapter, which addresses the all-male population at Guantánamo, but is an important issue for further exploration.
of prisoners (a “futility” tactic)\textsuperscript{552} when those prisoners were identified as Muslim and thus perceived—correctly or not—as adhering to particularly strong gender norms.

I do question whether characterizing sexual abuse as "instrumentalization" is the best approach, despite the fact that it is clearly degrading. Conceiving of sexual abuse as instrumental—that is, as providing sexual relief for the abuser—overlooks the many ways in which sexual violence operates as a demonstration of power, as opposed to a means through which one fulfills his or her sexual needs. However, that does not deny the fact that sometimes sexual abuse is instrumental: the maintenance of World War II concentration camps populated with “comfort women” expected to service Japanese soldiers’ sexual desires, for example, certainly attest to that fact.\textsuperscript{553} Here, though, most of the detainees who spoke of wrong-gendered or other sexual acts did not speak about sexual violence in terms of instrumentalization, but as practices specifically designed to humiliate.

iii. Implications for Cruelty

Waldron’s conception of cruelty as “focus[ing] on pain and distress,” and of the three terms to be “the least dignitarian in its connotations,”\textsuperscript{554} seems supported by the narratives above: most of the "worst" treatment described by detainees that did not readily fall into the inhuman and/or degrading categories focused on physical violence. This conception of cruel treatment as physical (although of course all physical abuse must be understood as having a psychological component and vice versa) seems to be supported by an apparent nexus between cruel treatment and common perceptions of torture, as evidenced in both domestic and international law. For example, Common Article 3(1) of the Geneva Conventions specifically proscribes "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,"\textsuperscript{555} suggesting a close relationship between physical violence and cruelty. Indeed, the linking of cruel treatment to physical abuse may help to explain why, as inhuman and degrading treatment seem to have been increasingly subsumed by a focus on the term “cruel,” the world has increasingly focused on physical abuse to the exclusion of those harms that are predominately psychological.\textsuperscript{556}

D. Conclusion


\textsuperscript{554} Waldron, “Cruel, Inhuman and Degrading,” 29.

\textsuperscript{555} Convention (III) relative to the Treatment of Prisoners of War, art. 3, para. (1)(a).

\textsuperscript{556} This tendency has been observed in the attitudes of some Supreme Court justices. For example, John A. Powell has noted the Supreme Court’s tendency to think “that if something is socially constructed, as opposed to biologically given, it’s not real.” Cathy Cockrell, “To Berkeley civil-rights scholar, race is upper-case concern,” NewsCenter, Dec. 11, 2012.
Former detainees’ stories reveal much about what it is like to live in a political-military prison. Their reflections also suggest quite a bit that may be relevant to domestic prisons: treating prisoners like animals or numbers, after all, is certainly not confined to the military context. And while the United States Constitution does not expressly prohibit cruel, inhuman and degrading treatment, the United States does prohibit cruel and unusual punishment—which the United States has repeatedly assured the Committee Against Torture protects against the same prison-based abuses. The United States also specifically prohibits torture, cruel and inhuman treatment through the Torture Victims Protection Act, Torture Convention Implementation Act, and Military Commissions Act. Thus, better understanding international law has implications for understanding those practices our domestic laws disclaim.

Certainly, better recognizing phenomena such as social islands that are exacerbated by lingual and cultural barriers may be important in the domestic context. Prison populations have grown increasingly diverse, suggesting such issues may have greater salience and relevance today than when the field of criminology was in its infancy.

In addition, while the reflections of former detainees shed a bright light on what it means to be imprisoned and the ways in which prison life is experienced, their observations may reveal insights into the experience of total institutions more generally. Analyzing forms of institutional treatment that prisoners perceive to be "the worst," and considering how that treatment differs from the assumptions of prison, military and government officials, helps explain why institutions are so frequently experienced as abusive, even when the treatment they inflict, at first blush, may seem relatively benign. In 2006, the debate over whether the waterboarding of detainees was torture or not, and in either case, whether it was justified, erupted across the world. However, my research suggests that that debate, while undeniably important, overlooked many of the forms of treatment that detainees experienced as particularly egregious—forms of treatment to which detainees were far more likely to be subjected yet barely seemed to warrant a second look.

The link between former detainees’ stories regarding their very “worst” experiences—and the ways in which those experiences repeatedly and regularly reflect threats to their social- and self-identities as men, as Muslims, and (even more broadly) as agentic human beings—are also critical to consider when devising penal policy, as well as policies for other total institutions.

Finally, recognizing what detainees and other inmates experience as cruel, inhuman and/or degrading is important not only for the well-being of inmates, but for guards, because of the threat of resistance and/or retaliation that may erupt as potential exercises of agency—a topic addressed in chapter eight. For example, the Barlinnie Social Unit Prison in Scotland, which has experimented with treating inmates as “full blooded human beings,” has found that contrary to many expectations, providing prisoners with enhanced autonomy and individual responsibility (as opposed to confining them to isolation as in supermaximum housing units) has significantly lessened aggressive behavior. Evidence provided by later chapters of this dissertation and

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557 See, e.g., Keramet Reiter, “Ceci N’est Pas Un Pipe, or This is Not Solitary Confinement” (dissertation chapter, forthcoming).
other empirical studies similarly demonstrate the extent to which prisoners will create a disturbance or resort to violent behavior to ensure their removal from a threatening situation; mitigating such threats holds tremendous promise for increasing prisoner compliance, in addition to prisoners’ physical and psychological well-being. Ironically, reserving some degree of agency for prisoners may ultimately provide prisons with a greater degree of control over where and how agency occurs, than when agency is denied altogether.

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VI. A Closer Look at Degrading Treatment: Sexualized Violence at Guantánamo

“Of all the secrets of war, there is one that is so well kept that it exists mostly as a rumour. It is usually denied by the perpetrator and his victim. … Yet every now and then someone gathers the courage to tell of it.”

Where there is social unrest, there is sexual violence: sexual violence almost always accompanies conflict, those periods when people feel most powerless, and seek to find some means through which to regain control. Despite its prevalence, sexual violence has been called one of history’s “greatest silences” and the “least condemned war crime,” and is the form of violence least likely to be reported. In fact, society’s understanding of sexual violence as criminal—let alone torturous—is very recent.

564 See, e.g., the following cases, which establish that rape can constitute a form of torture: Prosecutor v. Akayesu, No. ICTR-96-4-T, at ¶ 597 (1998) (“Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when 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”); Prosecutor v. Delalic, No. IT-96-21-T, at ¶¶ 495-96 (1998) [“Celebici”] (“whenever rape and other forms of sexual violence meet the aforementioned criteria [for torture], then they shall constitute torture”); Prosecutor v. Furundzija, No. IT-95-17/1-T, at ¶¶ 163, 171 (1998) (“International case law, and the reports of the United Nations Special Rapporteur, evince a momentum towards addressing, through legal process, the use of rape in the course of detention and interrogation as a means of torture. … In human rights law, in such situations the rape may amount to torture. … In certain circumstances … rape can amount to torture”); Prosecutor v. Kunerac, No. IT-96-23-T & IT-96-23/1-T, at para. 655-56 (2001) [“Foca”] (“By raping [the victim] himself and bringing her [and others] to be raped by other men, the accused … thus committed the crimes of torture and rape”); Prosecutor v. Kvocka, No. IT-98-30/1-A, at ¶ 145
One of the most common sites for conflict-related sexual violence is detainment. Not only does the fact of detainment facilitate access by “trapping” potential victims, but the micro-dynamics of power within such settings—especially a hyper focus on control and the fact that jailor and inmate are often sworn enemies—exacerbate its likelihood.\textsuperscript{565} There is increasing recognition not only of the range of abuses common to detention, including sexual violence, but the extent to which the relative powerlessness of captives amplifies the experience and long-standing impact of any abuse.\textsuperscript{566}

Recognition of the extent to which conflict and detention-related sexual violence is committed against men is especially nascent. Indeed, the accounts that began emerging from the U.S. Military’s detention center at Abu Ghraib in 2004 were startling not only for the diverse forms of violence that were employed, but for the identities of the perpetrators and of the victims. That a significant number of the perpetrators were American women, while many of the victims were Muslim men, challenged long-standing stereotypes of Americans as the vanguards of human rights, of men as the sole perpetrators of sexual violence, and of women as the quintessential victims.\textsuperscript{567}

In this chapter, I discuss the phenomenon of sexual violence as it reportedly occurred at three U.S. military detention facilities: Guantánamo in Cuba, and Kandahar and Bagram in Afghanistan, and thus as it occurred in a particular context. Because systemic underreporting has hampered broad empirical investigations into sexual violence against men; because it can be quite difficult to access former detainees; and because of the extreme reaction of those former

\textsuperscript{565} While Foucault has noted that demonstrations of power in prisons became less corporal and more focused on disciplinary tactics quite some time ago, that might not be as true in political-military prisons as it is in domestic contexts.

\textsuperscript{566} See, e.g., Metin Basoglu and Ebru Salcioglu, \textit{A Mental Healthcare Model for Mass Trauma Survivors: Control-Focused Behavioral Treatment of Earthquake, War and Torture Trauma} (Cambridge University Press 2011). Basoglu and Salcioglu’s studies reveal that “it is fear and helplessness … that account for chronic psychological damage in survivors.” Ibid., 61. Their studies also show that context is critical to the long-term impact of torture, cruel, inhuman and degrading treatment: per their research, both war contexts and detention settings positively correlate with the intensity of distress experienced by victims, because of a negative correlation with those victims’ sense of control.

\textsuperscript{567} Celia Rumann has posited that sexual abuse committed by female interrogators at Abu Ghraib and Guantánamo may not only have been illegal as used against detainees, but may have constituted abusive and/or illegal treatment of female soldiers that violates the Mann Act and/or various anti-trafficking laws. Celia Rumann, "Use of Female Interrogators: The Analysis of Sexualized Interrogations the Detainee Interrogation Working Group Did Not Conduct," 21 Hastings Women's L.J. 273 (2010).
detainees who did report such violence, the interviews provide much-needed insights about the ways in which sexual violence is both practiced and experienced in detention.

Beyond this chapter’s descriptive value, my theoretical intent is to investigate sexual violence as a manifestation of degrading treatment. I discuss the ways in which sexual violence operates in detention as a mechanism to degrade detainees by challenging and manipulating their self and social identities. I also posit that sexualized treatment that may seem relatively benign from an objective perspective could be and frequently was experienced as degrading, in part because of the cultural norms that were exploited and in part because of a threat to detainees’ identities as heterosexual men and as Muslim.

From a normative perspective, I argue for adoption of a relatively broad definition of sexual violence to enable subjective experiences to more effectively inform legal analyses. Throughout this chapter, I analyze the diversity of “sexualized violence” that occurred at Guantánamo; identify the ways in which cultural demographics potentially impacted perceptions of such violence; and discuss the ways in which cultural “gaps” between perpetrators and victims may have facilitated its occurrence, to illuminate what law might otherwise miss. Such a bottom-up approach to defining sexual violence holds the most promise for capturing the experiences of diverse detainees within inter- and multi-cultural setting, and refining our understanding of sexual violence—and degradation more generally—for law and policy-related purposes.

A. Relevant Literatures

The literatures relevant to these efforts are three-fold. Legally important are jurisprudential inquiries into sexual violence as degrading treatment. Descriptively important (for comparative purposes) are scientific studies of detention-related sexual violence and the prevalence and diversity of sexual violence as men as it occurs during periods of conflict (topics that overlap). Theoretically important is scholarship that explores the inter-relationships of sexual violence, identity, and masculinities. A summary of these bodies of scholarship is provided below.

i. Jurisprudential Inquiries into Sexual Violence as Degrading Treatment

As a starting place, the ways in which law has labored to prevent and remedy acts of sexual violence are crucial to consider. Since the late 19th century, the U.S. has been a leader in the effort to curtail conflict-related sexual violence through law. Some of the earliest documented attempts reach back to the U.S. Civil War and the establishment of the Lieber Code. Guided by the principles of “justice, honor, and humanity,” the Lieber Code sought to regulate the conduct of the Union Army during the war, although early efforts focused exclusively on the victimization of women.

568 In this chapter, I use the term “sexualized violence” to refer to violence and related forms of abuse that have an explicit or implicit sexual connotation. I use this term instead of the more traditional “sexual violence” when speaking about former detainees’ experiences to get around rigid definitions and thereby better acknowledge a range of sexually-oriented practices that interviewees denounced.
The Code is widely recognized as an important precursor to international humanitarian law, proscribing that only *lawful* aggression can be used to attain military victory.\(^{569}\) Among the prohibited behavior were acts of wanton and unnecessary violence, which were illegal and forbidden at every rank in the Union Army.\(^{570}\) Both rape and sexual violence were understood to be “wanton violence” and thus impermissible.\(^{571}\) The Code’s Article 37, which governs the administration of occupied territory, expressly protected against rape, while Article 44 provided for the immediate execution of any perpetrator caught in the act of rape who refused to cease such conduct.\(^{572}\)

In 1907, the Lieber Code was adopted as international law at the International Peace Conference in Copenhagen, and became the basis for Hague Convention IV for respecting the laws and customs of war on land.\(^{573}\) The jurisprudence prohibiting rape and other forms of sexual violence that developed in the aftermath of World War I, World War II, the Vietnam War, and the conflicts in Yugoslavia and Rwanda, vividly documents the prevalence of sexual violence against prisoners—across time and space—during times of war and political unrest.\(^{574}\)

The jurisprudence that has emerged from these critical periods is important for cementing the relationship between the prohibition of degrading treatment and the need to preserve human dignity. Paulus Kaufmann et al, in “Humiliation, Degradation, Dehumanization,” provide a particularly detailed overview of dignity as a conceptual underpinning of the legal concept of degrading treatment, as it has been expressed through the progression of international human rights and humanitarian case law.\(^{575}\) Elaine Webster, in one chapter, makes the link between degradation and dignity especially clear, noting that “degradation expresses a particular form of violation of human dignity.”\(^{576}\)

Jonathan Simon has tied this notion of degradation—as a violation of one’s dignity—to detention-related experiences.\(^{577}\) As he has explained regarding the warehousing of prisoners in California, “[o]nce in place, total incapacitation [through imprisonment] produces a zero-sum logic between the dignity of prisoners and public safety which directly promotes degrading punishment.”\(^{578}\) Simon posits that the Supreme Court’s *Plata v. Brown* decision, which


\(^{570}\) Lieber Code, art. 44.

\(^{571}\) Ibid.

\(^{572}\) Ibid.


\(^{574}\) See, e.g., de Brouwer, *Supranational Criminal Prosecution of Sexual Violence*.


\(^{576}\) Webster, “Degradation,” 68.

\(^{577}\) Simon, *Dignity and the American Prisoner*.

\(^{578}\) Simon has noted the “key elements of degrading punishment” as “lengthy sentences that have little relationship to individual desert or danger,” the very situation experienced by the largely “innocent” prison population at Guantánamo.
considers the phenomenon of prison overcrowding and declared such overcrowding a Constitutional violation, has “reaffirm[ed] the centrality of dignity as a value underlying interpretation of the Eighth Amendment”—the domestic counterpart to the prohibition against cruel, inhuman and degrading treatment.

As noted earlier in this dissertation, Jeremy Waldron has also carefully considered the nature of degradation. In his seminal article on the topic, Waldron argues that “degrading,” at least from a human rights / plain languages approach, seems to be “mostly a victim-impact term,” and thus one that is determined more by the impact on the victim than any focus on the perpetrator. While he warns of the importance of not emphasizing the subjective element of degradation to the exclusion of other considerations, as established in chapter two, the subjectivity that has been embraced by international courts has actually been quite narrow.

Importantly, Waldron points out that courts have determined that victims do not have to be aware of having been degraded, for treatment to qualify as having been degrading. I certainly agree with this—however, my intent is to make sure that degradation is not solely investigated from an objective perspective and/or a subjective one that unnecessarily discounts prisoners’ experiences. Elaine Webster has also discussed the relationship between degradation and experience, asking whether an act must be experienced as degrading, in order to be so. She resolves this question by noting the dual character of degradation as humiliation, explaining “a particularly significant point emerges from a range of humiliation literature—that humiliation is recognized as an emotion or feeling, but also as a state or social fact.” As she goes on to explain about the importance of recognizing this dual aspect of humiliation: “It is a valuable distinction that suitably allows us to acknowledge the subjective experience of degradation but at the same time accommodates a dimension of degradation that is not victim-subjective.”

Importantly for purposes of this chapter, Waldron identifies sexual abuse as one example of instrumentalization, the latter of which he identifies as one of four types of degrading treatment, making the link between sexual violence and degradation explicit. He then further ties degradation to the “Kantian meaning of indignity—being used as mere means, being used in a way that is not sufficiently respectful of humanity as an end in itself.” Thus, Waldron implicitly suggests that sexual violence may be an ideal phenomenon to study in order to better understand the nature of degrading treatment.

Despite the legal advancements that have been made to combat sexual violence, various government and military reports reveal the extent to which sexual violence against men continues to flourish in conflict and detainment settings. For example, a 2005 report prepared by Lt. Gen. Randall Schmidt and Brig. Gen. John Furlow for the Department of Defense—who reviewed approximately 24,000 interrogations that took place at Guantánamo between September 2001 and July 2004—documented several sexually explicit acts perpetrated by

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579 Waldron, “Cruel, Inhuman, and Degrading Treatment,” 38.
580 Ibid.
581 Ibid., 40 (citing Regina (Burke) v. General Medical Council (2005)).
583 Ibid.
584 Waldron, “Cruel, Inhuman and Degrading,” 38.
American military personnel. The report establishes that on two dates in December 2002, a female interrogator straddled a male detainee while he was being held down by military police officers. While he was being straddled, the detainee repeatedly tried to bend his legs to stop the interrogator from sitting on him, all the while praying loudly. In another incident, a female interrogator massaged a detainee’s back while whispering in his ear, causing the detainee to pray, struggle to escape, and swear at the interrogator “that she was going to hell.” The report’s authors found that personnel had forced a detainee to wear a woman’s bra with a thong on his head; told him his mother and sister were whores; told him he was homosexual and other detainees knew about this; tied a leash to his chains and led him around the room, forcing him to do dog tricks; required him to dance with a male interrogator; and made him stand naked in front of women for five minutes as part of a strip search. And in yet another instance, a female interrogator wiped red ink on a detainee's arm, telling him it was menstrual blood. While the report’s authors recommended that “the use of gender coercion as a futility technique” be "withheld" in the future, the perpetrators' supervisor admitted to having approved these tactics, and therefore investigators declined to recommend disciplinary action.

Some of the most shocking examples of sexual violence, however, were detailed in a report authored by Major General Antonio M. Taguba in response to the United States government's request to investigate allegations of abuse at Abu Ghraib, where such abuse appears to have been particularly rampant. Taguba found evidence of various coercive practices, including videotaping and photographing naked male and female detainees; forcibly arranging detainees in sexually explicit positions for photographing; forcing detainees to remove their clothing and keeping them naked for several days at a time; forcing naked male detainees to wear women's underwear; forcing groups of male detainees to masturbate themselves while being photographed and videotaped; arranging naked male detainees in a pile and then jumping on them; positioning a naked detainee on a box with a sandbag on his head and "attaching wires to his … penis to simulate electric torture;" placing a dog chain or strap around a naked detainee's neck and having a female soldier pose for a picture; threatening male detainees with rape; and "sodomizing a detainee with a chemical light and perhaps a broom stick.” In another instance, a male military police guard reportedly "had sex" with a female detainee. Few were held

586 Ibid., 16.
587 Ibid., 19.
588 Ibid., 8. This practice was ultimately found to be an acceptable "futility tactic," and thus appropriate for use by military personnel.
589 The use and approval of such practices as “futility techniques”— interrogation techniques designed to make those being interrogated believe that resistance is useless and thereby encourage cooperation—signals considerable knowledge of the ways in which specific detainee populations experience gender coercion and other sexualized violence, and suggests a desire to exploit the particular vulnerability of specific cultural groups.
590 Article 15-6 Investigation of the 800th Military Police Brigade [Taguba Report].
591 Ibid.
accountable for these abuses: while a handful of enlisted personnel and noncommissioned officers were found criminally liable, the officers in charge were not. \footnote{See Scott Horton, Another Verdict on Abu Ghraib, Harpers Magazine, Aug. 29, 2007. The military intelligence officer at Abu Ghraib was punished administratively, while the military police commander at Abu Ghraib was reprimanded and demoted. Ibid.}

Lara Stemple, director of the Health and Human Rights Law Project at UCLA, has identified some of the reasons why law has proven inadequate to address such abuses. Many laws prohibiting sexual violence explicitly exclude men as potential victims; others embed the expectation that sexual violence is a weapon used solely against women. \footnote{Stemple, “Male Rape,” 619.} As Stemple has observed, while the phrase “violence against women” occurs more than one hundred times in various U.N. resolutions and treaties, etc., as of her 2009 research “no human rights instruments explicitly address sexual violence against men.” \footnote{Ibid.}

ii. Social Science Literature on Sexual Violence Perpetrated Against Men in Conflict-Related Detention Settings

The social science literature on sexual violence against men—as it occurs in any context—is relatively sparse. Only recently has it begun to gain attention, both in the medical and human rights/humanitarian communities, as a phenomenon worthy of exploration. One scholar has estimated that research on sexual violence against men is approximately two decades behind that of sexual violence committed against women. Despite this, studies increasingly suggest the prevalence of conflict-related sexual violence against men can be quite significant. \footnote{See, e.g., Peterson et al, “Prevalence and Consequences,” 2.} For example, Dr. Lynn Lawry, a specialist for the Secretary of Defense for Health Affairs, \footnote{Lawry’s full title is Senior Health Stability and Humanitarian Assistance Specialist in the International Health Division of the Assistant Secretary of Defense Health Affairs.} found when evaluating the mental health impact of civil war on former combatants \footnote{Danielle Skinner, “Liberia Faces Post-Conflict Mental Health Burden, According to Health Expert,” U.S. Africa Command, June 19, 2009.} that thirty-two percent of male respondents reported having survived a sexually violent experience. \footnote{In that report, sexual violence is characterized as “any violence, physical or psychological, carried out through sexual means or by targeting sexuality and include[ing] rape and attempt rape, molestation, sexual slavery, being forced to undress or being stripped of clothing, forced marriage, and insertion of foreign objects into the genital opening or anus, forcing two individuals to perform sexual act on one another or harm one another in a sexual manner, or mutilating a person’s genitals.” Kirsten Johnson, Jana Asher, Stephanie Rosborough, Amisha Raja, Rajesh Panjabi, Charles Beadling, Lynn Lawry, “Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in Postconflict Liberia,” 300 Journal of American Medical Association 676, 680 (2008).} This number was fairly close to the forty-two percent of female respondents who reported similarly. The researchers were especially surprised to find that even more men than women who experienced sexual violence reported symptoms suggesting post-traumatic stress and major
Such studies help to establish that not only is conflict-related male sexual violence relatively prevalent, but that the psychological harms can be both severe and long-lasting.

Despite the apparent prevalence of sexual violence, “international human rights instruments … [have focused] virtually exclusively on the abuse of women and girls,” even as abuse against men “continues to flourish in prison and other forms of detention.”600 In addition to pointing out the physical and psychological harms of male sexual violence, she has indicated the social harms, as well: her research cogently articulates the dangers of continuing to treat sexual violence as a strictly female-oriented phenomenon, explaining “it reifies hierarchies that treat some victims as more sympathetic than others, perpetuates norms that essentialize women as victims, and imposes unhealthy expectations about masculinity on men and boys.”601 Of the three contexts she has analyzed—rape in prison, rape during armed conflict, and childhood sexual abuse602—the second is particularly relevant to this chapter.

Stemple notes the “essentializing of sex roles” can be especially great in the context of conflict. Most non-government organizations that have studied conflict—and especially conflict-related rape—have failed to recognize male rape; according to her research, only three percent even mention the phenomenon.603 And only one study considers the phenomenon somewhat closely. In that body of research, the subjects were Sri Lankan Tamil males who sought treatment at a torture treatment center in London and reported having experienced sexual abuse. For them, “the forms of abuse began with forced nudity, taunting, and verbal sexual threats, creating an experience of degradation and humiliation. Ultimately the abuse included various forms of genital mutilation and forced sex acts. Most of those abused had not reported the incidents to authorities, explaining that they were too ashamed604—suggesting a key reason why sexual violence against men tends to go unrecognized.

Better understanding sexual violence against men, as well as the experiences of male and female perpetrators, is critical. Not only is it necessary to help protect men from harm, but women as well.605 As Stemple has argued, “a female-specific approach to rape in the human rights instruments has … had the unintended consequence of reaffirming the portrayal of women

599 While the sexual violence could not be reported as causative, a correlation was found.
601 Ibid., 606.
602 Ibid., 608.
603 Ibid., 612.
604 Ibid., 613.
605 As noted earlier in these notes, Celia Rumann has posited that sexual abuse committed by female interrogators at Abu Ghraib and Guantánamo may not only have been illegal as used against detainees, but may have constituted abusive and/or illegal treatment of female soldiers that violates the Mann Act and/or various anti-trafficking laws. Celia Rumann, Use of Female Interrogators: The Analysis of Sexualized Interrogations the Detainee Interrogation Working Group Did Not Conduct, 21 Hastings Women's L.J. 273 (2010).
as defenseless victims.” Better understanding how men are victimized—and how, when and why women perpetrate sexual violence—can help shatter this limiting paradigm.

In general, male prisoners are particularly at risk of rape and other forms of sexual violence. Domestically, the U.S. government has found that as many as one in twenty prisoners within the U.S. domestic criminal justice system may be raped or otherwise sexually abused during their confinement. Human Rights Watch has found that such violence is systemic, and often has severe physical and psychological effects.

There is some evidence that prison-based sexual harassment may be even more pervasive than sexual assault. Daniel Lockwood, who conducted one of the first detailed examinations of sexual harassment in prisons, found that thirty-three percent of interviewed inmates had been propositioned by other inmates, while twenty percent had been subjected to insulting and/or threatening language; as many as seventy-one percent of non-Hispanic white inmates between the ages of sixteen and twenty-one reported having experienced some form of victimization.

James E. Robertson, a professor of corrections who has carefully considered prison-based sexual harassment, has determined that such harassment tends to take one of four forms, including 1) statements that are designed to feminize male inmates; 2) sexual propositions; 3) sexual extortion; and 4) unwelcome touching, kissing or fondling of “intimate body areas.” He has concluded that such harassment “almost invariably arises from a premeditated desire to

606 Ibid., 635.
607 Especially little is known about female perpetration, a subject in tremendous need of further exploration.
610 Human Rights Watch, No Escape: Male Rape in U.S. Prisons (2001), available at http://www.hrw.org/reports/2001/prison/report.html. Internationally, one study found that 20 percent of male inmates reported some type of coerced sex occurrence during their imprisonment. Nancy Wolff and Jin Shi, “Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath,” 15 J. Correct Health Care 58, 59 (2009). Researchers have found that the likelihood of prison rape is inversely correlated to an inmate’s size, perceived masculinity, and familiarity with prison. An Australian study has presented even more startling statistics, with as many as 26 percent of inmates reporting sexual assault. Stemple, Male Rape, 610.
613 Robertson, “Cruel and Unusual,” 50.
humiliate, intimidate and/or coerce," and has concluded that such practices likely qualify as cruel and unusual punishment.

Sexual violence in conflict-related detainment facilities appears to be even more pervasive, however, than sexual violence in domestic prisons, although here the focus seems to be less on inmate-inmate violence, than guard-inmate violence. Courts and researchers have found, for example, that sexual violence was strategically used against both men and women during the Yugoslav and Rwanda conflicts of the 1990s—and especially in detainment camps—as "an instrument of war and a weapon of terror." The Celebici case, the leading superior responsibility case decided at the International Criminal Tribunal for the former Yugoslavia (a court that was created to adjudicate conflict-related crimes in the territory) presents particularly graphic descriptions of male sexual violence. In that case, three of four defendants were charged with the grave breach of inhuman treatment as a war crime and cruel treatment as a violation of the laws or customs of wars, due to sexual abuse committed by their subordinates on male detainees. One defendant was convicted of cruel treatment and inhuman treatment based on the forcing of two brothers to perform fellatio on each other and for the tying of a burning fuse cord around another man’s genitals. A second defendant was convicted of torture for various acts of rape, including anal penetration.

Cases such as these have begun to reveal the prevalence and diversity of conflict- and detainment-related male sexual violence. According to an article in the Atlantic Monthly, 80% of male Bosnians and 76% of male El Salvadorans who were detained during periods of conflict have reported having been sexually abused. And according to another report, this one issued by the United Nations Population Fund (UNPF), 80% of 5,000 men formerly held at a camp in Sarajevo Canton reported having been raped during their confinement. Thus, contrary to the assumption that male (versus female) rape is a relatively scarce phenomenon, in some contexts it can be quite high.

Tribunals and non-government organizations have concluded that such rapes are perpetrated by institutional actors against male detainees for a number of reasons, including as a means of punishment, as an expression of ethnic hatred, as a means of emasculation and

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614 Ibid., 8.
617 Ibid.
618 Ibid., ¶¶1061-1066.
619 Ibid., ¶943.
622 Ibid., 15.
humiliation, as a method for obtaining information, as a tool to shatter leadership structures, as coercion and intimidation, and to create “an atmosphere of fear and powerlessness.” Thus such rapes operate as mechanisms for reifying authority in conflict and detention-related institutions.

iii. Sexual Violence, Identity and Masculinities

A distinction has long been made between being male, which is a biological phenomenon, and masculine, which is a socially constructed phenomenon. However, both are relevant to identity in terms of how one perceives one’s self, and how one is perceived by others. Researchers have found that “sexual and gender-based violence [can constitute] a particularly vicious attack on personal and social identity,” moderating the self- and social-identities of both victims and perpetrators.

Judith Hicks Stiehm has written about the relationship between masculinities and identity with regard to perpetrators, theorizing about the reasons why men become sexually violent. She has posited that because men do not have a unique capacity by which to define themselves [as women do with the biological capacity to give birth], they tend to define themselves by oppositeness—specifically, as being the opposite of women. Further, because there is nothing biological that defines them, men must define themselves by a social role, and in most societies, most of the time, the one social role that is reserved to men … is the role or roles that involve the exercise of a community’s force. … Again, because their special role is only socially defined, men need to assert and protect it.

Stiehm has further theorized that the precariousness of men’s identity inspires men to public performances of their masculinity. As she has noted in her observations of American

627 Judith Hicks Stiehm, “Neither Male Nor Female, Neither Victim nor Executioner,” in Male Roles, Masculinities, and Violence: A Culture of Peace Perspective (Ingeborg Breines, Robert Connell and Ingrid Eide eds., UNESCO 2000): 223-24. Sykes, in his seminal study of a maximum security prison, has similarly observed that imprisonment injures inmates’ sense of their own masculinity in part because of the absence of women against whom they can compare themselves, and ties that threat to their masculinity to the assertion of violence, and especially sexual violence. Greshom Sykes, The Society of Captives (1958); see also Robertson, “Cruel and Unusual,” 12-13 (discussing Sykes).
males, “one does not snitch, one does not tell, one does not appeal to authority; instead one takes care of matters oneself.”

To the extent that this may be true in detainment contexts, it may help explain why men are especially reluctant to discuss sexual violations, whether identifying with the perpetrator or the victim. “American boys … are taught that extra-legal (as well as legal) use of violence is both pragmatic and preventative. But the element of ‘honour’ is also involved. This slippery concept is worthy of great attention, for it can drive both murderous and sacrificial behaviour. ‘Honour’ seems to be a part of all cultures, though its precise meaning and requirements vary.”

She ties the exercise of violence, in the name of honor, to men’s historic role as protector. “[M]en who see themselves as protectors, as doing violence on behalf of others, can be moved to murderous behavior of a kind that they would never try to justify merely on the grounds of self-interest or self-defence.”

Of course, honor-driven violence can be predicated on more than men’s traditional role as protectors. Julian Pitt-Rivers, in his seminal rumination on the concept of honor, has identified the extent to which honor “possesses a general structure which is seen in the institutions and customary evaluations which are particular to a given culture,” and thus invariability in terms of the structural role honor plays within societies. Stressing the tremendous power of “honor,” he explains that “[h]onour is the value of a person in his own eyes, but also in the eyes of his society. It is his estimation of his own worth, his claim to pride, but it is also the acknowledgement of … his right to pride.”

He theorizes the role of honor in winning or losing a contest, stating, “The victor in any competition for honour finds his reputation enhanced by the humiliation of the vanquished.” This motivates, perhaps, the drive to humiliate the enemy: such an act may be used as a means to elevate one’s relative respect. Notably, “the de facto achievement of honour depends upon the ability to silence anyone who would dispute the title,” perhaps explaining why victims are often kept incommunicado, and their allegations minimized. He also adds that “the ultimate vindication of honour lies in physical violence,” an observation that suggests why some guards may have felt the need to brutalize detainees in the post-9/11 context. Of course, this observation may be culturally-bound, more relevant to some cultures (such as American military police) that others. Ultimately, honor is a mechanism through which power is transferred: “The conceptual systems which relate to honour provide,

628 Stiehm, “Neither Male Nor Female,” 225.
629 Ibid.
630 Ibid.
632 Ibid., 24.
633 Ibid., 24.
634 Ibid., 27. This link to status may also help explain why not telling detainees their release date was experienced as such an extraordinary challenge: as Pitt-Rivers has noted in the context of a lie, “to lie is to deny the truth to someone who has the right to be told it and this right exists only where respect is due. Children are taught to tell the truth to their elders who are under no reciprocal obligation.” Ibid., 33. Similarly here, to lie to detainees about their fate, or fail to provide them with very basic information about their circumstance, is to similarly infantilize and thereby degrade them, impinging their honor.
when each is taken in its totality and in its varied contexts, a mechanism which distributes power and determines who shall fill the roles of command.”

So what can disrupt this process? Stiehm predicted that the introduction of women into military and police units would lessen the violence in those units, however the cruelty with which detainees were treated by women at Abu Ghraib and other facilities suggests this rather essentialist perspective may be empirically incorrect. Accusations of torture meted out by Israeli forces, which have long included both men and women, similarly challenge this perspective.

This may be because Steihn’s perspective under-acknowledges the possible “gendering” of institutions; war and the military have long been equated with masculine identity, as means by which masculinities have been “articulated into our ideologies and social structures.” Why would women coming into all-male institutions influence institutions, more than the reverse? Especially when, as has been repeatedly observed, “violence … helps confer on men a rich set of privileges and forms of power … [and thus] violence or its threat becomes a means of ensuring the continued repeating of privileges and exercise of power”?

Of course, sexual violence as a phenomenon may be less about gender roles, per se, than about gender serving as a tool to some further a particular aim. Roger V. Gould has noted that violence occurs most often in the context of struggles for superiority, not hierarchical relationships where status lines are clear. Thus, violence is frequently about putting one in “his place,” establishing a pecking order. How total institutions, especially military organizations, constitute authority may therefore be key to the cross-gender nature of the perpetration of sexualized violence: women and men are both enrolled in the constitution of formal authority within such institutions, and one expression of that authority may be sexualized violence. While gender roles may be alluded to in that violence—for example, when heterosexual males sexually violate other males, implicitly signaling the victim’s inferior social status as the “woman”—the battle is less one of gender, than of using gender as a tool. This would help explain why women are also perpetrators of sexual violence: by taking on the traditionally male role of sexual predator and reducing male detainees to the symbolically “female” role of victim, they recall those traditional hierarchies. In some ways, the extent to which such tools elevate women and degrade men may have a particularly profound effect, since the dynamic doubly violates social norms.

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635 Ibid., 73.
636 Stiehm, “Neither Male Nor Female,” 226.
637 See, e.g., Mahal IDF Volunteers, “IDF Background Information: Who serves in the army?,” at http://www.mahal-idf-volunteers.org/information/background/content.htm#who (clarifying that Israeli military service is compulsory for both men and women).
639 Ibid.
641 Of course, the opposite may also be true: the victimization of women by men may be enhanced because it follows—and thus reinforces—traditional gender relations, and there is no dominant counter-norm to lessen the impact.
As Kaufman has observed with regard to male perpetrators, “human groups create self-perpetuating forms of social organization and ideologies that explain, give meaning to, justify and replenish these created realities.” However, Kaufman has also noted that violence is “not simply a result of men’s individual and social power,” but can result in contradictory experiences, including fear, isolation, and pain, and internalized expectations that can be unattainable. Consequently, “the personal insecurities conferred by a failure to make the masculine grade, or simply, the threat of failure, is enough to propel many men, particularly when they are young, into a vortex of fear, isolation, anger, self-punishment, self-hatred and aggression.” This may be especially true in conflict-related detention centers, where security is threatened, and personnel are struggling to confirm their authority over inmates and their superiority over the “enemy.”

The still relatively few women who are thrust into contexts in which masculine ideologies have dominated for generations, as with the American military, could plausibly become subject to similar “isolation, anger, self-punishment, self-hatred and aggression”—both because they are even less likely than men to attain the masculinized ideals around which the institution has developed, and face the double “failure” of not fully satisfying feminized ideals either.

As Dustin Lewis has noted: “Due to destructive stereotypes of femininity and masculinity, as well as to equally destructive prevailing social norms that denigrate homosexuality, homosexual and feminine attributes can be, and often are, conceived as weakness. In turn, this perceived weakness (evident during peacetime, but all the more so during wartime) can lead not only to dishonor, but ultimately to death.” This means it may be in female soldiers’ best interests to adopt hegemonic and stereotypically masculine traits and practices, in order to denounce their femininity and prove their “masculine” abilities in the “male gendered” world of war.

Kaufman adds the important observation that violent masculinity displays are often not performed for victims; they are done to prove to peers “and, primarily, to themselves” that soldiers are “real men.” Perhaps, for female soldiers, such displays provide critical opportunities to prove they are “one of the boys,” a phenomenon that can be witnessed across a variety of male-dominated contests. Or, as Kaufman has noted, the “rapidly increasing amount of sexual aggression, harassment and violent behavior by young women” may partially result from the fact that “young women are growing up with a sense that they, too, are powerful.”

Unfortunately, society’s definition of power too frequently remains the tried-and-true definitions of patriarchal power: power defined by the capacity to physically control others and

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642 Ibid.
645 Ibid.
646 Ibid.
647 For a description of this phenomenon in another common context—women in the workplace—see, e.g., Calvin Morill, The Executive Way: Conflict Management in Corporations (University of Chicago Press 1995) and Rosabeth Moss Kanter, Men and Women of the Corporation (Basic Books 1993).
the world around one’s self. It is not surprising that as women come into a sense of their own power, a significant number of them will express it by means of a dominant discourse, such as aggression. From the outset, the United States’ war on terror has been framed as taking control of an out-of-control situation and taking control in a very masculinized sense—and thus as an exercise of agency.

Tillner has articulated the ways in which gender identities cannot be isolated from other aspects of one’s identity, such as ethnicity, race, religion, or employment. He explains that, at its core, “identity … is a social relation and a process. It cannot simply be obtained, it has to be constructed and reconstructed in a never-ending effort. … The more room we have for agency and the more recognition we get by others, the easier we can believe that we are somebody, that we are a subject.” He has also theorized that dominance over another is a form of identity practice that constructs a difference, which legitimizes dominance that grants the agent of dominance the illusion of a superior identity; the other’s identity is denied, confined, erased. Dominance therefore is an identity relationship, a process of constructing between the other and oneself an oppositional and hierarchical relationship. It is no coincidence that sexism has been described in similar terms, because dominance is central to the concept of masculinity. Similarly, therefore, it should be unsurprising that dominance would often be articulated through acts of sexual aggression.

Robertson has similarly linked the need to assert masculinity with sexual violence, and especially sexual harassment, in prisons. Citing Sykes’ late-1950s study of a maximum security prison, he observes that prison automatically injures male inmates’ masculine self-images even before any sexual violence occurs, and does so in three ways: by imposing “symbolic castration” through the denial of heterosexual relationships; by severely regulating inmates’ lives and thus

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649 Ibid., 222.
650 See, e.g., the full text of President Bush’s speech on September 20, 2001, in which he declares the war on terror, available at http://middleeast.about.com/od/usmideastpolicy/a/bush-war-on-terror-speech.htm.
652 Interestingly, “masculinization” seems to be particularly acute when dealing with cross-racial situations. One study conducted on young German men found a correlation between racist ideology “and a general value orientation towards success, competition, money and strength.” Ibid., 54.
653 Tillner considers “the identity relation of dominance to be the most general definition of violence. Second, colonialism is marked by the same logic of constructing identities; since the effects of colonialism still influence our present world, this identity relation still exists … [and] as an identity relation, dominance is not only an empirical fact but a representation, such as the popular images of the Islamic world in European cultures. Through such representations the aggressive racism of individuals is linked to the ‘normal’ imaginations of cultural difference in mainstream culture.” Ibid., 55.
reducing the prisoner to “the weak, helpless, dependent status of childhood;” and third, by removing male inmates from a male-female binary world, in which they can affirm their masculinity as reflected in female eyes. 654 Sexual violence, when laid over this foundation, performs three functions: feminizing inmates, communicating aggressive intentions, and promoting “involuntary identity transformation and role assignment.” 655

Stemple offers additional insights regarding the ways in which male sexual violence impacts both the perpetrator’s identity and the victim’s. “Significantly, when both the perpetrator and victim are men, the interaction often typifies a gendered power-play of masculinized dominance and feminized subordination, as in the case of prisoner rape.” 656 Indeed, as suggested above, in the context of male-on-male violence, “many men who perpetrate rape maintain their heterosexual identity by feminizing their victims,” 657 just as has been seen in the mainstream media with Abu Ghraib and the forcing of detainees to wear female underwear.

Based on the above literatures, sexualized violence at Guantánamo and other American military detention facilities would theoretically operate to identify American soldiers as masculine, powerful and in control, and detainees as a feminized, less powerful “other.” Sexual violence would also likely be experienced as a direct threat to detainees’ self-identities as strong, capable men, and would pose an extreme threat to their continued social “existence,” both in terms of how they and others see them and how they and others believe them able to function in the world.

B. Sexualized Violence at Guantánamo

When describing his exhumations of the men and women who were murdered during Rwanda’s infamous genocide, Lieutenant General Roméo Dallaire, former UN Assistance Mission for Rwanda Force Commander, emphasized the insidiousness of sexual violence. In his memoirs, he states

*I don’t know when I began to clearly see the evidence of another crime besides murder among the bodies in the ditches and the mass graves. I know that for a long time I sealed away from my mind all the signs of this crime, instructing myself not to recognize what was there in front of me. The crime was rape…. For a long time I completely wiped the death masks of raped and socially mutilated girls and women from my mind as if what had been done to them was the last thing that would send me over the edge. But if you looked, you could see the evidence among the whitened skeletons. The legs bent and apart. A broken bottle, a rough branch, even a knife between them. … Some male corpses had their genitals cut off … many women and young girls had their breasts chopped off and their genitals crudely cut apart. They died in a position of total vulnerability, flat on their backs, with their legs bent and knees wide apart. It was the expressions*

655 Robertson, “Cruel and Unusual,” 14-15. While Robertson discusses these functions in the context of inmate-inmate violence, they arguably extend to guard-inmate violence, as well.
656 Stemple, “Male Rape,” 628.
on their dead faces that assaulted me the most, a frieze of shock, pain and humiliation.  

His recollection powerfully illustrates how often rape and other forms of sexual violence are recognized only secondarily to evidence of other crimes. Like General Roméo Dallaire—albeit in a very different context—at first I didn’t see the signs of sexual violence peppered through interviews with former detainees. Increasingly, though, as I read about practices which at first seemed to have legitimate penological significance—such as undressing detainees for showers or body searches—something began to seem unusual, and I began to pay more attention to brief asides that hinted at something else, something embedded deeper within the interviews. Almost like optical illusions, the stories of sexual violence surfaced as I considered these comments. Soon, they became impossible to ignore.

Among the 78 interviews with former detainees, 77 percent contain some reference to forced nudity, and 54 percent contain some reference to some other form of sexualized violence, including sexualized harassment. In approximately 36 percent of the interviews, nudity and/or another form of sexualized violence was described as—or as a component of—the respondent’s very worst detainment-related experience at Guantánamo, Kandahar and/or

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659 This included 76% of the U.C. Berkeley interviews (47 out of 62) and 80% of the University of San Francisco interviews (13 out of 16).
660 This included 57% of the U.C. Berkeley interviews (42 out of 62) and 31% of the University of San Francisco interviews (5 out of 16). Sexualized harassment (which I called “sexual violence” during the coding process) was defined quite broadly during the coding process. Included within this code was all unwanted physical touching of sexual organs; unwanted physical touching of other parts of the body combined with sexualized commentary; and other verbal and physical interactions of a sexualized nature.
661 “Sexual harassment” is a more common term than the one I use here, however it is defined in U.S. law as a form of workplace discrimination, which is not directly analogous to detainees. See, e.g., Black’s Law Dictionary (7th ed. 1999); EEOC Guidelines on Sexual Harassment, 29 C.F.R. §1604.11(a) (explaining Title VII of the Civil Rights Act of 1964, which prohibits workplace discrimination on the basis of sex). However, the definition of harassment on its own is analogous: harassment has been defined as “words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.” Black’s Law Dictionary 721 (7th ed. 1999). Thus, a more accurate term for harassment of a sexual nature as applied in detention contexts would be “sexualized harassment.” James E. Robertson has noted the need for a definition that captures the various forms of sex-based harassment that occur in non-workplace contexts. He has offered a helpful definition for use with domestic prisons, explaining harassment of a sexual nature—when directed at male inmates—includes “uninvited sexual comments or conduct made by and directed at male inmates that would be perceived by reasonable male inmates as offensive and/or coercive.” “Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates,” 36 Am. Crim. L. Rev. 1, 8 (1999). I adopt his definition for purposes of use with the term sexualized harassment.
This suggests that for a relatively significant portion of those who did experience such phenomena and were willing to talk about it, the experience was devastating.

There is also substantial reason to believe that the number of men who experienced some form of forced nudity and/or other sexualized violence may have actually been much higher. First, the extensive documenting of sexualized violence perpetrated against detainees at Abu Ghraib, Guantánamo and other U.S. military facilities—among the most shocking of which were allegations of rape—strongly suggests under-reporting, although the extent of any potential under-reporting is unclear. This comports with the fact that sexual violence tends to be widely under-reported in general. In addition, many former detainees who were asked about sexual violence either refused or declined to address the issue, suggesting a few may have experienced sexualized violence but not wanted to talk about it.

This likely underreporting may be attributed, in part, to demographic characteristics of the interviewees. First, all identify as Muslim. Many cited their faith as a component of their

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662 Specific to Guantánamo, just under 17 percent of the interviews reference nudity or sexual violence as an aspect of the interviewee’s very worst experience.


664 The reluctance to speak about sexual violence—and especially male sexual violence—has been linked to “a combination of shame, confusion, guilt, fear and stigma.” Sandesh Sivakumaran, “Sexual Violence Against Men in Armed Conflict,” 18 Eur. J. Int’l L. 253, 255 (2007). It can also result from a fear of criminal punishment, especially if the perpetrator was male and homosexual activity, in the victim’s country, is criminalized, ibid., 256, and from the lack of rhetoric relevant to male sexual violence, meaning that “some men who experience sexual violence do not have words at their disposal to express their trauma precisely.” Dustin A. Lewis, “Unrecognized Victims; Sexual Violence Against Men in Conflict Settings Under International Law,” 27 Wis. Int’l J. L. 1, 9 (2009). However, the “general social disruption caused by war can, alternatively, lead to an increase in reporting of sexual violence.” Ibid., 10 (citing Elisabeth Jean Wood, “Variation in Sexual Violence During War,” 34 Pol. & Soc’y 307, 321-23 (2006)).
discomfort with nudity and discussion of sexual topics; accordingly, their religious beliefs may have discouraged public, cross-gender discussion of sexual topics.

Second, the criminalization of homosexual acts in many parts of the world... may especially discourage reporting by victims of male sexual violence when the violence is perpetrated by other males. Although the prevalence of such criminalization is decreasing... most of the interviewees come from countries or were interviewed in countries that continue to criminalize and/or otherwise perpetuate strong social norms against homosexuality.

Third, and relatedly, the stigma of male rape is known to encourage many men to remain silent: a 2005 investigation into perceptions of male sexual assault victims found that men are blamed for their assault at an even higher rate than women, in part because of the stereotype that men who are sexually assaulted should be able to resist their assault. This perspective is especially prevalent when the perpetrators are women.

Picking up on this likelihood of stigma, many men may therefore refuse to report sexualized violence because of the threat it poses to their personal and public identities. Erving Goffman has observed that individuals assert elements of their identity in every social encounter, a phenomenon commonly referred to as “identity work.” Defined as “a range of activities individuals engage in to create, present and sustain personal identities,” various scholars have explored the link between identity work and the enactment of gender. Such identity work maybe realized through individuals’ “actions, habits, posture, and talk.” Because men engage in identity work around issues of masculinity in part through discussion of their sexual experiences, it makes sense that men would be particularly loathe to discuss being the victims of sexual violence, as such victimization undermines the “social script” that men are the givers and not the recipients of such acts.

665 For a list of countries that criminalize homosexuality, see “Countries Where Homosexuality is Criminalized (Male or Female),” Council for Global Equality Website, June 2011, http://www.globalequality.org/component/content/article/166.
666 Stemple, “Male Rape,” 632.
669 Ibid., 372.
670 Peter J. Burke and Jan E. Stets discuss personal identities in terms of the “self” as “an individual’s consciousness of his or her own being or identity…which works to control meanings to sustain itself.” Identity Theory (Oxford University Press 2009): 10.
671 Goffman, Presentation of Self.
Brian Kelly, who has written about the intersection of masculinities and gender/identity work, has further explained, “it is well known that men in many societies consider it normative for men to be the active partner in … sexual interaction.” In the context of detainment, at least with the sexual practices reported here, men were frequently described as the passive recipients of sexualized interactions. Kelly has noted how, in discussing their sexual encounters, men typically objectify women, much as the interviewees here were often objectified (as discussed in chapter five, which addresses the issue of cruel, inhuman and degrading treatment more generally). As Kelly has observed, “the identity work involved in interviewing will yield a particular type of gendered data.”

Kelly has also found that the interviewer’s gender may correlate with the masculinity representations made by male interviewees during qualitative interviews. While the population he studied differed in important ways from the interviewees here (culturally, ethnically and religiously), his research still suggests the gender of interviewers may have impacted reporting by former detainees. Several of these interviews were conducted by women. Although it is possible that male former detainees might be more comfortable speaking with a woman about sexual violence than with another man, it is even more likely that they may have been reluctant to speak with a woman about their sexually violent experiences. And even when the interviewer and interviewee were of the same gender, there were frequently members of the opposite sex present, potentially discouraging a frank discussion.

While, in many cases, mention of sexualized violence was therefore understandably obtuse, in others, any possible link to sexualized violence was even more uncertain. For example, some interviewees experienced post-release symptoms that have been found to correlate with sexual violence. One man described how he began to have an inability to control his urine while in the prison camps; another, post-release, experienced severe pain during sex. He explained that he wasn’t the only one who had experienced this phenomenon: “other people I talked to and discussed this issue with, they said that they are suffering from the same problem, and I still don’t know why and what they did to me.” While the interviewees did not make an explicit connection between their symptomology and sexual humiliation, such symptomology may indicate that abuse occurred and went unreported, in place of former detainees’ willingness to talk about it. Of course, these were not counted in this dissertation as representative of sexual violence having occurred. However, the possibility is worth noting.

Ultimately, though, even disregarding these last few cases, interviews provided ample references to sexualized violence. Such violence generally took one of three forms. These

675 Ibid., 5.
676 Ibid., 10.
677 Sexual abuse survivors have been found to have “a significantly higher incidence of genitourinary dysfunction symptoms, including stress and urge incontinence, and voluntary urinary retention.” G.W. Davila, F. Bernier, J. Franco, S.L. Kopka, “Bladder dysfunction in sexual abuse survivors,” 170 J. Urol. 476-9 (2003) (reporting the findings of a preliminary study conducted with female members of sexual abuse survivor support groups).
included forced nudity, sexualized harassment (such as sexual threats, forced sexual touching, unwanted exposure to pornographic images and practices), and finally, rape. While nudity was seemingly ubiquitous, most of the other sexualized violence was reported as taking place in one of two contexts—intake and interrogation.

i. Forced Nudity

Forced nudity was reported more than any other form of sexualized violence. Seventy-seven percent of the 78 interviews I reviewed included at least one incident of forced nudity, and discussed it in the context of a particularly upsetting occurrence.679

Forced nudity spanned a range of experiences, from exposure of only a portion of the body (as when forced to urinate or defecate in front of others) to full nudity. It occurred in many contexts: upon capture, upon intake at a detainment facility, when showering, during interrogations, and when sent to the “crazy block” (where some detainees were kept only in shorts instead of the more typical jumpsuit).

While many people might not perceive of forced nudity as a form of sexualized violence—let alone any kind of violence680—so many interviewees reported it as one of their most humiliating and degrading events, if not the most humiliating and degrading event of their captivity, that such a perspective ignores how it was experienced. The disparity between how non-Muslim, non-detained Westerners might perceive of nudity, and how it was experienced by this all-Muslim, predominately-non-Western, captive population, strongly points to the need to consider culture and context when evaluating whether prison conditions are impermissibly degrading. Importantly, other researchers point out, “the impact of any coercive sexual experience is likely to vary based on the situational characteristics of the experience and on individual differences in victims,”681 a fact that has largely been overlooked in the political and legal debates around torture, including sexual violence as torture or cruel, inhuman or degrading treatment.

Ultimately, the descriptions of nudity presented below suggest four things: 1) nudity at capture, transport and intake was deliberately used to humiliate prisoners and assert the U.S. government’s authority and control; 2) for many detainees, mockery of their bodies served to

679 This included 76% (47 out of 62) of the Berkeley interviews, and 80% (13 out of 16) of the University of San Francisco interviews.

680 This lay interpretation has been challenged by many definitions of sexual violence that have been developed around the world. For example, in one report issued by Human Rights Watch, which partially quotes a United Nations report, sexual violence is defined broadly as “any violence, physical or psychological, carried out through sexual means or by targeting sexuality,” and is described as including “forcing a person to strip naked in public.” Human Rights Watch, “We’ll Kill You if You Cry”: Sexual Violence in the Sierra Leone Conflict (2003), available at http://www.unhcr.org/refworld/docid/3f4f595b6.html (partially quoting United Nations, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, Final Report, E/CN.4/Sub. 2/1998/13, pp. 7-8).

681 Peterson et al, “Prevalance and Consequences,” 16. This individuation of experiences can mean, for example, that “in some situations, an experience with coerced kissing may have more negative consequences than an experience with forced intercourse.” Ibid.
heighten their humiliation, and was often experienced not only as mockery of their “manhood” but of their religion (indeed, nudity was frequently reported as occurring in conjunction with insults to their religion, and the two were often discussed together when detainees were asked about their worst detainment-related experiences); 3) many former detainees described their experience of nudity as similar to more “egregious” forms of sexualized violence, such as rape; and 4) several former detainees said they would have preferred death to what occurred, hinting at the extremity with which such nudity was experienced.

a. Nudity at Capture, Transport and Intake

Forced nudity was most common during capture, transport and intake, likely for several reasons. First, nudity may have been utilized for security purposes, for example, to lessen the likelihood that detainees could smuggle weapons into the detainment facilities. Other reasons may have included practicality (as the uniforms of one prison camp would be exchanged for another), or to assert American dominance (several former military personnel have discussed, as part of their standard operating procedures, using tactics that humiliated or degraded detainees in order to break them down, with the objective of lessening resistance and maximizing compliance). 682

Although there may have been benign penological justifications for some of the nudity there, that nudity was frequently accompanied by otherwise harsh treatment, which led to many former detainees experiencing the nudity not as being done for benign penological purposes, but for the more insidious penological purpose of a power exercise on the part of the total institution—namely, targeted degradation.

In addition to the possibility of a secondary intent, researchers are increasingly recognizing that practices cannot be analyzed in isolation if one hopes to understand the impact of those practices on individuals. For example, in their analysis of the psychological and physiobiological impact of detention-related acts on detainees, Basoglu and Salcioglu have recognized the enhanced distress commonly experienced by detainees who are subjected to multiple forms of abuse 683 As they have observed, “[i]solation from the outside world and lack of access to lawyers and due process of law [as experienced at Guantánamo] deprive the detainee

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683 Basoglu and Salcioglu, A Mental Healthcare Model, Chapter 2.
of …safety signals and maximize fear and helplessness,” providing a baseline vulnerability on top of which other potentially abusive practices are experienced. According to their findings, it is precisely this “fear and helplessness associated with [such] CIDT rather than physical torture that account for chronic psychological damage in survivors.” Thus, nudity—which especially exacerbates the fear of potential violence and fosters an exaggerated vulnerability and thus helplessness—may play a critical role in captivity-related distress.

One former detainee, now living in western Europe, provides an example of the context in which such nudity frequently occurred. He reports that upon arriving at a U.S.-run prison in Afghanistan, prisoners had their clothes ripped off, either “by hand or with scissors, and then there were two interrogators, two people there, taking notes and the other asking questions. And there were also two or three soldiers in the back who would sometimes hit us.” The questioning took place as he lay on the floor, naked, shackled, and hooded.

Another former detainee, also from France, describes his experience traveling to and arriving at his first American prison camp in Afghanistan:

[W]e left Kabul and drove for about half an hour. And we were taken to some kind of old airfield, a place where a plane could land. And a helicopter landed next to the car. And they took us to the helicopter one by one … We still had the hood on. And I understood that they were Americans. [After flying for about 20 minutes] they put us on our knees in front of an empty warehouse … and they would take us one by one to bring us inside. My turn came, I was taken. … And there was a room inside that warehouse. And then I was there and I was standing, they removed all my clothing, they destroyed my clothing, so I was naked, I was totally naked, and then they removed my hood and I saw the committee. So there were maybe twenty, thirty people in that room, some of them were soldiers with arms aimed at me and all sorts of persons. Everybody looking intensely at me, at myself. And there were also people in civilian clothes. … And what they did to me, they did the same to the others. … So they came to check me out completely. … They were Americans, they were clearly Americans. There were a few women soldiers. The first women I saw were soldiers, U.S. soldiers.

While he speaks rather cryptically of “what they did to me,” what becomes relatively clear is the sense of a cross-gender violation in a situation of significant exposure and vulnerability.

The degree to which speaking of nudity upset some of the interviewees is particularly apparent in the following exchange. As one man from Afghanistan recalled regarding his transport from Bagram to Kandahar:

Former Detainee: When we arrived in Kandahar, they ripped our clothes off and … they made us naked. I don’t know if they [took] pictures of [me].

Interviewer: Okay, how long were you in Kandahar?

684 Ibid., 40.
685 Ibid., 61.
686 Basoglu and Salcioglu have also noted the increased sense of vulnerability that comes with lack of sight, and the ways in which that increased vulnerability exacerbates perceptions of abuse. Ibid.
b. Nudity as a Religious Violation

Nudity was frequently described as an insult not just to one’s person, but one’s religion: humiliating because of the physical exposure and because of the ways in which such nudity insulted Islam.687 This is evident in the following recollection:

Yeah. They made naked, nude. All the prisoners. They never respected their religion or reputation of any prisoners. Any religion has its own principles. And Islam, it’s not really good in Islam. I don’t know why they were doing this. It’s really difficult to know. Whether they wanted to bother Muslims through this way, making them naked, or what.

In the following excerpt, another interviewee describes his nudity as a deep dignitarian and religious harm, one that he experienced as far worse than the physical violence he endured. This sense that nudity was a greater injustice than physical beatings—largely because of the religious degradation affiliated with it—was a recurrent theme:

I don’t care about beatings … the worst thing for me was when we were going [to] the toilets, there wasn’t any toilet for us or we would do in front of all other prisoners. … When one person was doing the toilet, then all the other 60 prisoners could see him. Another worst thing was when they were taking us for shower, they would make everybody naked and we were all waiting for the other person to take shower and then after we were done with the shower they would just tie all of us together and take us to our cells. This is the worst thing for us because this is an insult to Islam as well as to our personal tradition.

Another man describes being sent to the “crazy block”—even though he wasn’t crazy—where he was kept only in shorts. He explained that this was his worst Guantánamo experience, despite having been pepper sprayed and beaten bloody by guards for refusing to take medicine.

The extent to which nudity was perceived as horrific and as matched only by insults to religion transcended detainees’ national backgrounds. As reported by a Uighur man, now located in Albania, regarding his worst experience at Kandahar: “Right in front of our eyes, they stripped naked our brothers. Female MPs, they stripped them naked.”688 He equated this with a second “worst” thing, which consisted of spitting on and throwing the Koran in the toilet.

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687 As noted in the Koran, clothing was sent to mankind to cover one’s shame and guard against evil. 7:26.
688 The American Bar Association, through its Standards for Criminal Justice, Third Edition, Treatment of Prisoners (2010), has been careful to advise that opposite-gender prison staff
One former detainee from Europe says he endured such treatment by relating his life to that of the prophet Abraham, whose story he saw as similar to his own. He explained that Abraham had also had his clothes removed by people who did not believe him, and was forced to walk around naked. Yet no matter how bad Abraham’s treatment was, he never gave up his religion and his religious works. In this story, as in many of the stories conveyed by former detainees, nudity and a sense of religious violation are almost imperceptibly intertwined: as a result, the experience of the former seems to have almost automatically invoked the latter.

c. Nudity as a Sexual Violation

Building on the previous section, many detainees reported nudity as equally severe a violation as religious violations, even when the two were kept conceptually distinct. For example, when asked about his worst detainment-related experience en route to Guantánamo, one former detainee recounts:

*The worst thing that I still—an experience that I still remember is that our national sovereignty is trampled in our own soil and country. ... And the second thing that I will never forget is... making me nude... in front of other prisoners in order to take shower. Once the soldiers discriminated and insulted the Koran in front of me. And these are the [three] worst experiences that I will never forget.*

While some might argue that these three situations seem relatively benign, the extremity of these practices from the perspective of this prisoner becomes evident in a later comment he made regarding these incidents: “[N]o human being can tolerate it.” Through this comment, his interpretation of public nudity as unbearable—as something intolerable, incompatible with life and humanity—becomes visceral. For him, the violation was experienced as taking place on three levels: the national (the invasion of his country and the devaluation of his nation’s sovereignty), the personal (through exposure of his body), and the religious (through desecration of the Koran).

In many ways, all three might be understood as a type of metaphorical rape. In most cases, when men had their clothes removed, they were surrounded by soldiers who were clothed, repeating the power dynamic that too-frequently occurs in coercive sexual encounters.

The sense of a deep violation—this time, one based less on metaphor than a de facto rape—is particularly vivid in the following excerpt, in which one man reports having been forced to remove his clothes at gunpoint as he was taken into custody. He explains,

*It was winter and there was like half a meter height of snow. They took off our clothes and stored us in the snow, bare. They asked me to take off my shirt. I thought that they are suspecting me that I am having like bombs or explosives. Then I said, “That is fine, no problem for me.” I took off my shirt. When I took off my shirt they told, “Now take off your trousers.” I said no. They said, “We will shoot you if you don’t take off your trousers. We will shoot you to death.” The Americans ordered an Afghan police to hit [me] and that Afghan police hit me with a gun butt. I had underwear under my trousers. I took off the trousers, but I

should not be allowed to observe prisoners’ private bodily areas because of the potential harm to personal dignity. See, e.g., Standard 23-7.1 Respect for Prisoners, at 40; Standard 23-7.9 Searches of prisoners’ bodies, at 44-45; Standard 23-7.10 Cross-gender Supervision.
never took off my underwear. They said, “Take off the underwear or we will rip it off with our bayonet.” And then I took that off too.

Later, when he arrived at Bagram, “again they took off our clothes. And we were all standing naked and they were just inserting some stuff to …” At this point, the translator pauses and asks the interviewer, “should I just tell you what?” When the interviewer answers affirmatively, the translator explains, “they were inserting, you know, some stuff to people’s anus, they were saying it is our checkup.” After that, he says he was taken to a secret room so that the Red Cross wouldn’t know that the military had him in custody.

Even though this experience may not technically be considered a rape, the detail with which the interviewee remembers and relays the stages of his nudity, the extreme control asserted by his captors and the threat of ripping off his clothes with a bayonet is experienced very much like a rape, one that is made more explicit later when the doctors insert “stuff” into his anus.

There is external empirical support for the perspective that forced nudity and subsequent practices are experienced as sexual violations. For example, in their extensive research into the experiences of torture and war trauma victims, Basoglu and Salcioglu have observed that the forced nakedness of detainees “seems to induce a sense of helplessness … in the face of imminent danger by depriving the detainee of the sense of protection and illusory security that clothing affords. Because of the sexual connotations of nakedness, stripping also raises a possible but uncertain threat of sexual assault.”

Thus, nakedness isn’t just nakedness: in many instances, especially when experienced in the context of war-related captivity, the threat is one of sexualized violence.

The similarity between forced nudity and gang rape is especially visceral in the following exchange. When asked to describe any treatment he experienced as particularly humiliating, one interviewee answered as follows:

<table>
<thead>
<tr>
<th>Former Detainee:</th>
<th>Yes, they took all of our clothes.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interviewer:</td>
<td>When?</td>
</tr>
<tr>
<td>Former Detainee:</td>
<td>When we arrived in Bagram.</td>
</tr>
<tr>
<td>Interviewer:</td>
<td>How did they take them?</td>
</tr>
<tr>
<td>Former Detainee:</td>
<td>By force. Because we don’t let them.</td>
</tr>
<tr>
<td>Interviewer:</td>
<td>So when you say by force, did they rip them off, or …?</td>
</tr>
<tr>
<td>Former Detainee:</td>
<td>Yes, force, eight person, ten person around you and you are in the middle.</td>
</tr>
</tbody>
</table>

Indeed, the dynamic here—fear and vulnerability exacerbated by being in the control of an enemy and thus one who plausibly seeks to do harm—is the same as that found in rape. As Susan Brownmiller and others first observed in the 1970s, rape is a crime of power, not sexual desire; here, the group-instigated nudity appears to have been experienced as a deliberate show of inescapable force on the part of the institution.

d. Nudity as Worse than Death

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689 Basoglu and Salcioglu, A Mental Healthcare Model, 41.

690 See, e.g., Susan Brownmiller, Against Our Will: Men, Women, and Rape (1975, rep’t Ballantine Books 1993) (introducing the notion of rape as a tool of war).
Sexual violence, historically, has been considered a lesser crime than murder, when it has been considered a crime at all; nudity is even less frequently conceived as criminal. Yet many former detainees described their experiences with nudity as worse than death, suggesting this lesser conceptualization of nudity and rape may not always be appropriate, and that context—including the cultural background of both perpetrator and victim—should be considered when determining whether detainment-related practices are appropriately considered cruel, inhuman or degrading, or even torture.

While many individuals may discount the “worse than death” claim as merely rhetorical, there is significant reason to think that in some cases it is not. The first is philosophical. Many scholars who have delved deeply into the violation of dignity that lies at the heart of human rights abuses have concluded that there are, indeed, some categories of wrongs that may be experienced as worse than death. While death is often believed to be the worst thing that can happen to someone because of the extreme threat it poses to one’s ongoing physical existence, this emphasis on the physical ignores both the psychological and symbolic harms that are inflicted during certain acts. Torture is one example of an extreme harm that is often conceived as physical. A full understanding that physical torture is not just concrete, but has psychological and—to a far less recognized extent—symbolic ramifications helps clarify why, when the symbolic and psychological harms outweigh the physical, something like rape could be considered worse than death. Kuch begins to get at this with his explanation of recognition theory when he notes that “identities can be threatened or wounded by acts of misrecognition or disrespect … because recognition is constitutive of social and personal identity.” Indeed, Avishai Margalit has insightfully observed that “human beings are creatures capable of feeling pain and suffering not only as a result of physically painful acts but also as a result of acts with symbolic meaning.” Thus, for Margalit (per Kuch) “humiliations are cruelties—not in the sense of physical cruelties, but symbolic cruelties.”

The second reason to believe that the claim that rape was experienced as worse than death may not just be rhetorical, stated solely for emphasis or other effect, is empirical. For example, the degree to which nudity was experienced as an extreme violation—much more so than many non-Muslim westerners and/or non-prisoners might imagine it—is particularly evident in the following response to a query regarding an Afghani man’s worst experience in Bagram and Kandahar: “The greatest violence and experience I have suffered is just nudity. Ever


Hannes Kuch has explained regarding torture that while torture does not necessarily lead to the victim’s death, “this is not to say that torture is a less extreme form of physical violence than murder. On the contrary, the endless extension of inflicting pain—together with the concomitant aim to keep the victim alive and conscious—is definitely one of the most extreme forms of physical violence.”


Kuch, “The Rituality of Humiliation,” 47.
since, if they have killed us, it wouldn’t have been any sorrow to me.”

To help put this quote in perspective, this man rated his nudity as worse than having too little water to drink and having been forced to kneel in hot sand for so long that his knees became infected. These relative valuations whereby many described dignitary and religious harms as less bearable than physical brutality is especially important to note, and critical for making sure that non-Western and/or non-Christian interpretations of cruel, inhuman and degrading treatment are considered when evaluating whether prison-based treatment and conditions are potentially criminal. As Manfred Nowak explains in his forward to the 2011 book *Humiliation, Degradation, Dehumanization*, “[m]any victims … whom I interviewed in my function as Special Rapporteur on Torture in all world regions …reached a stage in which they regarded death as a relief compared to the suffering of being further dehumanized.”

This man was far from alone in his reaction; in several interviews, forced nudity is described as worse than death. As one man explains: “The worst experience, before I was taken to Guantánamo, was taking off my clothes. … I [told my guard this was against Islam] but they still asked. That was the worst experience for me.” In an attempt to illustrate just how bad this experience was, he adds, “I would not mind if the entire members of my family had died, but this action should not have been done to me.” His experience plunged him into such a deep depression that since then “sometimes I cannot control my mind. I get angry very soon. And sometimes when I’m talking to people, I can’t open my mouth. And I got this from that time.”

696 Reflecting this extreme distress, many men at Guantánamo have attempted suicide. Of the interviews reflected here, eight include mention of having tried to kill one’s self. While this reflects only 10 percent of the interviews, this number is relatively high due to Islam’s strong prohibition against suicide. Contrary to the Guantánamo camp commander’s allegation that suicide attempts at Guantánamo were an “act of asymmetric warfare”—as martyrdom, and thus as a type of resistance against the United States (see, e.g., “Guantánamo Suicides ‘Acts of War’,” BBC News, 11 June 2006; Charlie Savage, “As Acts of War or Despair, Suicides Rattle a Prison,” NY Times, 24 April 2011)—at least seven of them are described as sincere attempts to kill one’s self. A total of six detainees have reportedly committed suicide at Guantánamo to date (Baher Azmy, “The Face of Indefinite Detention,” NY Times, 14 Sept. 2012), although hundreds of attempts have been made, likely for diverse reasons. One reason why the number of successful suicides is not higher is because of the strong punishments of institutional personnel that appear to result if guards are unable to prevent such suicides. Thus, there was intense pressure on guards, in most cases, to ensure suicide attempts were not effectuated. Detainees do appear to have picked up on this, and in some cases have staged mass suicides (or attempted mass suicides) as a means to create an additional burden for guards, likely prompting the allegation of asymmetrical warfare, above. This phenomenon is discussed further in this dissertation’s chapter on resistance.

697 Nowak at vi. This directly counters the frequent assumption of many lawmakers and law enforcers that death is the ultimate wrong, and thus that against which all other harms should be measured. While I do not mean to suggest that murder is less than horrific, such understandings demonstrate how the valuation of various wrongs is frequently contingent and contested. Indeed, all harms must be considered in context in order to reveal the full extent of the harm that has been experienced, and the wrong that has been committed.
As yet another man explains regarding his worst experience in Bagram, “The worst experience for me was they took off my clothes and were taking my pictures. We know we are Afghans and Muslims. We have seen the Russians came to Afghanistan, but they had never treated people this way. They were killing people but not treated this way. I prefer killing more than being treated this way.”

And as a translator explained in broken English on behalf of another former detainee:

[T]he worst experience for them as Muslims and Arabs, it was when they were taking them to go to have their showers. They would force them to go in groups and there were normally five people going to have a shower together. And they have to go all the way to the place where they have their showers naked and from them, I mean, would you accept that? Maybe for Europeans and Westerners it’s fine, but for us as Arabs and Muslims, we are not used to that. And he said, generally, if I can die from hanging that torture and that kind of humiliating … So … complete humiliation comes to our religion, traditions, and things that are related to our ideology and values.

Another man reported that,

When I [was] first brought to Guantánamo, right after we got off the plane, and they were in-processing us before they took us to our cell blocks, front of 20, 30 people, they forced to, uh, did they forcefully get us naked. There’s female guards there, twenty to thirty people standing there watching us, and then they just cut off all clothes with the scissors, and they just made us naked. [At this point the translator begins speaking as herself.] And I asked him how did you feel about that? And he says, um, he said it is the worst feel ever a man can experience, and in our culture, in our religion, the men are very private, your private parts, you don’t get naked in front of anybody, you don’t show private parts to anybody, and the—you are forcefully being naked in front of twenty, thirty people, standing there, watching you, you are naked, and that is the worst feeling ever, you, you feel like you want to die, but you can’t die, and they—you feel like nothing, you just feel so lost, so small, so terrible.

Ultimately, nudity appears to have served not only to devastate and humiliate detainees, but to dehumanize and (as explained in the next section) harass. Alternately, it appears to have occurred as a first step toward exacerbated forms of abuse. As Stemple has noted, “the use of nudity as an interrogation technique was developed by the military and used in US military

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699 The cultural aspects of sexual violence and war need significant additional research. For example, whereas most domestic rape is reportedly intra-racial, the dynamic in the context of war is less clear. It would be particularly interesting to evaluate whether there are different frequencies of sexual violence among inter-racial enemies versus intra-racial enemies, and if so, what those variations are, and why. While it seems reasonable to hypothesize that inter-racial rates of sexual violence would be relatively high given a greater presumed ability on the part of perpetrators to dehumanize their victims, this hypothesis is necessarily in tension with the relatively high rates of intra-racial violence domestically (unless, of course, that latter rate is due to proximity and note to factors inherent to race).
operations in Afghanistan and [at Guantánamo]. Then imported to Iraq, the use of forced nudity there has been credited in relevant scholarship with setting the stage for the dehumanization of detainees and an escalation of abuse.”

ii. Sexualized Harassment

Sexualized harassment was generally reported as taking one of three forms. First, there were many reports in which “gaze” was prominent. This ranged from sexualized interactions such as having female soldiers stare at naked male detainees, to photographing men while they were naked, to refusing to allow men to cover their private areas, to mocking men’s bodies—all phenomena that are tightly interwoven with detainee nudity. Second, the use of sexual imagery as a means of humiliation was also reported: while nudity was predominately about humiliating detainees by exposing their own bodies, sexual imagery relied on the exposure of others’ bodies. This included forcing detainees to look at pornography or watch either female and/or female and male personnel engage in implicitly and/or explicitly sexual acts. Third, some sexual touching was reported, although these descriptions tended to be more cryptic, or described as having happened to others. Examples of each of these phenomena, including several instances where the various tactics were experienced in concert, are described below.

One man, who was only sixteen when he was detained, tells the story of how a female guard regularly flirted with or picked on him (he wasn’t sure which). One night, he woke and started to bathe in preparation for prayer. He put up sheets to hide his body while he cleaned himself. However, the female MP came over and stood outside his cell. When he told her to go away because he was naked, she stayed and watched him, refusing to go. Ultimately he threatened to throw water on her if she wouldn’t go away. While he claims he never did throw the water, the next day she wrote him up for having done so. He reports that because of her behavior, he received “four times the punishments;” when she left at the end of her deployment, she apologized to him for her behavior, and gave him a new toothbrush in an attempt to make amends.

Another former detainee, now living in Bahrain, describes a combination of nudity, pornography, and sexual touching. He says he was never “sexually humiliated” himself, but that such practices happened to other prisoners. When asked what he heard, he explains:

700 Stemple, “Male Rape,” 614 (citing Anthony R. Jones and George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade (2005), available at http://www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf). Relatively, scholars have observed that violence may be “the result of a character structure that is typically based on emotional distance from others,” Kaufman, “Working with Men and Boys,” 214, a phenomenon that seems intimately tied to dehumanization. Emotional distance was actively fostered at Guantánamo both by the inadvertent dehumanization of prisoners and training that emphasized the need for soldiers to remain emotionally disconnected from detainees.

701 Several former detainees—particularly those from the west—shared stories of a small handful of guards (“good” guards) who expressed regret or remorse, either for their own treatment of detainees, or on behalf of the American government.
Some of the prisoners they were taken to a room and they were naked and they would handcuff them and bring some women in the room and the women would be naked as well and they would be touching them. So some of them during interrogation they would bring women who were almost naked in front of them as well … and they would ask them during the interrogation that if you answer our questions and everything we could give you some time with these women, do you want to spend time with them? They would offer some of the prisoners pornographic films and magazines during the interrogations as well. He says he was not interrogated by women [so] there was no problem. He says one of the female interrogators was not wearing a lot of clothes and he was not looking at her, so she asked him, why don’t you look at me? He said “it’s up to me if I wanna look at [you] or not.” He says it did not happen with everyone, there were about 750 men, it is not possible to do that with every single person.

This exchange not only suggests a variety of sexual humiliation methods used in the context of interrogation, but that the military might have used some female personnel as potential or pretend sex workers, or that female soldiers were volunteering to pose as such.

In addition, many former detainees spoke of being photographed while naked. While some described this as occurring at intake, which suggests it could have been done for identification and documentation, others describe it as occurring during interrogations or other contexts. This sense of an exploitive “gaze” hints at pornography, especially since many of the men perceived no purpose for the photographing other than degradation or humiliation. As one British man explains when asked if he was treated all right or if he experienced any humiliating treatment, “it was humiliating from A to Z. … We were strip-searched; photos were taken while we were naked. … [T]here was no mercy, no luck. Some people were treated more bad than others. Everyone experience[d] torture, they call it torture.”

Mockery of detainees’ bodies often accompanied nudity, and thus operated as a form of sexualized harassment. One man describes the humiliation he experienced en route to Guantánamo as his worst experience. “When we were taken to Guantánamo they were taking us one by one and put us on the ground, our faces towards the ground. They again ripped off our clothes and we were standing naked. They chained us while we were naked. They made us walk for almost one hour while we were naked. And there were male and female soldiers laughing at us and taking our photos.”

Another interviewee explains that he would be taken to the bathroom with a lot of punishments. … I would be wearing the hood. … The bathroom I was taken to was completely against the Afghan culture and traditions. The bathroom was as big as this cupboard, and everybody could see me when they told me to go to the bathroom …. And the toilet was up, and I was unable to climb the toilet. So first I had to put my hands and then legs and then just sit on the toilet. And they had put double handcuffs on my hands, and sometimes it was very difficult for me to take off my trousers. And then the soldiers had to take of my trousers. There were two soldiers, a male and a female soldier. And when we were sitting on the

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toilets, the soldiers were sitting in front of us. I was asking them not to look at us. “Just close your eyes or look to some other places.” They [would] tell me, “No, it is our rule.” Sometimes they were making fun of me. They were telling to each other, look at his private parts.

Such mockery seems to have been fairly common, and served to enhance the degradation affiliated with nudity. For example, when asked about the different forms of punishment he experienced, one man explained “when we are sitting on the toilet and we want to cover up our genitals … they don’t allow us to use something to cover, and they just stand in front of us and ask us to stand up, and it just, uh, different ways of humiliation and they just make fun of us and laugh, for them it is like a game.”

One former detainee from France stated that his sexual humiliation was his worst interrogation-related experience:

Former Detainee: Well it’s difficult to say what was the most difficult to bear. Probably it was when you had to remain tied for a very long time in the dark with a very strong air conditioning blowing on you, it was very cold. And it [got] worse after the visit of the French police. There was also the incident of the women.

Interviewer: Women?

Former Detainee: Yes, a woman undressed in front of us, it was a humiliation for us. But the most painful of all was to wait for a very long time not knowing what was going to happen. We were cold, we’d hurt, and we just kept waiting there not knowing what. But it was not always the same, it was different. It was not systematic, there were always differences and it lasted more or less time, sometimes it was during the day, sometimes it was during the night.

Interviewer: Just because I think it’s important, I don’t want to dwell on it, but, can you tell us more about what happened when this woman undressed, what was that about?

Former Detainee: Well, there was, they brought in this woman. It was a civilian interrogator and they asked me if I was a member of al-Qaeda, if I was planning to commit some more attacks, and of course I said no, I said no. Okay, there was this lady who came, who I guess was military but she was in civilian clothes. [An interrogator] told me, well, we’ll leave you with her, maybe this will change your mind. I kept my head down, I did not know what was going on, I was trying not to talk to her, but she started to undress. And while she was talking to me in English, this lasted for a long time. I was still looking down, I was not looking at her, I did not know if she was completely naked or still in her underwear. But she started to touch me and then after a while, after about an hour, a guard came in and says okay, it’s not working, that’s enough. And I could hear the laughter of the people who
were watching this from behind the mirror, the glass, the one-way window. And I could hear the laughter, and this was just a very humiliating experience. This was probably the worst part.

Interviewer: When you were being interrogated, were there ever any psychologists, that you thought people were psychologists, or any doctors that came into the room?

Former Detainee: No it was, there was no way to know, we knew there were people watching because they were behind the one-way mirror, and we could hear whispers sometimes, and people being there. But we had no idea who they were. And also there was a camera and we could see that the camera was filming the room.

Another former detainee from the middle east told a similar story through his interpreter when asked about the living conditions in Guantánamo:

[H]e said the living conditions was always the same, but it was mainly what their focus was on, the psychological pressure and humiliation. And sometimes they would come into your room and take your blanket away and your mattress and take your cleaning products, if you have any. And then, sometimes they would just come to you and enter their hands into your private parts and humiliate you. Then I asked him, do you think that they were trying to have sexual contact with you because they needed it? And he—and some people had to accept because they are there alone? He said, I’m sure some did that—you know you cannot resist sometimes, but we don’t know, it depends on the people themselves. But we knew that they need to humiliate us more than anything. And it was done by men and women and it was an ongoing thing.

Importantly, he does not tie this forced touching to the sexual needs of his abusers, but to their need to humiliate and degrade.

Another former detainee, from western Europe, describes sexual humiliation that occurred during his “horrible” first night in Kandahar. After being beaten, he and other men were taken to a tent where there was a large group of people,

and we were undressed and were made to stand naked in front of them, some of them give us some sort of examination quickly in front of everybody including women. … [A]nd we were told if you move there were people with machine guns in towers around you and you will be shot immediately. …[A]nd then we were taken to a place where it was like, you’ve seen those pictures, it’s like Abu Ghraib. But what they did with Abu Ghraib they did it first with us in Kandahar. They would pile us up one on top of each other and most of us were naked. I still had my pants on but the guys on top of the pile were completely naked. What happened is they throw us into a small room and there is not enough room for everyone and they told us, they tell us, if you move we shoot you, so we don’t move. We stay where we are, so they keep piling, they keep sending people in, and they just pile on top of each other. And nobody dares to move. … This was their “welcome night,” as they called it.
Another former detainee, also from western Europe, describes a nearly identical situation, explaining that he and a number of other detainees were put in a warehouse, naked and hooded and handcuffed, and that soldiers were taking pictures of them. Later, he explains this was his worst experience in Kandahar, when they were “all standing naked and still handcuffed, very close to each other,” with pictures and videos being shot, a situation he describes as "very humiliating and … very violent because they were hitting us.” They were not allowed to use the bathroom, and were extremely cold. Prior to arriving at the warehouse, “they gave this medical exam, which included a finger inserted in the anus.” The nudity and anal exam would be repeated upon his arrival at Guantánamo.

One man from the middle east discussed his belief that the reason women were present during interrogations was to humiliate and otherwise degrade prisoners. In response to his interpreter’s query as to whether the women were “just present there or [were they] trying to intimidate them or to kind of abuse them sexually,” he replies, “yes, that was the main reason for them to be there so that they knew that they weren’t—that was something that is not supposed to be done in Islam. And so they knew it was a, like a weakness, that they played on.” When prompted to describe an incident, the translator explains that “he said on one occasion that he was in the room and being interrogated and a woman with—an American female soldier, along with an American messenger—that they were having sex in front of him.”

In an interview with a former detainee who now resides near the border between Europe and the Middle East, both evidence of sexualized harassment—and the reluctance to talk about it—are evident. When asked about any treatment he felt was particularly humiliating or degrading, he answers “[b]eating was excessive. So they took off our clothes completely. I don’t want any further questions, but sexual harassment [by] women.” Later, when asked about his worst experience in American custody prior to Guantánamo, he answered “The worst was … ripping off our clothes, sexual harassment, and also disrespect to Qu'ran.” He also explains that in preparation for his transport to Guantánamo, women soldiers tore off the blue suits that he and fellow detainees had been wearing. When asked if he was forced to be naked in front of women, he answered, “Yes, and they were doing it on purpose.”

Reluctance to discuss sexual humiliation may also be inferred from the following exchange, although whether that is what the interviewee was referencing cannot be stated with certainty. After talking about how the conditions in Kandahar were particularly bad, the translator asks the interviewer to hold on for a second. While the translator and interviewee began to talk quietly and at length, a second translator says to the interviewer, “He’s speaking Pashtu, so I don’t know exactly what he’s saying, but I—from what I can tell, he’s telling him that it’s okay that we’re with women, he should still tell every single thing that he experienced, because a lot—a lot of things that happened to him were particularly bad, and—and he doesn’t feel comfortable maybe saying that in front of us.” When the first translator resumes speaking, it is only to say quite vaguely, “so yeah, it was the things we covered earlier … all of this was very oppressive for me, and all of it was very bad.”

Sexualized harassment also took the form of threats of abuse. For example, one former detainee from Afghanistan explains that he heard many rumors about the sexual abuse of prisoners, although he says he wasn’t sexually abused himself. However, he reports that in Bagram he was told by American interrogators that detainees were being taken to Guantánamo, “where we would be sexually attacked by dogs.” Another Afghani man was purportedly told
during interrogations, prior to being sent to Guantánamo, that “if you don’t confess, we will send you to Guantánamo. There are some gays and homosexual activities and they will do very, very bad actions with you on a human base.”

Anwar, introduced in chapter four, spoke of fondling as an aspect of a larger program designed to humiliate. He explains that soldiers would bring in females to “touch” the detainees during Ramadan, “do all sorts of indecent things.” He describes how one guy was taken to interrogation, where female “panties” were put on him; the military personnel would then make fun of him. In addition to putting bin Laden’s picture on his back, they put a naked woman’s picture on his head, all of this during Ramadan.

Stemple has noted in the context of Abu Ghraib that harassing “acts such as humiliating nude poses [and] the use of women’s underwear … seemed designed as a direct affront to the victim’s masculine identity.” As I suggested earlier, where gender relations and masculinity is tied to religion, victims may also experience such harassment as an affront to their religious identity. The use of cameras, both film and photographic, to record such abuses—justified as necessary to document identity or create a record of military practices and their results—was experienced and comes across in the interviews as pretextual; indeed, as Stemple reports, “the use of a camera to record the abuse at Abu Ghraib has been described as a ‘shame multiplier,’ extending the humiliation beyond the time and place in which it occurred.”

iii. Cavity Searches, Prostate Exams and Rape

While the rape of a woman may operate as a means to turn her own gender against her—to degrade her gender and remind her of her “place”—for men it may have alternate meanings. As suggested in the literature review above, not only is male rape about degradation but about demasculinization, bringing men down to the lesser status of women through a show of masculinized dominance and authority, whether the perpetrators are male or female.

Perhaps unsurprisingly given the sense of shame frequently associated with sexualized violence, most men who did speak of rape spoke about it in very vague terms. One former detainee was quite explicit about the general reluctance to talk about sexual acts: “So in Kandahar I was hung up by my wrists with my eyes closed and people would come by and hit me, there was physical torture and beatings and there was sexual torture and a lot of people don’t want to say it but it happens.”

Also typical was discussing rape as having happened to other detainees. As one man from Jordan explains through his translator in response to questions regarding his worst Guantánamo-related experience:

Well one of the worst things happened to him [was] when they took him for no reason and they locked him for one month in a private cell. They took everything from him. The cell was very cold. The A/C was at this highest level and it was very cold, he was nude. There were women, some of the women, they used to perform some sexual acts, touching their organs. And yes, he was also subjected to sexual harassment and sexual abuses. Some of the detainees were raped, either from women or men.

As mentioned earlier, some of the most extreme forms of sexual violence were reported as taking place during transport and/or intake, or in the context of cavity searches conducted for penological or medical purposes. While several former detainees acknowledge the justifications for such searches, they also described the occurrences—which were often conducted by doctors—as especially degrading.

One former detainee from Afghanistan relayed how his beard was forcibly shaved and he was placed with other detainees, none of whom were permitted to sleep or use the toilet for almost a day in anticipation of traveling to Guantánamo. He claims they were violated by doctors both before and after transport.

_In the afternoon, it was almost four o’clock, we were checked again by the doctors. I can’t tell you what kind of a checkup was it, it was just, like, so brutal and shameless and degrading. After that we were taken to the plane. And we were … we were in such a big grief and torture on the plane … . After we landed in GTMO, some soldiers came and then, some soldiers came and took us to the toilets, and they made us staying under the showers, and then they brought some brushes which are usual for carpets and they started to rub our body on those harsh and hard brushes, in order to cause pain to our body. Afterwards, I—afterwards I was taken to the doctor and the doctor checked me in a very, very brutal and shameless and degrading way again._

While many interviewees reported that doctors treated them well, others saved their harshest condemnation for members of the medical profession. As one former detainee from Afghanistan relayed:

**Former Detainee:** The first time we arrived in Guantánamo we were checked out by doctors there but again we were insulted there too and after that we were taken to isolation room, cells.

**Interviewer:** When you say you were insulted do you mean that they forced you to be naked?

**Former Detainee:** They were taking off our clothes as our hands were shackled. They took off our clothes by force. They ripped them off and then they made us take shower. After that we were taken to isolation cells.

After this he was kept in isolation for a month. In his account he seems skeptical that these were truly doctors, or alternately, that these are things a doctor either should or would do. This seems,

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704 Another former detainee, when asked if he had heard about detainees being treated poorly by doctors, reported that this especially occurred following the November 2002 arrival of General Miller as commanding officer at Guantánamo. He explained that General Miller gave the interrogators enhanced control over detainees. According to this individual, when one detainee refused to release information to interrogators, those interrogators stopped his medical treatment. Another detainee, who was on the “frequent flyer” plan, commenced a hunger strike; he was ultimately subjected to force feeding through tubes, which violates the World Health Organization’s ethical guidelines for doctors. He also explained that injections were frequently forced on detainees, who would be subjected to the Extreme Reaction Force if they did not voluntarily subject themselves to the shots.
ultimately, to have become an issue of trust: the roughness with which he alleges to have been treated is also noteworthy.

The trauma of sexualized violence is particularly evident in the following portrayal of the worst experience of one Uighur man, as relayed by his translator:

The worst experience ever for him is, he says he—while, while in Kandahar, but then I ask how about in Guantánamo, he says yes, in Guantánamo too, so in, while he was in Kandahar and Guantánamo something that he has experience, which is for Muslim men, the Muslim people in the Muslim world, and for Uighurs as well, the Uighur culture, being naked, for a man to be naked in public, in front of other people, especially [in] front of woman, other women there, is something that they cannot bear, that is the most humiliating situation. That is something he has never ever heard anywhere, that [he] never thought that he will experience personally himself, but while he was in Kandahar and also in Guantánamo as well, they strip them naked, take pictures, and even the female soldiers are taking pictures and standing in front of them, you know, when they are naked, and … how they checked their retinal, was inserting fingers or stuff like that … those are the kind of searches that they have faced in Guantánamo and they—in Kandahar—was the worst experience ever for him.

In other cases, it wasn’t penetration itself, but the threat of penetration, that operated as a source of extreme distress. The next man, from Afghanistan, describes his horror in detail as he relays his first interaction with Americans, prior to and immediately after his delivery to Bagram. Regarding his capture, he relates the following:

Former Detainee: Of course it was very painful. I was held by a man on my right [side] who was speaking Pashto. I have no idea whether he was Afghan or Afghan-American, and I heard that guy told the American Commander to just put a stamp of Guantánamo on this guy. When I opened my eyes, an American soldier … put his hands on my eyes and was telling me not to look any other places, just look at him directly. … And the soldier who was standing in front of me, he was telling me “just look at me.” And he was telling us about the conditions in Bagram. My hands were tied very tightly in the back. He was speaking very loudly and he was not talking like a human being. He was talking like an animal. And he was talking to me very closely and his spit would come on my face. And that guy was telling me, “Do you know me? I’m a dog.”

Interviewer: He said, “I am a dog,” or “I am God?”

Former Detainee: He was saying, “I’m a dog.”

Interviewer: What did you think was going to happen to you?

Former Detainee: What we thought and hoped of Bagram was completely opposite. And it was even worse than what we just experienced before that.

Interviewer: How was it worse?
Former Detainee: It was very worse, and there is a lot of stuff that I am going to just say. When that guy was done with his instructions and conditions about Bagram, another soldier came with scissors and that soldier untied my hands from the back and put handcuffs on my hands. I was surrounded by six to seven American soldiers and one translator. The American soldier who untied my hands, he just cut off my trousers with the scissors and just took off the trousers and my shirt. They took [off] my shirt, my clothes. It is a very big insult for Afghans, especially for Pashtuns, and even to those who are like a very big enemy of him, they would never do that, like take off their clothes. At that time I prayed to my God, just give me death. I want to die, not to see this condition. When they took off my clothes, another guy who said that he was a doctor, he said, “I’m going to vaccinate you.” He injected me in the back. He also gave me an injection on left hand. After that they give me orange prison uniforms. The trousers was very big. I could not hold the trousers. They were always coming down. From here they pulled me away with them and took me to another cell where there were two Americans and one translator in the cell. One of the Americans did not have any clothes on his body. He had only shorts. The other American had a very big chain in his hand and he was just moving it like this. They looked like hungry tigers. The Americans had tattoos, tattoos of snakes and scorpions, tigers and teeth of tigers. They guy who had the chain, he was just moving the chain and looking at me, staring at me. The first question they asked me what my name was. After asking me my name, the bare American soldier came and hold me in the neck and just hit me with the wall. And he was shouting very loudly and he was saying, “You are a liar.” He was holding my neck with one hand and was hitting my head with the wall with his other hand. Then he sat down and wrote my name down. And then he asked me my father’s name. After he asked me mother’s name. Afghans, particularly Pashtuns, will never tell strangers their mother’s name because that is a big shy for them. Pashtuns, most of Pashtuns, call their mothers aday [sp?] like mom, sometimes mommy. They call it aday, I said, “We call my mother aday, but I don’t know her name.” He punished me a lot for that, and they were saying that you should tell us your mother’s name. I was telling them “if I’m a criminal, then I’m a criminal, ask me. My mother is not a criminal. Why are you asking me my mother’s
name?” They tortured me for almost two hours, and they wrote my name, my father’s name, the district and province where I come from. And then they stopped the interrogation because I didn’t tell them my mother’s name. After that they put a black hood on my head and tied it on my neck. They took me to another place. I could not see the place where it was I was taken, but I could feel there was a bar gate. I was taken to that room and they tied my hands to the ceiling. My hands were handcuffed, and then the middle of the handcuff was tied in the ceiling and they were just pulling me up. … They pulled me until blood came out of my hands and my skin was peeled. And the soldier was shouting very loudly and was saying “Where is that mother fucking soldier to attack him sexually?” And then that soldier from another corner saying, “I’m here.” And then this soldier was telling him, “Are you ready?” And he was saying, “No, I’m not ready. I just sexually attacked three more prisoners. Give me five or ten minutes.” “What is your number?” (not through translator) Batch number. “What is your number?”

Interviewer: What is your number?
Former Detainee: And another soldier just held me and said, “What is your number?” As we couldn’t see the number, our eyes were shut, we couldn’t tell them my number. And after that I was taken away from that place and taken to another place. And it was the lunch time when they took us to another place.

Interviewer: The soldier who was calling for the other soldier to sexually abuse you, did you think that was going to happen, or did you think he was just trying to scare you?
Former Detainee: I thought they would sexually abuse me and I was really scared.

Interviewer: So then what happened?
Former Detainee: I just want to go to the bathroom. I’m sorry.

Interviewer: Yeah.

The sense of an extreme violation based on penetration has a parallel in other experiences, particularly those that occurred during intake. One prisoner, when he first arrived at Guantánamo and saw the American flag, thought “They’re going to treat me well here now, as we’re in America.” However this initial thought was quickly destroyed. After being thrown into a van, told not to move or he’d be killed, being stripped and roughly showered, he was made to lie on a bed. There was “no translator there, the women soldiers came to [us] with big injection syringes [and] took out [our] blood. They took out our blood and the soldiers who were holding us were telling us, ‘We are taking your blood and we are selling it then we are buying gold.’”

Despite how upsetting these occurrences were to detainees, many of them would probably be deemed legal based on American interpretations of cruel, inhuman and degrading
treatment and cruel and unusual punishment. In other cases, acts that may have had legitimate penal purposes and those that did not occurred in concert. This becomes apparent in the following example:

Interviewer: Okay. Okay. What treatment while you were in Bagram do you feel was especially humiliating or degrading?

[The interpreter then says to the interviewer, “he’s saying that you’re going to get – you’re a women.”]

Interviewer: I don’t mind. I don’t mind. If you feel comfortable, then I don’t mind. If you don’t feel comfortable …

Former Detainee: The first time I was taken to Bagram, they took off my clothes and they made me naked. It was an act humiliating to me. And they were touching me up - feeling you up?

Interviewer: Yeah, yeah.

Former Detainee: You got the idea?

Interviewer: Yes.

Former Detainee: With their fingers.

Interviewer: Okay. Okay.

Former Detainee: And as they were inserting their fingers in their anuses.

Interviewer: Okay, okay. Okay.

Former Detainee: And this was an act of humiliation. This action should not even be done to animals.

While, in many cases, the insertion of fingers into anuses may have been cavity searches, it is less likely that “feeling [him] up” had a benign penal purpose. Certainly, the way it was interpreted by the interviewee was not as a medical or security procedure, but as “an act of humiliation.” This practice was repeated several more times: a second time at Bagram, right before loading him on to the plane to head to Guantánamo, when taken to a doctor, and then again when taken to interrogation.

A small handful of British former detainees explicitly mentioned cavity searches. Intake tended to be a period of particularly harsh treatment, during which the United States was attempting to assert its authority and its dominance over the prisoners. The excessive violence that attended arrival at a U.S. military base is described by one of the British former detainees in the context of Kandahar: “[T]hey took us off the plane, they stripped us. They took photos…of us. They did cavity searches which I didn’t, we don’t know why they did it, just causing pain to us. And punching us, kicking us, throwing us all over the place.”

Because many of the men had no reason to be familiar with prison practices, it is certainly understandable that such cavity searches would have been construed by other prisoners as rape. Recognition of the insertion of a finger into one’s anus as a cavity search did not extend to men from all cultural backgrounds, as becomes evident in the following description of a

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705 Of course, it should be noted that the United States government’s position was that prohibitions against cruel and unusual punishment do not apply to military detainees, since they were imprisoned for purposes of preventative detention, not punishment.

Middle Eastern man’s arrival in Bagram. Chained and naked, when they arrived at Bagram the soldiers

would throw them as if they are objects out of the buses. Then they would take their clothes off because, after being transferred from the first prison to Bagram, they would force them to be naked and then they would put red clothes on them for the ride being on the bus. Once they get to the end, to Bagram, they would force them to take their clothes off and be naked and be dirty again in that way. Torture and sexual abuse would be repeated over and over.

Such practices would repeat when he was transferred to Guantánamo: “It was always the same questions … . Was always the same. They cover your face, take your clothes off, force you to have a shower in front of others and start fingering you and also like having sex with you. … And that was the systemic way of transferring you from one prison to another.” But even for those detainees who recognized these events as cavity searches, such searches were often interpreted as sexual in nature. One British former detainee explains that cavity searches were the “most horrible thing that could happen,” citing them as worse than beatings. He says that after them, he and his friends would joke and say “Oh! You got bummmed over! You got two fingers man?” to turn something serious into something funny, which he described was their “immature” way of coping.

In other cases, such practices seem to have had less of a penalogical purpose. One man from the middle east, when asked about any abuse, first discusses the psychological pressure to which he was subjected, as when he was put in a room only to find the clothing of a friend torn to shreds; he imagined his friend had been similarly cut into pieces, or that dogs had attacked him. He continues,

And when it comes to the first step of the interrogation, they first take your clothes off you and then people are there watching you. In that room, there would be, like, very strong lighting and then you are naked. Dogs are around you. For sure there was sexual abuse. They will start one finger in you, one finger in the prisoners and then they would go on with it. … The sexual abuse was something that everybody had experienced. That is what he knows.

In many cases, rape was merely alluded to, as in the following exchange. When a former detainee in Afghanistan is asked about his community’s reaction to the fact that he was in Guantánamo, his translator answers on his behalf: “A lot of things they are all thinking about this one. … And, yeah. And the—the people says he is a gay, like friendly with gay—with boy to boy.” When asked why, the translator responds: “Because they know the reality of this.” And yet another former detainee, from Yemen, answered in response to whether he had ever experienced forced nudity, “everything that you can think of or imagine happened to us.” However, another Afghani prisoner, who similarly reports having heard rumors in his community that those released from Guantánamo had been sexually abused, denies that rumor: “I have heard most of these people in our community think that a lot of prisoners in Guantánamo are sexually abused and when we are saying no, no one is sexually abused, they think that maybe we are shy of telling people of that.”

C. Implications
While the various forms of sexualized violence reported by former detainees were frequently described as humiliating and thus may appropriately be understood as an example of degrading treatment, most of the violence—on its own—may be legal under current conceptions because of a lack of any evidence of an intent to inflict severe pain and suffering. This suggests the tremendous importance of considering the cumulative effect of the prison environment and the many abuses to which detainees have been subjected in conjunction with sexualized violence when determining whether specific practices—such as nudity—should be considered cruel, inhuman and/or degrading, not only from a subjective interpretation, but an objective one.

Better integrating subjective experiences suggests that cruel, inhuman and degrading practices differ depending on culture. This suggests that cultural considerations need to be taken into account when considering which penal practices should be considered permissible in multi- and inter-cultural penal environments. As mentioned earlier in this dissertation, Abdullahi Ahmend An-Na’im has illuminated Western biases underscoring current interpretations of cruel, inhuman and degrading treatment, a concern that was first raised in the wake of World War II by members of the international community during the drafting of the Declaration of Human Rights—the document upon which later laws prohibiting cruel, inhuman and degrading treatment have been premised. An-Na’im has argued for a stronger consideration of culture when determining whether particularly practices are inhuman and/or degrading. In this chapter, I have attempted to illustrate several ways in which various forms of prison treatment may have been experienced as especially cruel, inhuman or degrading when viewed through a Muslim and/or non-Western lens—perspectives that were ignored, or, more insidiously, exploited—by detainees’ predominately non-Muslim jailors. If the intent of the prohibition against cruel, inhuman and degrading treatment is to protect the dignity of inmates, as has repeatedly been asserted, then prisoners’ perspectives must be ascertained and those practices that are most harmful, condemned.

707 Indeed, practices such as cutting off detainees’ clothes while they remained shackled, one of the practices detainees most decried, was required by Guantánamo’s Standard Operating Procedures. See Camp Delta Standard Operating Procedures (SOP), ch. 4, ¶4-8.

708 As Robertson has noted, prisons—like workplaces—are particularly conducive to sexual harassment, and when sexual harassment occurs, prisons can quickly become hostile environments, institutions “permeated with discriminatory intimidation, ridicule, and insult.” Robertson, “Cruel and Unusual,” 7-8 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 20 (1993)).


712 In the international context, see, e.g., the International Review of the Red Cross’s overview of torture and cruel, inhuman or degrading treatment at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule90. In the domestic context, see Trop v. Dulles, 356 U.S. 86, 100-01
Indeed, as noted above, the psychological disturbance resulting from sexualized violence against men is now believed to be at least as significant as that of women. Researchers are increasingly finding that sexualized violence impacts men’s sexual identities even after the period of violence has ended. For example, several studies have found that sexual assault can be followed by significant confusion about victims’ sexual orientation. According to one study, as many as seventy percent of male respondents who had experienced sexual assault reported having experienced a crisis regarding sexual orientation, while almost as many “worried about their masculinity,” regardless of the sex of the perpetrator.

Importantly, there may also be cross-cultural differences in the degree of harm that is experienced. For example, as suggested above, Western detainees at Guantánamo may have experienced many practices, such as nudity, as less harmful than their non-Western counterparts, underscoring the need for non-Western interpretations of the egregiousness of penal practices. Researchers and courts are beginning to recognize that the degree of mental suffering experienced by victims of sexual violence—as well as any physiological symptomology that might result from such mental distress—may differ based on social and cultural conditions. Although much more data on this is needed before any conclusions can be reached, this seems to have been the case at Guantánamo. For example, one former detainee from Western Europe described his experience of nudity not as humiliating, like many of the others, but surreal. At one point, he was being questioned by FBI agents about where he was from, while nude. When he mentioned where he was from, the interrogators asked, isn’t that near Stratford upon Avon? He answered yes, “the birthplace of Shakespeare.” Then, instead of discussing how insulting and degrading this episode was, he commented, “I couldn’t believe I’m standing here naked having a conversation about Shakespeare.”

In addition, cultural distance between the largely American prison personnel and the non-American detainee population may have facilitated many of the practices that detainees found to be particularly horrific. Indeed, cultural distance seems to have played an important role in both the experience and in the commission of the actions. While there is, of course, significant deviation in non-Muslim Westerners’ comfort with nudity and sex, lap dances and forced nudity may have seemed far less egregious to the American personnel instigating such occurrences than

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(1958), in which the U.S. Supreme Court famously asserts that the “basic concept underlying [the Eighth Amendment’s prohibition against cruel and unusual punishment] is nothing less than the dignity of man.” See also, more recently, Brown v. Plata, No. 09-1233 (U.S. 2011).

713 Peterson et al, supra note 2, at 19. Symptomology correlated with male sexual violence includes anger, anxiety, depression, and suicidal thoughts and acts. Id.


716 See, e.g., de Brouwer, Supranational Criminal Prosecution, 86 (citing the Celebici and Kunerac cases).

717 Research into differences in the ways in which American POWs were treated by German versus Japanese captors during World War II could prove illustrative, as could further nuancing the results based on the race and/or ethnicity of the American POW when there was variation.
to the prisoners who were the recipients. This may have relaxed constraints that would have naturally occurred where practices seem torturous across cultures. Comparative research would be helpful to investigate how forced nudity and cavity searches have been experienced by non-Muslim, Western prisoners as compared with this exclusively Muslim, mostly non-Western population, some of whom (as detailed above) tended to experience forced nudity as so horrific that they stated they would have “preferred to die” rather than be stripped naked.

Perhaps one of the most important phenomena revealed by former detainees’ reports of sexualized violence is that some forms of torture—at least those sexually violent practices that are experienced as torture—may occur inadvertently, and thus without an intent to torture and/or sexually violate anyone. As noted above, what many detainees experienced as sexualized violence may have simply been prostate exams undertaken by doctors or (even more likely) cavity searches, procedures that the United States would not consider inappropriate, let alone illegal. This may seem to justify such practices to the West.

However, when the interviews are carefully reviewed for context, a few things begin to conflict with the idea that these events were solely conducted for benign reasons and thus some practices were apparently motivated by a malignant intent. Examinations were frequently made in full view of others, in the context of extreme violence (clothes cut or ripped off, heads shaved, men thrown to the ground and stepped on, faces ground into the gravel). There was often no translator and/or no explanation, and sometimes such searches were conducted with men who had no familiarity with and/or understanding of these practices. Such practices may reflect an integral relationship between sexualized violence and the assertion of formal authority in total institutions during periods of war and other conflict. The reported experiences of former detainees also raises several questions: can cavity searches cross a line into rape? If so, when? Should rape and sexual violence be intent-based crimes? Whose perspective should law prioritize?

Waldron has suggested a valid justification on the part of institutional actors may legally obviate the degrading aspects of institutional practices. He argues, using the example of a prisoner who is shackled in order to prevent the prisoner from harming others, “in the shackling case, what is degrading is the use of chains without any valid justification. Once the justification is clear, the element of degradation evaporates. But in the interrogation case, we choose treatment that is inherently degrading because we think that it is precisely the degradation that will get the detainee to talk.”

While requiring a valid justification may adequately protect individuals from egregious practices in some contexts, it may be quite ineffective in others, especially environments that have a strong cross-cultural component. For example, even if there is a logical penal purpose for a potentially sexualized act such as nudity or a cavity search, a possible standard might be that such acts are still prohibited if the perpetrator “knew or should have known” that such an act would be especially offensive to the victim or that the victim would have little reason to comprehend the penological justifications. Alternately, if the justification eviscerates the criminality of the act, that justification should only apply if the recipient is informed of that justification in a language that he can understand and that justification is found not to have been pretextual (a point with which I believe Waldron would likely agree). At a minimum, it could be

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719 Ibid.
required that the perpetrator have someone explain what is being done and/or why, through a qualified translator.

Waldron describes sexual violence as an example of an instrumental crime, and thus one that degrades the recipient. Based on the qualitative responses analyzed here, certainly some of the practices that former detainees experienced as sexualized violence were not, in fact, instrumental, at least in the sense of the sexual gratification of the perpetrator. While abuse committed in the context of intake procedures, or in the context of interrogations, may have been instrumental in the sense that it was committed with the penological intent of breaking a prisoner’s will, such practices would not necessarily have a sexual intent, despite having been experienced as sexualized violence by detainees.

Of course, many other forms of sexualized violence (such as mocking detainees’ bodies) may have been intended to sexually humiliate prisoners. This suggests the need to think carefully about intent and the diversity of ways in which detainment-related sexualized violence can be instrumental: for example, an act could be instrumental for the individual carrying out that act (e.g., sexual fulfillment or the assertion and confirmation of masculinity) and/or instrumental for the institution (e.g., the exercise and/or enforcement of authority on the part of institutional actors to meet the institution’s objectives).

Indeed, sexualized violence would probably be instrumental in terms of satisfying the sexual needs of personnel in relatively few cases; a long history of feminist literature clarifies that sexual violence is rarely about the sexual desires of perpetrators, but about a display of dominance. Thus, it is usually not so much instrumental for sexual reasons as for humiliation’s sake—and thus about a display of dominance for either the individual perpetrators and/or the institution as a whole—something that might be considered even more degrading than the alternative. In the reports from former detainees, forced nudity and other sexualized acts seem to have particularly targeted the fact that the detainees identified as Muslim, a religion that strongly discourages nudity and physical interaction between non-married individuals. As described above, interviewees reported women interrogators straddling male detainees; stripping in front of detainees; stripping the detainees themselves; or touching detainees’ bodies. However, considering various theories of intent, the “legitimate” underlying purpose of breaking down prisoners’ resistance to interrogation and/or prison authority might be argued to protect even gratuitous humiliation from legal ramifications. This has certainly been attempted, and with a

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720 Ibid.

significant degree of success. And in some cases, cultural distance may have made some humiliating practices seem okay to those perpetrating those practices.

One of the phenomena former detainees decried was the cross-gender nature of many practices, which proved a particular affront to their masculinity by reversing the gendered paradigm of males as aggressors and females as recipients of sexualized violence. While it is not illegal to have women guard male military prisoners, it should be stressed that even in the United States such cross-gender practices have been frowned upon in some contexts because of the potential psychological harm that can result from the affront to one’s dignity.

For example, in 2010 the American Bar Association approved a revised and updated Standards on the Treatment of Prisoners, which was intended to serve as a “useful source of insight for courts and correctional administrators.” Those standards explicitly state, in the section titled “Personal Dignity,” that [c]orrectional authorities should treat prisoners in a manner that respects their human dignity, and should not subject them to harassment, bullying, or disparaging language or treatment, or to invidious discrimination based on race, gender, sexual orientation, gender identity, religion, language, national origin, citizenship, age, or

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physical or mental disability.” In addition, and more specific to gender, “[e]xcept in exigent situations, a search of a prisoner’s body, including a pat-down search or a visual search of the prisoner’s private bodily areas, should be conducted by correctional staff of the same gender as the prisoner. Pat-down searchers and other clothed body searches should be brief and avoid unnecessary force, embarrassment, and indignity to the prisoner.” Further, “[c]orrectional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner’s private bodily areas.”

While the ABA Standards are not binding, they do hold persuasive sway and set a general norm for acceptable prison practices. Although military and civilian contractors may have justifiably needed to engage female personnel in the guarding and washing of male detainees due to personnel constraints, gratuitous harms should never be excused.

For the female soldiers who stripped in front of detainees, gave lap dances—even though they’re technically the perpetrators, might some of them also be victims? I do not mean to suggest that female personnel always had less than full agency; they may have willingly participated in those events that were experienced as sexually egregious, may have even suggested them. However, coercion could have also occurred in several ways: first, directly by their peers or superiors, and second, by a climate of institutionalized masculinity to which they were attempting to conform. Either way, there may have been severe penalties—explicit and implicit, professional and personal—attached to nonconformance.

The use of gender to humiliate prisoners also raises deeper questions regarding whom such practices degrade beyond prisoners themselves, for example when pictures of naked women or women’s underwear are used as tools of degradation. In what ways does male sexual violence, including sexual harassment that relies on symbols of femininity, victimize not only the men who are subjected to such treatment, but women more generally?

Also worthy of further exploration are the ways in which detainment-related nudity and sexual violence challenged and exploited detainees’ identities. The many references that characterized forced nudity and other forms of sexualized violence as insults against Islam suggest they threatened men’s identities as devout Muslims. The fact that detainees were the recipients of sexualized practices also challenged their identities as men. As Basoglu and Salcioglu have observed, humiliation and related forms of sexualized violence “[are] usually observed by attacking the individual’s integrity and by violating taboos, political or religious beliefs or other values upheld by the detainee. In the case of a male detainee, inserting a baton into the anus, for instance, is not only extremely painful but also a powerful insult to his ‘manhood.’ … Threats of rape or actual rape are not only a form of uncontrollable violence but also an attack on the individual’s social standing, particularly in traditional societies.” Here, sexualized violence against detainees ultimately threatened, demeaned and attacked their identities as men, as Muslims, and as Muslim men.

724 Ibid., standard 23-7.1(a).
725 Ibid., standard 23-7.9 (b)-(c).
726 Ibid., standard 23-7.10.
727 Ibid., I (noting that previous versions have “proved a useful source of insight and guidance for courts and correctional administrators”).
728 Basoglu and Salcioglu, A Mental Healthcare Model, 42.
Particularly noteworthy is that all of the sexualized violence relayed by former detainees involved descriptions of sexualized violence perpetrated by personnel—not fellow inmates—despite the fact that rates of inmate-to-inmate prison rape are estimated to be quite similar to staff-to-inmate rates, in domestic contexts. There may be a number of reasons for the emphasis on personnel, including but not limited to the extreme isolation in which many detainees were held, which may have reduced opportunities for inmate-on-inmate violence; that all of the detainees are Muslim, and many have a correspondingly stringent antipathy toward nudity and sexual violence, which may have minimized their likelihood of instigating violence; perceptions that interviewers were asking about harms experienced at the hands of Americans and not those “incidental” to prison life; a sense of solidarity that mitigated inter-detainee violence; and loyalty to one’s fellow prisoners, which would discourage revealing any wrongs that they committed. This list is certainly not exhaustive. However, it does suggest more research is needed to explore whether, in military detainment, inmate-to-inmate sexual violence occurs, and if so, how frequently, in what forms, and under what conditions.

The findings presented here have implications not only for the military/international context, but the domestic. Although there are significant differences between domestic prisons and military detainment—including but not limited to the fact that in the latter case individuals are more likely to be held by a political or military enemy, and that there may be variations in the structure and management of detention facilities—there are also similarities. At a minimum, the United States is an especially diverse society and thus imprisons individuals from a diversity of cultures; more careful investigation of the interaction between culture and context, on the one hand, and cruel and unusual punishment, on the other, may well be warranted.

Finally, much as with cruel, inhuman and degrading treatment, there is no single, generally accepted definition of sexual violence. However, based on the narratives above, a reasonable definition would be “any violence, physical or psychological, carried out through sexual means or by targeting sexuality”—the definition that has been adopted by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict. While this definition is quite broad, a broad definition of sexual violence is potentially useful when attempting to capture the meanings attributed by victims, so that various forms of violence

729 See, e.g., Allen J. Beck and Paige M. Harrison, Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007, U.S. Dept. of Justice (revised 2008) (estimating the national rate of nonconsensual sexual acts between prisoners at 1.3 percent, and staff sexual misconduct perpetrated against unwilling prisoners at 1.7 percent).

730 Cindy Struckman-Johnson and David Struckman-Johnson, “Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men,” 80 Prison Journal 379, 388 (2000) (explaining a reported rate of zero inmate-on-inmate rapes at one prison facility as likely due to the lockdown procedures routinely used by the facility to manage its relatively large prison population).

are not inadvertently omitted from analysis. For example, it was found in one study that asking interviewees if they had experienced “sexual violence” without defining the term “allowed participants to define rape or sexual assault for themselves,” which “has the benefit of allowing participants the autonomy to interpret their own experiences.” It also has the benefit of opening up the range of acts that might be considered sexual violence, so that diverse cultural and contextual perspectives can be taken into account.

D. Conclusion

“Murder kills the body; rape kills the soul.”

This chapter offers empirical support for the argument that a closer investigation into the role of culture in interpretations of torture and other forms of cruel, inhuman and degrading treatment is desperately needed. It also provides evidence that sexualized violence occurred at Guantánamo, Kandahar and Bagram; that sexualized violence took a variety of forms; that the experience of sexualized violence was exacerbated by the cross-cultural context of military detention; that nudity and other forms of sexualized violence constituted one of the worst (if not the worst) detention-related experiences for many men; that the harms were often long-lasting; that the kinds of sexualized violence that occurred were neither well captured by, nor remedied through, existing legal constraints; and that sexualized violence directly threatened and may have been designed to threaten detainees’ identities as Muslims and as men.

By illustrating the ways in which sexualized violence might be understood as a threat to identity and thus not only as a physical wrong, this chapter challenges the traditional categorization of rape and other forms of sexual violence as necessarily “less than” murder. Indeed, while murder focuses on the body, sexual violence is often experienced not only as a physical affront, but as a means to destroy one’s personal and social identities. In this way, it operates as a mechanism through which to enact a metaphysical assault, a means through which

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733 Ibid., 16 (citing several studies where such a technique was used, and providing as an example J.J.F. Soares, J. Luo, B. Jablonska, and O. Sundin’s research as related in “Men’s Experience of Violence: Extent, Nature and ‘Determinants,’” 16 Int’l J. of Soc. Welfare 269-277 (2007)).
734 Paraphrasing the feminist argument that rape murders the soul. See, e.g., Bridget Crawford, “Rape as Murder of the Soul,” Feminist Law Professors, Dec. 30, 2007; Anthony Ramirez, “Firsthand Experience of Rape, and Resiliency,” N.Y. Times, Dec. 28, 2007; Stacey Rae Benner, “Soul Murder, Social Death, and Humiliation: Consequences of State-sponsored Rape,” 4 N.Y. Sociologist 1 (2010); Anselm von Feuerbach, The Wild Child: The Unsolved Mystery of Kaspar Hauser (Free Press Paperbacks 1997) (translation from the 1832 German original) (Von Feuerbach is believed to have been the originator of the term “soul murder,” a phrase he first used in his descriptions of the experiences of Kaspar Hauser, a young man who was purportedly raised in a condition of total isolation and sensory deprivation in Germany during the early 1800s).

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to “kill the soul.” In addition, by providing examples of the connection between sexualized violence—a form of degradation—and threats to deeply-held identities, this chapter hopefully illuminates the role that identity can play in experiences of degradation.

Ultimately, the findings presented here strongly suggest a more careful consideration of the subjective, cross-cultural implications of prison practices is warranted, along with the cumulative nature of prison abuse and the contexts in which such abuses occur, when determining the extent to which detention-related treatment is degrading.
“Man is by nature a social animal…. Anyone who either cannot lead the common life or is so self-sufficient as not to need to, and therefore does not partake of society, is either a beast or a god.”

VII. From Man to Beast: Imprisonment and Social Death

In this chapter, I identify the ways in which social death permeates the narratives of former Guantánamo detainees. Social death, as described in this dissertation, can be thought of as the culmination of the degradation described in the preceding chapter—it is dehumanization taken to its extreme.

Many aspects of incarceration threatened detainees’ identities to such an extreme that they engendered a non-physical, but still very real, type of death. It was an experience of social death, both in Guantánamo and especially post-release, that many former detainees reported as the worst consequence of their imprisonment.

This chapter builds on the work of Orlando Patterson—who investigated the phenomenon of social death in the context of slavery—to identify the various mechanisms within the prison context that facilitated a sense of social death for some detainees. I also identify the mechanisms that extended the phenomenon for many detainees, such that they found themselves imprisoned in a form of social death even after their release. Importantly, this chapter also builds on the work of later scholars who make explicit a connection between social death, the loss of identity, and the relationship between identity and meaning.

A. What is Social Death?

The literature on social death is relatively sparse. Erving Goffman has been credited with coining the phrase, although it doesn’t appear in any of his published works: it first emerges in one of his student’s dissertations (that of David Sudnow) in the 1960s. However, it is Orlando Patterson’s book *Slavery and Social Death* that is commonly considered its seminal sociological treatment. While Patterson primarily talks about the phenomenon in relation to slaves, not prisoners, he does mention its relevance to captivity more generally. Later scholars, including

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735 Aristotle, *Politics*.
736 Orlando Patterson, *Slavery and Social Death: A Comparative Study* (Harvard University Press 1982).
739 Patterson provides several examples of the affiliation between slavery and military might: while Kwiakiutl Indians designated slaves by the root term for the verb meaning “to cut off the head,” in Ancient Greece, the official responsible for war (the war archon) was, notably, also responsible for regulating slaves. Patterson, *Slavery and Social Death*, 39-40. Perhaps most
Frances Norwood, Maureen Trudelle Schwarz, and others, have extended the concept to a variety of social experiences, including aging, alcoholism among the Navajo, and the marginalized status of women in Kenyan society.

While Patterson provides a detailed description of the origins, context and processes underlying social death, he does not offer a concise definition. However, later scholars, building upon his work, have helped summarize the term’s meaning. One of the most cogent has been provided by Avery Gordon. She states that “[s]ocial death refers to the process by which a person is socially negated or made a human non-person as the terms of their incorporation into a society: living, they nonetheless appear as if and are treated as if they were dead.” And as Frances Norwood has similarly explained in the context of aging and illness, social death “is probably best described as a series of losses—loss of identity and loss of the ability to participate in social activities and relationships that eventually culminates in a perceived disconnection from social life.”

Ultimately, both Patterson and Gordon are clear that social death is, at its core, a “relational idiom of power” and thus not solely a construct of the individual, but of the larger society in which he or she is embedded. Maureen Trudelle Schwarz, in a section of her book titled “The Making and Unmaking of Persons”—which perhaps not coincidentally echoes Elaine Scarry’s reference in her seminal description of torture as “the making and unmaking of the world”—discusses Navajo conceptions of personhood and their relationship to social death, poignantly, the legal rights of prisoners versus the general public is encapsulated in the United States Thirteenth Amendment’s abolition of slavery except where slavery is imposed as punishment for a crime—yet another example of the intimate historical relationship between slavery and criminality. U.S. Const., amend. XIII. Also see Eric Cummins discussion of civil death in The Rise and Fall of California’s Radical Prison Movement (Stanford University Press 1994), where he notes the California statutory provision that “A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead,” and thus as without legal identity from 1871 forward, becoming “civilly dead slaves of the state.”


Wanliku M. Kabira, Mashaeti Masinjila, and Milton Obote, Contesting Social Death: Essays on Gender and Culture (Kenya Oral Literature Association 1997) (discussing women’s “institutionalized marginality,” including the exclusion of women from property inheritance and participation in the “public sphere” outside the home, ibid. at x).

Avery Gordon, “Some thoughts on haunting and futurity,” 19 (pre-publication draft, since published with revisions in 10 Borderlands 1 (2011)).

Norwood, Maintenance of Life, 7.


In the case of Guantánamo detainees, the larger “society” would be the world of the prison, with the “relational idiom of power” constituted by the interaction of official personnel and their captives.

describing how within the Navajo culture, one can lose one’s social life a little at a time. As she explains, anthropological analyses have revealed that there are significant cross-cultural differences in conceptions of personhood, and that in many societies, the status of being a person “consists of the relations—ties and obligations—that obtain among human beings and other entities.”748 She then points out that in many cultural contexts ‘social life/death and physical life/death may not coincide …. This is so [for example] in the Navajo world where becoming a person is incremental. Attainment of full Navajo personhood is a gradual process accomplished through multiple social acts—thoughts, actions, rituals—including special treatment at critical points in the life cycle and continual repetition of reciprocal deeds.749

Indeed, “[n]otions of reciprocity influence both the Navajo sense of the self—perceptions of individuality and individual volition—and the Navajo person—the sum of socially sanctioned rules governing rights, prerogatives, obligations, and agency embodied in the corporeal body.”750 And as Beth Conklin and Lynn Morgan have theorized, in one conception of personhood, “social relatedness and personhood develop incrementally, so that personhood is more of an interactive process than a fixed location on a social grid. Rather than being bestowed automatically at a single point in time, personhood is acquired gradually during the lifecycle; it can exist in variant degrees, and different degrees of personhood reflect different social values. The accrual of personhood is not necessarily a one-way process; under certain conditions, personhood may be lost, attenuated, withdrawn, or denied.”751

Thus, not only is social death a relational concept, but it is also “dynamic, fluid and contested.”752 In the context of slavery in 19th-century South Africa, John Edwin Mason explains that for slaves, this contestation and fluidity around social death resulted from slaves refusing to accept the permanency of their condition.753 As he notes, in the era immediately preceding emancipation, slaves “struggled against social death, sometimes noisily, more often quietly; sometimes violently, more often surreptitiously; infrequently with arms, always with the weapons of the mind and soul.”754 As demonstrated below, the social death of former detainees both during and after imprisonment has been similarly fluid, relational, and contested.

The legislative history of the Declaration of Human Rights reveals that a concern to avoid something like social death—namely, the disappearance of individuals’ “legal personality”—was a concern of the Declaration’s drafters. John Humphrey, author of the Declaration’s first draft, was particularly adamant that the Declaration recognize the right to one’s “legal personality” as seminal. René Cassin, another of the Declaration’s primary drafters, interpreted one’s legal

748 Schwarz, “Problem Drinking,” 158.
751 Quoted in Schwarz, “Problem Drinking,” 157-158.
754 Mason, Social Death and Resurrection, 8-9 (quoting Patterson, Slavery and Social Death, 1-14, 207).
personality as “the ability ‘to be a bearer of rights, obligations and responsibilities.’” Further underscoring the relationship between the status of slaves and prisoners in international law, when Eleanor Roosevelt, chair of the UN’s Commission on Human Rights—the body tasked with drafting the Declaration—once protested that this notion of a legal personality was confusing, Cassin drew the link between the concept and the legal limitations of individuals victimized by “modern forms of slavery.” While inclusion of this right in the Declaration was heavily contested, “[e]ach time the drafters came back to the Nazi violations of it and decided that the right was too basic not to be included.” In the final draft, legal personality was, however, re-named the right to be a “person before the law,” something it was believed laypersons would more readily understand.

A variation of the form of death referenced by the Declaration is known in the United States as civil death. In her article, “When Felons Were Human,” Rebecca McLennan provides an especially helpful chronology of the evolution of civil death as it relates to convicts in the United States. Her article describes how civil death—the legal fiction that originated in medieval English law, which compels treatment of many convicts as if naturally dead both while in prison and post-release—had significant social consequences.

Some might wonder why I have chosen to focus on social death instead of civil death (the term more commonly used domestically in the context of prisoners) than legal personality (the human rights term). First, such terms refer to the legal limitations imposed on individuals as a result of their conviction. Such limits can include, for example, the inability of former convicts to vote or hold public office, enter into contracts, secure public housing, or qualify for financial aid. In this chapter I am concerned, however, with more than these legal limitations to exercising the full rights of citizenship.

756 Morsink, Universal Declaration, 44, quoting René Cassin. Indeed, the absence of the right to a legal personality was reflected in the Nazi practice of ensuring that individuals of the Jewish faith were considered “legally dead” during the regime, a practice of which the Commission would have been painfully aware due to its review of Nazi practices. Morsink has more recently illustrated the relationship between legal death and natural death by providing an example of a case that was heard in a German court during the Nazi era. There, the court deemed a man “of complete legal incompetence” by mere fact of his Jewishness: “Just as death makes someone incapable of carrying on physically, so, in the Third Reich, being a Jew made this man incapable of carrying out his duties” such that he could have the legal authority to enter into a valid contract. Morsink at 45, partially quoting Ingo Muller, Hitler’s Justice: The Courts of the Third Reich (Cambridge, Mass., Harvard University Press 1991): 116.
757 Morsink, Universal Declaration, 44.
758 Ibid.
My focus is on social death because civil death and legal personality reflect just one subset of this larger and less explored phenomenon. Ultimately, the legal limitations dictated by civil death and the absence of a legal personality are accompanied by various other social forces that culminate in a cumulative experience—for some—of a living death that extends beyond the legal plain. Second, none of the former detainees whose responses are relied upon in this dissertation were ever convicted of a crime in conjunction with their detainment, and thus for them, at least, the phenomenon of legal or civil death triggered by a conviction is irrelevant. Thus, it is a broader social stigma—not just a legal one—that dominates their testimonies. With social death, not just an individual’s legal personality is impacted, but a much wider range of social functioning.

Patterson has identified what he calls “two conceptions” of this broader notion of social death: the intrusive and extrusive modes. In the intrusive mode, slaves are the “defeated enemy” symbolically representative of the “power of the local gods, and the superior honor of the community.” According to Patterson’s second, “extrusive” conception of social death, “the dominant image of the slave [is] that of an insider who [has] fallen, one who ceased to belong and had been expelled from normal participation in the community because of a failure to meet certain minimal legal or socioeconomic norms of behavior.” The paradigmatic representatives of this latter category are the domestic destitute and, tellingly, the domestic criminal. Most illustratively, the ancient Egyptian word for “captive” was synonymous with the word signifying the “living dead.” This extrusive mode of social death similarly predominated in imperial China and in Russia, where “slavery was very closely tied to the penal system … In the eyes of the law [criminals] were nonpersons; their property was distributed to their heirs; [and] their wives could remarry.”

Patterson eloquently summarizes what he means by these two conceptions, by explaining that “in the intrusive mode the slave was conceived of as someone who did not belong because he was an outsider, while in the extrusive mode the slave became an outsider because he did not (or no longer) belonged. … The one fell because he was the enemy, the other became the enemy because he had fallen.”

According to the interviews I analyzed for purposes of this dissertation, many former detainees appear to have experienced both the intrusive and extrusive forms of social death. They generally experienced the intrusive mode of social death while incarcerated, and the extrusive

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761 Patterson, *Slavery and Social Death*, 39. Especially interesting in light of the Muslim faith of most of the Guantánamo detainees, “it is in Islamic religious and social thought that we find the purest expression of the intrusive conception of social death. The outsider was foreigner, enemy, and infidel, fit only for enslavement after the jihad, to be incorporated as the enemy within. … The slave is primarily a person taken captive in war, or carried off by force from a foreign hostile country.” Ibid., 41.

762 I would suggest it is not behavior that is at issue, but the circumstances in which one finds one’s self.

763 Patterson, *Slavery and Social Death*, 42.

764 Ibid., 43.

765 Ibid., 44. Regardless of the distinctions between these two conceptions, both ultimately culminate in a singular phenomenon: the creation of a liminal existence.
mode after their release. While Guantánamo detainees have certainly been framed as external enemies—their imprisonment justified by their war-time capture and their presumed status as "the enemy"—many interviews suggest that once returned to their homes or released to a third country, several former detainees experienced life as "the [internal] enemy because [they] had fallen," despite the lack of evidence of any participation in the terrorism of which they were accused.

B. Social Death at Guantánamo

“The very first time it was like dying … Capture, imprisonment is the closest thing to being dead that one is likely to experience in his life.”

The arrival of detainees into American custody was riddled with rumors and symbols of a more literal death, fitting preludes to the social death that followed. One interviewee’s description of his arrival leaves the sense that he has been bagged and tagged and left for dead: when first handed over to American Special Forces by the Northern Alliance in December 2001, he was strip searched, plastic ties were tightened around his wrists and ankles, and a sandbag placed over his head. He reports that the bag was then duct taped and a number written on the tape to identify him before he was set aside with other faceless detainees. Notably, in many

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766 Some might wonder why I have chosen to focus on social death instead of legal personality (the human rights term) or civil death (the term more commonly used domestically in the context of prisoners). First, such terms refer to the legal limitations imposed on individuals as a result of their conviction. Such limits can include, for example, the inability of former convicts to vote or hold public office, enter into contracts, secure public housing, or qualify for financial aid. See, e.g., a discussion of this in Eric Cummins, The Rise and Fall of California’s Radical Prison Movement (Stanford University Press 1994) and Gregory Frederick, “Prisoners Are Citizens,” PrisonerLife.com, http://www.prisonerlife.com/articles/articleID=46.cfm. In this chapter I am concerned, however, with more than these legal limitations to exercising the full rights of citizenship. My focus is on social death because civil death is just one subset of this larger and less explored phenomenon. My thesis is that the legal limitations placed on prisoners and former prisoners are accompanied by various other social forces that culminate in a cumulative experience—for some—of a living death that extends beyond the legal plain. Second, none of the former detainees whose responses are relied upon here were ever convicted of a crime in conjunction with their detainment, and thus for them, at least, the phenomenon of legal or civil death triggered by a conviction is irrelevant. Thus, it is a broader social stigma—not just a legal one—that dominates their testimonies.

767 Patterson, Slavery and Social Death, 44.


769 Indeed, as has been stated by one former senior intelligence officer, the prisoners who entered U.S. black sites during the first decade of the twentieth century entered a “netherworld,” an observation echoed in the statements of many former detainees about their time in Guantánamo and the prisons in which they were previously held. Dana Priest, “CIA Terror Suspects in Secret Prisons,” Washington Post, Nov. 2, 2005.
cultures, people’s faces are covered and their bodies labeled only after their demise.

Stories of detainees’ capture and arrival also echoed the entry into social death that has been discussed by Patterson in the context of slavery. Patterson, in his book, notes Claude Meillassoux’s earlier, highly-structural perspective on the phenomenon. In the 1970s, Meillassoux argued that social death through slavery “must be seen as a process involving several transitional phases” that ultimately culminate in a form of social negation. In the first phase, the slave is “violently uprooted” from his native context, and then “desocialized and depersonalized.” In the second phase, the slave is introduced to his master’s community, but is, paradoxically, introduced as a “nonbeing,” a process that culminates in “a kind of social death.”

Suggesting that the process of social death may operate similarly for prisoners and slaves, most former detainees experienced a parallel to the structural “phases” identified by Meillassou. Specifically, most were abducted by American or Pakistani forces and/or sold to the United States in exchange for a bounty—typically $5,000, but more for those who spoke English—much as slaves were once sold at auction. At least one former detainee made the relationship between slavery and his capture explicit. When asked whether any U.S. government authority had ever told him why he was being held in Guantánamo, he explained:

They haven’t told us, but we usually [asked] them … why were we brought to Guantánamo, and tell us our fault and our sin. Once an American soldier or officer told us in Kandahar that we were sold to them by money. Like slaves. And I told the officer that you claim that you know the rights of human, and how you buy the people or human being through the trade, and the business of human beings is prohibited all over the world. How do you do it? And he told me, “Don’t

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770 Patterson, Slavery and Social Death, 38.
771 The intimate relationship between slavery and the torture of prisoners is particularly evident in the development of international law. Under customary international law, such torture, like slavery, is *jus cogens*, meaning the prohibition is a peremptory norm from which no derogation is permitted. See Gail Miller, Defining Torture (Benjamin N. Cardozo School of Law Florsheimer Center for Constitutional Democracy): 3. Slavery and imprisonment also have a tightly interwoven history. For example, the draft War Crimes Report of the late 1940s, which provided the United Nations with a summary of Nazi practices (to which the Declaration Against Human Rights was a vehement response), explained that “prisoners of war were denied ‘adequate food, shelter, clothing, and medical attention and were forced to labor in inhuman conditions. It said that from the occupied territories whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production and similar tasks connected with the war effort.” Morsink, Universal Declaration, 41, partially quoting the War Crimes Report (W.20/p.55). Consistent with this example, captives have frequently held a dual status as both slave and prisoner.
say these words to me. It will affect you severely.”

The interviews I reviewed suggest there were five ways in which detainees, once within the U.S. political-military prison system, entered into the process of social death.

i. Death by Dehumanization

The first mechanism consisted of treating detainees as something other than human (for example, as a number, object, or animal). As explained earlier in the chapter on inhuman and degrading treatment, treatment as an object or an animal was experienced by many former detainees as among the worst to which they were subjected. Even among those detainees who experienced severe beatings, witnessed murders or suicide attempts, or endured other forms of extreme physical or psychological violence, it was this sense of having their humanity disregarded that especially threatened their identities, and thus prevailed as particularly severe. Such dehumanization facilitated the process of social death for some by “erasing” their sense of being human.

One former detainee who identifies as Uighur explained that the worst aspect of his imprisonment came after he had been declared a non-enemy combatant during a combat status review tribunal (“CSRT”) hearing. While he was initially overjoyed to hear the United States say it had no evidence against him, his joy quickly faded when he was informed that no country would take him and thus he couldn’t be released. While he had initially thought it would take just a few weeks to find a willing country, those weeks stretched into a year, at which point he and a fellow Uighur detainee were ultimately released to Albania. The latter detainee, who was also interviewed, blasted the United States for sending them to the impoverished nation. Noting that the United States is the greatest power in the world, he argued that they could have sent him to a different country, but felt that the choice to send Uighurs there was the result of a “game” between the U.S. and China, with the Uighurs mere bargaining chips in that game, and not human beings with lives, families, and interests.

ii. Death through Isolation

The second mechanism that contributed to the experience of prison-based social death was separating detainees from other humans, and thereby eliminating most aspects of their social life. This happened in two ways. First, prisoners were physically isolated from one another (typically upon their admittance to the institution and later for punishment). Second, many prisoners found themselves socially isolated from one another due to linguistic and cultural differences.

a. Solitary Confinement

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773 Treatment that denied their age or gender, for example, treating adult male detainees as children or women did not dehumanize them, but resulted in a different indignity – treating them as if of a relatively low status.
Placement in solitary confinement as a means of punishment is the paradigmatic example of forced isolation and has been discussed quite a bit in the prisons literature. For many detainees, however, it was not only in the punishment block that they experienced isolation. While many former detainees decried the infamously harsh conditions of Camp X-Ray, where they were kept in cages exposed to the elements, being moved to the more modern Camp Delta, once it was built, could be even more psychologically challenging. As noted earlier, Camps 5 and 6 were “brick to brick” replicas of American supermax facilities in Indiana and Michigan: solid-walled facilities devoid of any contact with the outside world. While exposure to the elements was significantly less than in X-Ray, in the modern Camp Delta many detainees found themselves plunged into an opposite extreme: one where it became nearly impossible to tell night from day, and especially challenging to communicate with those in nearby cells.

One former detainee from France explains that between the two prison camps

*Delta was worse. X-Ray in fact was better because we were outside, we were outdoors, we could see out, and of course sanitation was bad. … [But] we had hope when we were in X-Ray, we knew that there were journalists, they were showing us, we knew they could not keep us there indefinitely. … I remember the day I was transferred to Delta, it was absolutely horrible, because Delta was, you were in an enclosed place, it was dark … and we had kind of lost hope.*

When asked how he survived his thirty months in Delta, he answered “I don’t know how I survived, I think it’s just, I thought I was going crazy, there was a guy next to me in X-Ray, when I arrived he was fine, and then he became crazy, he went nuts. And I was looking at him and I was thinking I’m going to do the same, the same.”

Many of the men lived in this relative isolation, removed from the world and all its markers, for quite some time. One former detainee from Germany, when relaying his experiences in Camp Echo (where detainees were also isolated from one another), explained how the process of isolation was not only symbolically related to death, but threatened long-term health consequences:

*There are different kind[s] of isolations. … [T]here are regular isolations if you need to go interrogations, you need, you need to walk in the open air, the guys need to take you and walk with you to the interrogation rooms. And here you can see the sun, you can get fresh air, and it’s … they are thinking all about that, [the] people making torture rules … . in Camp Echo, you can, how I said, you can live forever without sun or fresh air. I mean, maybe [you] don’t understand it now, what is, for what it’s good to see the sun for couple minutes … you go to interrogation, even that couple seconds are helping you to stay strong. Because your body needs the sun, and you feel much better if your body gets in the sun. So, I mean, Egypt’s, Egypt’s … they [were] keeping people for couple years in the dark room, and after then they telling them that they can go home in the evening time. Most of [the prisoners] don’t know they go under the sun after, after 10 or 15 years in the dark room … couple weeks later they died because their body [is too] weak for the sun. And if they go under the sun they die. It’s a famous, famous kind of torture.*

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One interviewee endured three years in such extreme isolation that few (if any) of the other prisoners knew he was there. Another interviewee languished in isolation for more than a year before the ICRC learned of his presence; two years passed before he would have any contact with other prisoners. He credits the limited contact he had with guards, writing poetry, and memorizing the Koran as making a significant difference in his ability to mentally endure this period.

b. Cultural and Linguistic Isolation: “Social Islands”

Critically, the interviews also suggest a much less explored but just as powerful form of isolation that occurred simply by isolating detainees from others who spoke their language. This cultural and linguistic isolation created what I refer to as “social islands” within the prison facility, which operated almost as effectively (if not more so) than physical isolation as a means to eliminate social vitality, and thus the experience of being a full, living being. This was an occurrence that was so difficult to endure that some prisoners would create disturbances within the prison—even though they were individuals who prided themselves on being rule followers, and even though it meant they would likely be beaten—just to get guards to move them. Many had discovered that after you’re punished and sent to isolation, when you’re released, you’re never sent back to the same cell block as before. So some deliberately used disturbances as a tool to effectuate their transfer to a different block, just for the possibility that when they were relocated, they would be placed near another detainee who spoke their language.

Learning languages from fellow detainees and teaching them to fellow detainees became a key coping mechanism by facilitating human interaction and negating isolation—and thus served as a bridge between social islands that effectuates a resistance to social death. One former detainee from the United Kingdom explained that his greatest loss of hope came when he realized the failure of his own government to intervene on his behalf, thus rendering him (like a ghost) institutionally invisible. In the following quote, he discusses the role of language in maintaining his sanity during that particularly difficult period of lost hope, a period that the holocaust literature has established can be—quite literally—fatal for detainees. 775

Interviewer: Did you become friends with other prisoners or other prison personnel?
Former Detainee: Yeah, with a lot of prisoners. Because we, what had happened was that we'd be around a lot, and the guys next to you, that's all you need is communication really. And just to keep yourself sane, you start talk[ing] to them. If you're sitting in your cell and thinking all the time, you will go crazy. So what we used to do was teach people English. … what we started to do was just like teach them basic English and we starting learning Arabic as well, so we could like

775 Psychologists at concentration camps in Europe during World War II have noted that whenever a detainee lost all hope, death was frequently around the corner. See, e.g., Bruno Bettelheim, Surviving and Other Essays (New York: Alfred A. Knopf 1979) (first printed 1952); Viktor E. Frankl, Man’s Search for Meaning (New York: Pocket Publishers 1997) (originally published in 1946).
translate for the guys next to us. That was like to keep ourselves sane really.

Staying sane ultimately became a critical objective for safeguarding one’s metaphysical self and avoiding crossing over into a type of living death.

iii. Sensory Deprivation

The third mechanism for facilitating social death was, in some ways, a hybrid of the other two (dehumanization and isolation). In this case, it involved separating detainees not just from other people but from themselves, by negating the five senses that are almost definitional to human life.

The use of "sensory deprivation," whereby military personnel placed goggles over detainees’ eyes, gloves over their hands, headsets over their ears, and hoods over their heads cut prisoners off from almost all sensory experience, nearly destroying their ability to perceive and communicate with the world around them. It also damaged their ability to perceive themselves: this technique was known to produce auditory, visual, and tactile hallucinations in as little as six hours, and was a form of treatment to which all of the interview subjects were at one time subjected, most during transport.776

In some ways, sensory deprivation proved the ultimate threat to one’s social vitality—not only did it interfere with detainees’ ability to effectively communicate one another, but it effectuated the ultimate erasure of one’s previous identity and personality, and thus one’s sense of self.777

Perhaps one of the most extreme and poignant examples of sensory deprivation (albeit in a different form) was experienced by a former detainee whose leg was amputated by American doctors while he was in Guantánamo. To this day, he and his lawyers have been unable to obtain his medical records; he remains convinced that his leg was healing when it was taken from him without his permission. It was never explained to him, at least in a language he could understand, why his leg was amputated. When interviewed, his lawyers were purportedly trying to help him raise funds to obtain a new prosthetic. He cites the loss of his leg as the greatest “negative” of his time at Guantánamo, one that has forever impacted his identity and his ability to care for his family: the experiences of being a provider and a man with two legs are gone forever.

776 Some research suggests hallucinations may be induced in as few as fifteen minutes. See, e.g., O.J. Mason and F. Brady, “The psychotomimetic effects of short-term sensory deprivation,” 197 Journal of Nervous and Mental Disease 783-5 (2009).

777 Tellingly, this treatment is already considered torture and/or cruel, inhuman and degrading treatment by the European Court of Human Rights when used in conjunction with various other interrogation or detention practices (Ireland v. United Kingdom, 25 Eur. H.R. Rep. (1978); Ocalan v. Turkey, 37 European Ct. H.R., 238 para. 222 (2003); Aksoy v. Turkey, 1996-VI Eur. Ct. H.R. 2260 (1996); Aydin v. Turkey, 1997-VI Eur. H.R. Rep. 1866 (1997)), and when used over a prolonged period, are considered torture under the United States’ Torture Act (Physicians for Human Rights, Leave No Marks, 33), as well as a violation of the Army Field Manual on human intelligence collection (Army Field Manual 2-22.3). Thus, such practices violate both domestic and international law.777
As briefly touched on above, a related phenomenon was the experience of going insane. Many prisoners reported feeling as though they were going mad, or witnessed other prisoners who had gone crazy. In addition to destroying their ability to effectively communicate, these prisoners were, in a sense, like the living dead in that their bodies lived on, but their minds were gone.

Such “insanity” could occur in several ways. In addition to the temporary hallucinations created by sensory deprivation, several former detainees reported having been kept in a type of medically-induced stupor, or seeing others kept in such a state. One former detainee told of an “Arab guy” who would lapse in and out of mental illness. One day, the Arab inmate started to pray but then began to cry, sobbing, “I don’t remember how to pray, I don’t know where mecca is, I don’t even remember my son’s name.” The interviewee explained that after taking 200 mg of medication the Arab man had started to get better, but after being prescribed 800 mg, he had begun to lose his mind. The interviewee used this example to illustrate his ultimate conclusion: that “the biggest criminals in Guantánamo are the doctors.”

For others, insanity could result from the pressures of prison life, which many attributed to intentional psychological abuse and others to the cumulative nature of their prison experience. One specifically spoke of the need for human interaction and its role in survival, which he explicitly linked to mental stability. When asked by researchers if he had made any friends at Guantánamo he explained, “because of the situation … you have contact with the people next to you and you empathize with the people immediately around you—and if not, you would go crazy immediately. It’s unavoidable, just to survive.”

The link between death and insanity is even more explicit in another interview. When asked if he saw other detainees being abused at Guantánamo, he answered that he had heard “one guy died” but wasn’t dead. When asked what he meant, he explained that the detainee had hung himself but didn’t die; the soldiers were able to bring him “back,” but he had lost his mind.

As one former detainee noted, such erasure, like death, threatened permanence. He explained that at Guantánamo, with regards to prison abuse, “the psychological part of it is much worse than the physical. Because the physical—you can always recover from physical pain, a bruise, broken arm, it will always heal—but when you’re scarred psychologically, once you’ve gone crazy, it’s very rare … to come back to normality. It’s literally a miracle.”

The spectre of social death is also evident in the stories former detainees relay about how their families coped while they were in prison. Indeed, many families lived for quite some time with the uncertainty of whether their loved one remained alive, and if they knew they were alive, when they would return home, something that could be analogized to a purgatory of sorts. One former detainee describes how his family had to come to terms with his absence:

I know that my parents’ life stopped when I was away, and they don’t want to talk to me about it…. But their life was really difficult for my parents and for my sisters. My brother in particular he did everything he could to have me released. He went to the United States… he tried to talk to the U.S. Congress, he tried to go to the White House, he talked to people in the International Red Cross. He did a lot of things to try to have me released. The problem is that I was not there, but I was not dead, they knew I was not dead, so they could not just decide that I wasn’t going to be there anymore. And what my brother told them, “well what
you should do is act as if he were dead, because otherwise you will never be able to survive. Just consider that he’s dead.” That’s what my brother told them.

Bruno Bettelheim, a noted psychologist who has shared the insights he gleaned while struggling to survive as an inmate in a Nazi concentration camp in the 1940s, has illustrated the sense of death—of a permanent distance from one’s family—that may be shared by those confined in total institutions. He describes the “ambivalence” many concentration camp inmates experienced toward their families while detained, which likely contributed to the sense of social negation. He notes that “once the stage was reached of accepting everything that happened in the camp as ‘real,’ there was every indication that the prisoners were then afraid of returning to the outer world.” While they did not admit it directly, “from their talk it was clear that they hardly believed they would ever return to this outer world, because they felt that only a cataclysmic event—a world war and world revolution—could free them, and even then they doubted that they would be able to adapt to this new life.”

Bettelheim has also noted that as the camp became more real to prisoners, life outside the camp began to lose its reality. He says that the pace of this change, this process of one’s old life dying, depended on the depth of a prisoner’s emotional ties to his friends and family, needing a minimum of at least two years to succeed, a change that was marked by a focus that shifted from life outside the camp to the inner world of the prison. He describes the mental battle that marked the experience of relatively new prisoners: even as their families appeared to engage in all means possible to secure their freedom, “the prisoners consistently accused them of not doing enough … These prisoners would weep over a letter telling of efforts to liberate them, but curse in the next moment when learning that some of their property had been sold without their permission. They would swear at their families who ‘obviously’ considered them ‘already dead.’”

Bettelheim has theorized that such ambivalence toward family members was due to prisoners’ “desire to return to the world as exactly the person they had been, [a phenomenon] so great that they feared any change, however trifling, in the situation they had left. They wished their worldly possessions to be secure and untouched, although these were of no use to them ….” He goes on to suggest that the reasoning lay in “some sort of magical thinking running along the following lines: ‘If nothing changes in the world in which I used to live, then I shall not change, either,” which was an attempt to prevail over any fear that they, themselves, were changing.

However, I believe that the ambivalence also reflects something deeper: not a fear of change (which is characteristic of life), but a fear of death. When one who has been institutionalized thinks back to one’s friends and family, they are typically haunted by scenes of the everyday, scenes they know intimately, but that have one quite unsettling difference: the inmate is not there. It is as if one is a ghost observing these episodes: loved ones get ready for work or school, set a table, sit down to a meal, hold conversations, reflect on the everyday minutiae of work and love and life, but you are not there to share those familiar episodes. There

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778 Bruno Bettelheim, *Surviving*.
779 Ibid., 69.
780 Ibid., 69-70.
781 Ibid., 71.
782 Ibid.
is a panic in knowing that they cannot see you, cannot interact with you, and yet you can see them and feel these episodes so completely. While Bettelheim attributes the anger prisoners feel to “not only the fact of change, but also the change in standing within the family which it implied,” the switch from being the individual upon which one’s family depends, to one who is dependent, I believe there can also be something more: a sense that you are staying the same, unable to progress in your life, stuck—or worse, even decaying—while they are allowed to grow and move and change.\textsuperscript{783}

At its most extreme, this “erasure” of prisoners could become quite literal. Many interviewees spoke of fellow detainees disappearing entirely. One former detainee, KBM, when asked to describe some of the tortures he witnessed at Kandahar said, “When we talked about it amongst ourselves I would hear that there were other people who were tortured differently. I know the Afghans would say that there were a lot of people that just disappeared and the problem was that Karzai had no political power to try to track them. If you were British or you were French then that was a problem for the Americans, but there were a lot of Afghans that went missing.” To actually disappear from all of social life, even the social life of the prison, could be considered the ultimate social death. Notably, it seems the likelihood of disappearing was linked to the relative power of nations, not individuals, further underscoring these men’s invisibility, and the irrelevance of their specific identities to their own fates.

So what, then, allows one to surpass this sense of being stuck, immobile, socially dead, while incarcerated? Gordon has argued that,” To achieve a measure of agency and possibility … it is necessary … ‘to redeem time’ or ‘master the present.’ This redemption involves refusing the death sentence and its doom, involves refusing to be treated as if one was never born, fated to a life of abandonment and spectrality,”\textsuperscript{784} to find a way to “live in prison without allowing the evil of prison to live in you.”\textsuperscript{785}

As discussed in this dissertation’s later chapter on resistance and endurance, detainees had to find a way to grow and change while confined to the camp. Indeed, at Guantánamo, those who seem to have survived most intact learned new languages, studied or taught guards and

\textsuperscript{783} Dan McAdams and Philip Bowman have noted the importance that a sense of one’s ability to grow and “change” can play in one’s identity formation. When studying individuals’ life stories, they identified stories that were predominately marked by “redemption” (stories that had negative beginning but positive outcomes) versus “contamination” (stories that had positive beginnings but negative outcomes). They acknowledged that good outcomes, per research conducted by Tedeschi and Calhoun, tend to manifest in one of three ways: by citing changes in one’s self, changes in one’s relationships with others, and changes with regards to life philosophies or other spiritual-existential beliefs. They hypothesized a likely correlation between redemption stories, which often reference personal change, and psychosocial adaptation and overall mental health. Dan P. McAdams and Philip J. Bowman, “Narrating Life’s Turning Points: Redemption and Contamination,” in \textit{Turns in the Road: Narrative Studies of Lives in Transition} (American Psychological Association 2001, eds. Dan P. McAdams, Ruthellen Josselson, and Amia Lieblich) (referencing R.G. Tedeschi and L.G. Calhoun, \textit{Trauma and Transformation: Growing in the Aftermath of Suffering} (Sage 1995)).

\textsuperscript{784} Gordon, \textit{Haunting}, 30.

fellow prisoners lessons from the Koran, or otherwise found a way to progress in their lives and development, in direct defiance of the immobility of death. In this way, they could fight the never-ending sameness of prison, the purgatory of a cyclical existence.

Others found it critical to accept their fates. As relayed by one former detainee when asked how he endured his time in Guantánamo, “at first it was incredibly difficult but humans learn to adapt and so I just learned to accept what was happening—not agree with it, but accept it. There were others who went crazy. And later I thought about it and I realized there that there are some people who live on the North Pole in minus fifty degrees, I couldn’t do it, but the way you deal with torture is by accepting it.”

Most notably, all of these efforts required insisting upon one’s own dignity or recognizing the humanity in others. This can be seen, for example, in the story of the prisoner who refuses to be negated when a guard insists a slip of paper with the prisoner’s ID number on it is not his but that of another prisoner. It can also be seen in the tremendous support—even brotherhood—that many detainees provided for one another. For example, when telling the story of his release, one former detainee explained how conflicted he felt to be leaving due to the selfless joy expressed by those being left behind. He recalls,

*I felt happy in a way but I felt sad for the other people. It’s hard to be happy. The other guys were amazing. In three days, I was supposed to go home and the guys were like singing for us and they were happy for us. It’s like they were going home, so happy, just amazing. They were singing the whole night, but the next night we didn’t go home. So they sing for another night, and the third night, they were still singing. It was so amazing. They were giving us advice, ’stick together when you go out, stick together. Watch out. The world is gonna open up for you, don’t get too caught up. If you are going to speak, speak together.’ They were so right. … Best people to ask for advice is from the people in hardship. Three days of celebration and then there was the release. It was sad, I was very sad for them, I cried for them. How can I feel happy when they are staying behind?*

As noted in Gordon’s work, referencing former prisoner Stephen Jones, “to retain one’s dignity and a communal humanity living in a crowded cage at gunpoint, regulated by the presumption that you are no better than you’re being treated, it is essential to treat others with a courtesy that restores civility to the very place where by definition it has been withdrawn.”

As she notes, “[s]ocial death is not a singular biographical condition but a relational idiom of power. And so regardless of the social death sentence, prisoners must make a life as best they can while in prison.” Indeed, “[h]ere the question of the past, the present and the future—indeed time itself—looms large in many complicated ways,” much as it does in death. “Perhaps the most obvious or seemingly definitive is the way in which the law renders punishment in units of life-time, giving present time and taking away life, where life is conceived as the right to futurity.”

This emphasis on making a life for one’s self in prison was exacerbated for detainees—even beyond the “typical” prison experience—by the fact that none knew how long they would

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786 Gordon, “Destigmatization,” 34 (citing Avery F. Gordon, “Seize the Time: An Interview with Stephen Jones” (Race and Class, forthcoming)).
788 Ibid.
be there. Indeed, no sentence had been given, and thus no future could be conceived. Many were told they would live the rest of their lives in confinement. As noted in the human rights report *Guantánamo and its Aftermath*, the worst experience for many detainees was not knowing when they would be released, “not knowing, you know, why you’re there, or when you can go home,” and thus existing in a liminal space in which one struggled to endure as a person “without future.” Thus, a strange relief for many detainees—one that they could, however, not always trust—was learning that they were heading home, that a future outside of Guantánamo might actually be possible.

C. Social Death After Guantánamo

“So I was living in hell before Guantánamo, and I was living in hell in Guantánamo, and when I returned home, it was another hell.”

Former detainees’ portrayals of their lives after Guantánamo similarly point to the phenomenon of social death. For some men, release resembled heaven; for others, it created a state of limbo; still others descended into hell. Regardless, they all found that prison had irrevocably altered their pre-GTMO lives.

Avery Gordon is one of the few scholars who has examined the phenomenon of social death in the post-imprisonment context. She explains that “[t]he notion of social death is to clarify what kind of person the prisoner becomes as she or he is civilly disabled or dead in law and in the broader social domain.” For some, the result might not be a complete devastation of their former selves: instead, she notes, social death is rarely a complete achievement, despite its ability to deliver some—those who “succumb”—into a living “purgatory.” As she further

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789 Metin Basoglu and Ebru Salcioglu, in their analysis of the relationship between perceptions of control and experiences of torture, have similarly recognized a lack of known “end date” as a particularly powerful stressor. As they have observed, “the element of uncertainty appears to augment the helplessness effects of uncontrollable stressors” during confinement, exacerbating the psychological trauma torture victims experience. *A Mental Healthcare Model*, 43.


792 More than one former detainee tells how the U.S. military would use the promise of release to manipulate prisoners. One relayed a story he had heard in Guantánamo from others about a group of men from Iraq that were told they were going home, flown all the way there, touched down, and then sent right back to Guantánamo and Camp 4, presumably as a form of psychological manipulation. Approximately half of the former detainees, when asked how they felt when told they would be going home, answered that they did not believe the news because they no longer trusted the military personnel. Those who did believe it were either told by someone they trusted (either a guard with whom they had developed a personal relationship or a fellow detainee), or realized it when their prison treatment changed in the last few days before their release.

793 Former Guantánamo detainee.

794 Gordon, *Haunting*.

795 Ibid., 24.
explains, Alessandro de Giorgi has illuminated the distinction between “the ‘biological event’ and the ‘biological experience’ of death, [arguing] that [former] prisoners and other ‘undeserving categories of people’ are subject to a new ‘right of death’ that alters the terms of bio-politics as we’ve previously known them.”

In many interviews, one of the most talked about aspects of former detainees’ experiences was their distress at finding that even once they were released from Guantánamo, they were unable to return to a life of normalcy, and thus to fully integrate back into the land of the “living.” Upon their release, many were immediately imprisoned in their home countries for periods that spanned anywhere from a few hours to a few years. Others returned to find that they were unable to obtain jobs and social connections due to the “mark of Guantánamo.”

Some important work has emerged over the last couple of decades, and especially recently, about the social lives of former prisoners and their inability to reintegrate into and thus fully participate in society. For example, McLennan has investigated the historical foundations of the continuing practice in the United States of rendering many convicts civilly dead, meaning that they are legally foreclosed from full civic participation in society even after their release from prison. A particularly important study is that of Devah Pager, who demonstrates the impact of past imprisonment on the ability to acquire jobs post-release. Similarly here, almost all of the interviewees reported that they have been unable to get jobs, no matter their educational background or the status of their previous profession. However, that inability to reintegrate into society has extended far beyond employment.

Patterson, in *Slavery and Social Death*, notes an inability to return to social viability following captivity as having been typical of release from slavery. He cites the experience of the Kongo Community of Zaire during the nineteenth century as particularly illustrative: “Once a person became a slave, there was no way ever of releasing him from this condition, even though he might have been released from a particular master or even from his master’s community.” Similarly, while detainees could be released from Guantánamo—and the vast majority have been, with all but 169 of nearly 800 detainees having been let go as of this writing—many of

796 Ibid., 19-20.
797 Fletcher et al, *The Guantánamo Effect*.
798 McLennan, “When Felons Were Human.”
800 Patterson, *Slavery and Social Death*, 215. However, other scholars have noted potential mechanisms used by slaves to claim and/or regain some degree of social vitality, even while enslaved. For example, Dylan Penningroth, in *The Claims of Kinfolk: African American Property and Community in the Nineteenth-Century South* (University of North Carolina Press 2002), discusses the ways in which Southern slaves used civil courts to establish inheritance and other family-based claims, and engaged in informal property systems that were independent of any legal framework. Such examples suggest former captives may well have means to resist the imposition and reification of social death through law and dominant social norms.
them have found it extraordinarily difficult to “recover first-class citizenship.” As noted previously, almost none of the interviewees has reclaimed the job he had previously, even though the United States never established evidence of their wrongdoing.

The experience of social death post-release is particularly evident in the following:

So when we were in Guantánamo people have such nature that they are very [adapting]. So after a while you got used to it. You start having the real torture, the real discomfort, once [you] are out [of] Guantánamo. For instance it’s impossible to get proper employment, we can only work as freelance, like freelance interpreter or translator or things like that, but it is, for us, impossible to get a regular job. For instance old friends, old circles, they are even afraid of greeting because they think then they may also be taken under custody or interrogated or the like. And I cannot lie [to] the questions, but similar to those kind of things. Guantánamo is of short duration, it was only two years. I left Guantánamo at age 23. And it felt, [it] put me … in distress until the end of my life.

While, as described in the section below on rebirth, the extent to which social death was experienced post-release varied cross-culturally, many former detainees—regardless of cultural background—returned home to discover family members had died or disappeared; their homes had been bartered to raise money to help facilitate their return; and that government and non-government organizations would ignore their pleas for assistance when the private sector refused to employ them. This dealt serious blows to their identities, in terms of their profession, their status as husband or father or child, their status as a landowner, and in some cases, as a citizen of a particular country, when they found that even their citizenship had been stripped away.

Toward the end of one interview, when asked what most changed in his life because of Guantánamo, an interviewee begins answering without waiting for the question to be translated, speaking directly to the interviewer in his native language. When he finishes, the translator explains:

So—concerning the negative … what is the most difficult is um, you, people look at you as uh ex-detainees from Guantánamo. So they judge you, without knowing you, they think okay, as you were there you are, you are someone [who] is not good to have relations or—to look for a job, you have to justify why on your resume you have four years without doing nothing, and once people hear the expression Guantánamo they freak out, so, and everything is hard you can’t have a normal life, everything is uh, is difficult, especially each time the media talk about Guantánamo they write again their names, their stories, so people can recognize them and so it is very difficult to, to endure the, how people look at you and how they judge you through their eyes.

Many found themselves released thousands of miles from family members with no means to secure a visa to return home. Or, when they returned home, they found that loved ones had died in their absence—mothers, fathers, siblings, children—or they were greeted by young

802 Patterson, *Slavery and Social Death*, 215.
803 Many ended up in captivity because of bounties paid by the U.S. government; rivals frequently turned in individuals with whom they were having a dispute or whose lands they coveted to secure thousands of dollars in U.S. money, or turned in foreigners for similar reasons.
children who had no recollection of them. This latter phenomenon seems to have been particularly devastating: for many of the individuals whom these men had helped bring into the world, it was as if they had never existed on earth.

The sense of social negation becomes particularly poignant in the following passage shared by a man who was released to Albania instead of his native China, where his family resides. He will never be able to return home because of the likelihood that he would face imprisonment and execution:

Emotionally … another difficulty I have right now is when I talk to my children on the phone. They talk to me like a stranger. Just talk for a couple words, how are you, fine. Bye. They don’t really communicate with me. I don’t have that father and children bond between them, because I am a stranger for them. They didn’t hear my voice for five years, and in five years this children’s life is a long time. And, when I asked my wife why don’t they talk to me, and when my wife asked them, they say we don’t really know him. He says he’s our father, you know this guy … but we don’t have any memory of this father. I don’t like going to store, I mean, going to outside or walk around and go to places. Even on the weekends we don’t go anywhere because when I see couples holding hands, loving and caring and having their children, and going out, and visit, having good time, it really affects us in a very negative way because we have had a life like that, we had had a normal life, falling in love with a woman, and being married, and having children. Now I’m, what am I basically? I am not a normal person. I have three kids who I don’t have the actual bond with them. I have a wife over there. I cannot even talk to her in a loving and passionate manner on the phone because I don’t even remember how to do that. I don’t look at myself [as] a normal human being. I’m more like the animal in the zoo, or something, and just it’s not real human feeling.

Gordon’s work extends Patterson’s conception of social death to all “captives,” pointing out the enormity of the sacrifice that is expected both during and following imprisonment: “In exchange for avoiding immediate death, what’s taken from the captive is his past, his family, his culture, his honor, his future, his very being. In exchange for his life, he must give his life.”

For this particular detainee, his wife, his children, his former employment, his nationality—all those key aspects of his identity seem forever beyond reach.

Another, younger individual, who has similarly been released to a foreign country far from family and friends, also has a fatalistic sense of his future, despite having enrolled in college classes and taking other concrete steps to try to move his life forward. As he explained in an interview with Witness to Guantánamo, when asked about any “positives” or “negatives” that resulted from his imprisonment:

There is absolutely no any kind of positives came out of this … but negative? Everything has been negative. For example, my personal life, not married, and there—of course I want to get married, and I met many girls, and we get along very well, fell in love, and they—but before you take next step, to get married, once the family finds out I am from Guantánamo Bay, that I was in Guantánamo, that stops right there, they force [us] to end the relationship, and I, many, many
times this happened to me, I asked girl to marry me, but because I was in Guantánamo she doesn’t want to marry me.

His sense of social isolation also extends beyond romantic relationships to his attempts at sustaining platonic friendships:

I am going to college right now, and I have friends at, in college, and also they don’t say anything, I can FEEL that I am being discriminated, I can feel with this relationships, or throughout the classes, in daily experience, I always face, some sort of um, the incidents because of this Guantánamo issue, for example, one day we were in classroom, teacher was speaking about 9/11 incident, this one guy, he was actually friend of mine, we get along very well, when the teacher is talking about 9/11, this guy is pointing at me and says terrorist … and so I got up and left the room, and the teacher knows me very well, so after I left the room, apparently the teacher gave a big lecture in the classroom about me and said you know, he is not a terrorist, that is not a nice what you did, he left his home to go to study abroad, and then because of this, this, this issues he ended up in Afghanistan, and he was just wrong place in wrong time, he got picked up. He was in Guantánamo but he was cleared, he was innocent, he was released, and now because of this he cannot even see his family, he is isolated, he is here, and how could you hurt him like this? Then the guy came over to me later and he apologized to me, we still talk, we still get along well, he said that he was just kidding around, he was not serious, but what he did, it hurts me, and something like this happens on daily lives all the time.

When asked whether he thinks this reaction will ever change, he responds, “I believe it will be always be like this.” He remains unable to openly communicate with his family back in East Turkistan: he explains that the Chinese [police] have been threatening his family, “in front of neighbors,” creating “pressure for their lives.” He says that they are really scared, and because of that, they say they don’t know where he is, even to their relatives, and he tries to minimize any communication, relegated to a social island even within his own family.

Patterson has noted that when a slave was released from his master’s household, there was a ceremony that claimed to be one of redemption; however, the ceremony ultimately functioned as a “gift exchange” with the exchange operating not between the slave and his former master, but between that master and the slave’s former clan members. In many cases, release in the Guantánamo context was not true freedom on the part of a former detainee, but an exchange between the United States and the detainee’s native government—or a third party government—to whom he was entrusted.

Once transferred, many detainees have found themselves—like slaves—financially destitute and thus dependent on neighbors, family members or the state. They have almost always been released without compensation (other than, in some of the most generous of scenarios, $40 to cover the last leg of their transportation): even the money they had in their pockets when captured was rarely returned. Some came home to find that all of their property had been sold, either by the remaining family members to make ends meet during their absence (many detainees were their families’ primary breadwinners), or as part of efforts to pay for lawyers or bribe local government officials in an attempt to discover their whereabouts. In other cases, their passports had been stolen.
For almost all of the interviewees, that destitution continues. As stated above, with very few exceptions, former detainees have found it difficult if not impossible to secure a job. The reasons underlying this have been multiple: for example, many have been released to poor countries where jobs are sparse. In addition, some have found themselves unable to work due to poor health brought on by captivity, including physical problems, such as the loss of a leg or an eye due to gunshots or beatings. But perhaps most commonly, they have continued to experience social isolation brought on by what Laurel Fletcher and Eric Stover of U.C. Berkeley call the “mark of Guantánamo,” a stigma that appears intimately related to the “mark of a criminal record” that Devah Pager has noted in the domestic context. As Patterson has famously explained, “The captive always appears … as marked by an … indelible defect which weighs endlessly upon his destiny.”

In the following passage, a former detainee explains how the mark of prison continues to stain his future prospects:

"Something should happen to the people who are responsible for arresting all these people and then releasing them back, and not really clearing their names because nobody's ever said to us that were innocent and that we haven't done anything wrong. It's just that we still have this black mark on us. ... If they're going to charge [detainees], they should charge them. It didn't take five and [a] half years to convict someone of a crime. And either close the camp down, or something should happen. But to just leave them there and say to the world, oh these people are terrorist[s] based on what, we don't know, is just ridiculous. And I think the present government, I would like, someone should be held responsible for what's happened, and the lives that have been destroyed.

The following exchange with a former detainee from the West, similarly documents the ways in which the mark of Guantánamo continues to challenge his social vitality, post-release:

Interviewer: Can you tell me how your life has changed… since you were transferred from Guantánamo? Has it changed?

Former Detainee: I mean it's changed for me because people look at you weird. You know, since 9/11. I think it's not just me. I think it's affecting a lot of Muslims all around the world, you know, how people look at them. I think it's mainly difficult for Muslims to be in [this western country] now because recently we had, you know, [the leader of the country] said that Muslims need to do more to integrate into society. I fucking was born here. [Interviewer laughs.] How much else do you want me to do like? We speak the same, we got the same lifestyle. I mean what else [does our country] want [from] us? Do you know what I mean? So, you know, it's

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805 Fletcher et al, Guantánamo and its Aftermath, 4-5 (mentioning a Guantánamo stigma).
807 Patterson, Slavery and Social Death, 20. Interviews reported having suffered from various stigmas, post-release, including that they are terrorists, homosexual or spies for the United States.
difficult when your [national leader] makes them kind of comments. And when he first came in power he said, he promised, I think when he first came in power he never said these kinds of things like Muslims need to do more. I don't see how we can do more or what to do more. You know. And it's made it more difficult and for me, and for [the other former detainees from this country], it's made it more difficult of who we are. And the name we carry around us. Guantánamo is always going to be a part of us. It's always part of my history. When I go to jobs. It's been like three years, I haven't had a job. 'Cause no one will employ me 'cause I always have to say, for two and a half years. When people look at your C.V., when you got a job interview for work, and they all look at your C.V. and say, oh, OK. You left school in 1996 and you went here. Doing this job, doing that job. 2000 you're doing this job. That's weird. 2001. 2004 where you been? It's blank! Everyone catches it. 'Cause, you know, you got to list all your jobs you did. And you've got a massive gap. 2000, and then all of a sudden you got 2004. All persons say, "That's two years, three years. Where you been? What have you been doing?" You can't lie then, you know? You know, "I was in Guantánamo," you know, say that. Oh, ok. You can, you tell them. Then after a while you don't hear from them, you don't get a reply. So it's been difficult. In that way it's changed my life, 'cause I can't find a job. I've got a house, I've got a mortgage, I've got a ... girlfriend, you know? Financially, she works, she works like. She pays for everything, do you know what I mean? It's supposed to be that I pay. She's a woman. I should be providing for her. I mean, OK, she provides for me now. Hopefully in the future, you know. She doesn't want to work. She wants to go part time. I want to go full time. Because I can't get a job, she has to work to support me. Do you know what I mean? And I'm relying on a woman. Not that only I'm relying on her, I want to work! I want to have the nice car. I want to pay my mortgage off quicker. I want this and that, and I can't get it. I can't have the luxuries of the world because I can't get a job and I ain't got the money. So you know it's difficult. It's made life hard. And also, every time we fly out of the country and we fly back into the country, we get arrested by the anti-terrorist squad again. All the time. Every single time we've been out of the country and back here, we get stopped for two, three, hours and questioned. Where you been? Who paid your flight and stuff? So it's like the way I see it, what's the word, it's just
like, picking on us kind of thing, do you know what I mean? So it's been difficult. When we go on the bus, or the train or the town centers … town centers are the best place 'cause I find it hilarious, you know. You walk in the middle of a gathering, like [the town center], people make way for me. They actually part. It's like, you know, when Moses come out to sea to part?

Interviewer: Yeah, yeah. There you are.
Former Detainee: Seriously, I'm like Moses now, with the beard … And people make way. And you can see everybody move out. You're walking. No one's going to look at you. Everyone moves out. How does that make me feel? It doesn't make me feel proud. It makes me feel like, you know, I've been targeted, I've been left out. 'Cause I don't feel people are making me, you know, feel part of society. So I got to do more, as [our chief executive] said … I got to do more to reintegrate in society, but I don't see why I should 'cause I ain't done anything wrong. But I mean, I blame, I don't blame, I blame the Bush government obviously, but I blame our country's government more because they never openly said that these guys are innocent. They just let us go. The headlines were released "5 [citizens] because of no evidence," but they didn't say oh, we made a mistake, and the media said, they just said, "Oh we just released them." And on top of that, [our chief executive] came on TV and said, somebody asked him, I can't remember where he was, somebody asked him on like a program, like a discussion show, and he said, "What about the guys that was released from Guantánamo?" He said, "Oh, we're still monitoring them." So basically what he’s saying is we're guilty, but because they have no evidence against us, they couldn't convict us. So he put that thought in people's mind that we are still guilty of a crime.

Later, the discussion continues, focusing on the reaction of his community:

Former Detainee: They don't want us back … because, you know, this area …. I think it's got the most, second most racist population in the whole [country]. [Another town] is first, I think. And [this community] is second. And recently we just had the elections, the local elections, and in [this community] alone, there was four seats and three were won by … [this] racist, you know, right, hard right side, wing. And the one seat was won by [the left]. And a couple years back, it was all [the left]. 'Cause of what's happening now, everybody's like, [unintelligible]. So you know, you know, I think, I've never asked people why they don't want us back in town. But I
think, I'm giving them an excuse like for my behalf. I shouldn't, but I think everyone's, they're scared of the backlash of the [right]. Cause they did threaten to come to where I live, used to live, and cause a lot of trouble. And people were scared.

Interviewer: So when you talk about, so the Muslim community here, you're saying, is . . .

Former Detainee: Yeah. They don't want us back, they don't want us back. If it was a white community, it was more sympathetic towards us rather than our own, which was shocking. And that's throughout the country. The white people, non-Muslims I should say, were more sympathetic and more understanding towards us rather than like, you know, the Muslim community around all the [country], especially [here].

Later, when asked what he would want in terms of compensation for his imprisonment, this interviewee replies:

_I would be more than happy, I wouldn't want like millions of dollars like, and say, yeah, I'm a millionaire. Pay my debts. Well, I have to pay for my father and bring me back to where I was. You know, get me a good job. Clear my name to the world. Officially come on the stage as he does, and say “These guys were innocent and what happened to them was our fault.” Say that. And if people give me a job, fine with me. Perfectly fine with me. I don't want like 10 million. I would want my name to be cleared and people to give me a chance in life. That's what I would want._

In discussing social death among the Margi of Nigeria, Patterson has explained that there the enslaved criminal “remained in the society: a part of it, yet apart from it. He was not physically expelled, for that would be less humiliating . . . . Rather, it was the loss of identity and normality that was so objectionable to the proud Margi.”

For many detainees who have been released home, it is as if they exist in a similar state, one divorced from their previous, “normal” lives. Patterson has pointed out that in this “institutionalized marginality, the liminal state of social death was . . . one of the most difficult aspects of his or her condition for the slave to bear.” Importantly, this implicates the role of government—both the United States and detainees’ home governments, and—when released to another country than their home country—third-party governments. As Patterson has explained, the power to “mediate” between those who are socially dead and those who are socially alive imbues the slave master with a godlike power, a power in which the master’s authority ultimately rests. Here, that can be seen in the refusal of both the United States and the United Kingdom to declare these men “innocent,” and thereby help them begin the process of rebuilding their identities, and thus their lives.


809 Patterson, _Slavery and Social Death_, 46.
Gordon writes that the life left to the captive is one of “externally imposed social negation”: 810

The enslaved will be granted no legitimately recognized existence independent of the entity—state, cooperation, crown, empire, temple, individual, etc.—to whom he is absolutely subject, who possesses a monopoly interest in him. A “nonperson,” he is thoroughly dishonored and natally alienated, separated from all rights or claims of birth, treated as a “genealogical isolate” with neither present nor future claims or obligations to living and dead “blood relations.” “Ceasing to belong in his own right,” the enslaved lose, in effect, birthright, a socially recognized place in the stream of time itself. This is fatal. It is as if he were never alive to begin with.

Meillassoux earlier labeled this phenomenon—that of remaining forever an unborn being—“non-né.” 811 The sense of being a genealogical isolate is poignantly illustrated by the narrative above from the former detainee who can never return to his family in China, as well as the many other men who expect never to marry and thus be able to build families or care for their own.

In addition to the structural difficulties many men have had rebuilding their lives, such as the lack of jobs and ability (for some) to return to their native countries, many also appear to suffer from psychological trauma, which negatively impacts their ability to make social connections and to resume a baseline of normal social functioning. One former detainee, a Uighur man released to the tiny island nation of Palau, has managed to retain hope that someday he will someday be united with his family in East Turkistan, even though he remains, for now, hundreds of miles away. For this man, the sense of social death—of living on a social island, even though he is physically surrounded by other living beings—is particularly made manifest by the fact that he has been released to an island that is not only metaphorical, but literal. For him, hope hinges on the possibility that the United States will eventually fulfill the promise it made to him and to the others released with him, that their time on the remote island would be temporary. He dreams of getting off the island, and resettling in a larger country. For now, under the terms of the U.S.’s agreement with the tiny island nation, former detainees can never obtain citizenship—thus, his identity as a citizen of any country has been obliterated by the fact of Guantánamo. This means that in Palau he is permanently a refugee; as a non-citizen, he is, in many ways, the non-né (the never born) referenced by Meillassoux. Non-citizenship also means that he cannot get a passport to visit his wife and children, suggesting his identity as a spouse and father has also been (at least temporarily) buried.

D. Rebirth

“Last night the sheik went all about the city, lamp in hand, crying ‘I am weary of beast and devil, a human being is my desire.’” 812

So how is one reborn after an experience like imprisonment? How does one negate this process of social death? Mason refers to this phenomenon in the slavery context as

811 Ibid., 22-23.
812 Rumi, as reprinted in Margalit, The Decent Society.
“resurrection.” However, he suggests that for slaves in South Africa during emancipation, it was the emancipatory act itself that resulted in resurrection. Interviews with former detainees suggest the process of rebirth is not so simple: while one may have been physically and legally released from his prisoner status, as suggested above, the social “death mark” continues.

Thus, it seems that scrubbing off the mark—de-stigmatizing oneself—is crucial to rebirth. This is a process that some scholars have equated with “normalization,” which, in turn, is theoretically affected by the undermining of the harmful stereotypes upon which stigmas are based. Thus, normalization is ultimately about the managing of stigmas, with the goal of the stigmatized individual or group to be thought of as much like “normals” (the nonstigmatized) as possible.

Erving Goffman was one of the first sociologists to seriously dissect stigma’s parameters and characteristics. He has defined “stigma” as “the situation of the individual who is disqualified from full social acceptance” and departs from expected social norms. He stresses the central role of the communication of social information to the maintenance or undermining of stigma, social information being “the information the individual directly conveys about himself.” Thus, the many ways in which former detainees communicate information about themselves to the world to disprove the stereotypes related to their detainment are critical.

i. The Possibility of Destigmatization and Normalization

Indeed, interviewees mentioned several different stigmas as plaguing them post release. There is the stigma of being a terrorist; the stigma of being homosexual due to assumptions they were raped in prison, and thereby “made gay”; a related stigma of being a sexual abuse victim; and a stigma of becoming a spy for the U.S. government (which some non-detainees have theorized was the reason detainees were released). The desire to combat the mark of Guantánamo and its attendant stigmas explains, perhaps, why so many former detainees have been willing to talk to researchers and why three of the most prevalent themes to emerge from this research were identity, innocence, and resistance—suggesting a resistance to the stigmatized identities imposed upon them, and a desire to have their innocence recognized. Participation in documentary films, news stories, and social science research provides an opportunity to publicly clarify the record surrounding their imprisonment and their release, and thus to scrub clean the mark and establish themselves as individuals worthy of society’s notice and respect.

In her scholarship, Carrol A.B. Warren has highlighted just how difficult it is to achieve normalization by challenging such stigmas and the stereotypes upon which they

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813 Mason has noted that “most slaves refused to believe that they were dead, socially or otherwise,” and accordingly were (quoting Patterson), “desperate for life.” Mason at 8.
816 Warren, “Destigmatization.”
817 Goffman, Stigma, preface.
818 Ibid.
819 Warren, “Destigmatization.”
depend. As she explains, “stigmatization is a more common process in our society than destigmatization: ‘Entrance into deviance from pivotal normality is much more frequent than entrance into normality from pivotal deviance.’” She establishes that the goal of destigmatization generally takes one of two forms: either the reformation of the individual, generally through treatment and/or self-help, or the reformation of society’s attitude toward the stigmatized group, which is generally accomplished (or at least attempted) through political activism.

It is this latter goal that has been the predominant objective of several former detainees, although both forms have arguably come into play. For example, interviews appear to have been used both to re-frame individual identities as well as stress the need for work, which could be viewed as a form of self-help. One translator from Bosnia with whom I spoke several times particularly stressed former detainees’ desire and need for jobs. While helping to coordinate interviews with two former detainees in Bosnia for the Witness to Guantánamo project, he repeatedly suggested that the project might want to consider hiring one of the interviewees to conduct translations with Arabic speaking detainees, or consider paying them a stipend for their time. This was due to their extreme financial distress, and the resentment of some that relatively wealthy researchers and others from United States and Great Britain were potentially receiving financial benefit from their work and publications, which were frequently dependent on interviews with former detainees, while former detainees considered to receive nothing and were struggling to create even a bare-bones living for themselves. As a result of his advocacy, the project began awarding former detainees a $100 stipend at the conclusion of their interview.

In addition, several former detainees have dedicated their post-Guantánamo lives to group advocacy efforts: one now speaks on behalf of detainees through a prominent, international NGO. Another has a new social and professional identity as a leader in a human rights organization that was launched to eradicate the “abuse of individuals and demonization of societies” and promote global respect for human rights, especially for individuals who have been detained in conjunction with the war on terror. Even when not part of a systematic effort, most interviews with former detainees are peppered with protestations of innocence, apparently to

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820 A stereotype is generally defined as “the content of an assumed set of characteristics associated with a particular social group or type of person.” Biernat and Dovidio, “Stigma and Stereotypes,” 89. While stereotypes of Muslims, terrorists and prisoners do not perfectly overlap, in many cases they have become difficult to disentangle, especially as the equating of Muslim males with terrorism has gained in prevalence following 9/11. Several scholars have identified the central role of stereotypes in stigmatization. Stereotypes serve a functional and iterative purpose: often, they provide the necessary justification for maintaining a stigma about a particular individual or group. Monica Biernat and John F. Dovidio, “Stigma and Stereotypes,” in The Social Psychology of Stigma (New York: The Guilford Press 2003): 89. In this respect, stereotyping operates as a social mechanism through which stigma is enacted.


822 To avoid coercion, interviewees were not told about the stipend in advance, and the stipends were kept to a reasonably small amount that was first vetted with other researchers to conform with industry standards.

counter the terrorist stigma, as well as the stereotypes that adhere to convicts more generally and the sense that the interviewer will believe the detainee “deserved” his experience.

Michael Hyde suggests that society’s means for combating the social death of others and allowing for rebirth may be simply to acknowledge that person’s existence. He writes:

The unacknowledged find themselves in an “out of the way” place where it is hard for human beings, given their social instinct, to feel at home. The suffering that can accompany this way of being-in-the-world is known to bring about fear, anxiety, sadness, anger, and sometimes even death in the form of suicide or retaliation against those who are rightly or wrongly accused of making one’s life so lonely, miserable, and unbearable. Acknowledgement provides an opening out of such a distressful situation, for the act of acknowledging is a communicative behavior that grants attention to others and thereby makes room for them in our lives. With this added living space comes the opportunity for a new beginning, a second chance…. There is hope to be found with this transformation of space and time as people of conscience opt to go out of their way to … acknowledge the worthiness of [others’] existence.\(^{824}\)

He goes on to argue that

Acknowledgment is a significant and powerful form of behavior, one that can bring joy to a person’s heart and also drive a stake through it. Acknowledgment functions as both a life-giving gift and a life-draining force. Moving from its positive to negative form and then to a state of no acknowledgment at all, we find ourselves in a place that is hard-pressed to support life because it is so barren of the nourishment provided by the caring concern of others. Institutionalized forms of negative acknowledgment such as racism, sexism, and ageism expose people to this fate. Certain rituals of culture, on the other hand, are meant to protect us from it. Proper decorum dictates, for example, that we say “hello” and “goodbye” to people so that they feel noticed.\(^{825}\)

Finally, he claims, “[a]cknowledgment is a moral act; it functions to transform space and time, to create openings wherein people can dwell, deliberate, and know together what is right, good, just and truthful. Acknowledgment thereby grants people hope, the opportunity for a new beginning, a second chance ….”\(^{826}\)

Attention from media and the public—through speaking engagements, interviews, one-on-one communications, and otherwise—provides an opportunity for society to acknowledge the suffering former detainees have endured, and creates an opportunity for former detainees to be seen and heard.

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\(^{824}\) Michael J. Hyde, *The Life-Giving Gift of Acknowledgment* (Indiana: Purdue University Press 2006): 1. Hyde quotes Stanley Cavell when explaining that “the alternative to my acknowledgement of the other is not my ignorance of him but my avoidance of him, call it my denial of him.” Ibid., 4 (quoting Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy* (New York: Oxford University Press, 1979): 389, 435). For many former detainees, it seems to be this avoidance against which they are struggling; this is especially evident in their willingness to submit to the interviews that form the basis of this dissertation.


\(^{826}\) Ibid., 7.

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The problem with Hyde’s approach is that it puts most of the control in the hands of society; the marginalized, the socially dead, remain relatively helpless to alter their condition. However, this may, to some extent, echo reality: the United States government and other national administrations do seem to be in the best position to “clear” the mark of terrorism with which former detainees seem stained. However, both the United States and several former detainees’ home countries have repeatedly refused to do so for what seem to be political reasons. Many decry the fact that the United States and/or their home countries have failed to set the record straight about their innocence; in fact, these countries have tended to do just the opposite, playing up the “return to hostility” of a handful of former detainees and greatly exaggerating claims about others. Indeed, it’s arguably in some political actors’ best interest to keep former detainees stigmatized, to lessen former detainees’ credibility and thereby protect high-level current and former government officials from experiencing the legal consequences of their acts. In the end, such practices ensure not rebirth, but stillbirth.

Ultimately, Warren has explained that there are three possible outcomes that can result from destigmatization: 1) normalcy (the desired state); 2) further deviance; or 3) charisma. While “normals are those who fulfill expectations, deviants and the stigmatized are those who fail, and charismatics are those whose actions surpass the normative.” This latter concept is reflected in the one-handed girl who becomes a world-class pianist or the invalid who becomes president: individuals who defy expectations for what they can achieve. Warren notes that “[b]oth stigma and charisma tend to be all-encompassing, particularly in the context of public figures and the public audience. In accounts in the mass media, individuals are presented as either deviant or heroic;” the normal generally escape notice. Thus, as Warren suggests, the stigmatized may be even more likely to achieve charisma than normalcy. The difficulty is that “the hoped-for transformation of identity may be overlaid … rather than fundamentally altered, in the public eye.” Critically, “the charismatic and the deviant are [thus] more closely related to each other than either is related to the normal,” as both violate expectations, either positively or negatively. Thus, destigmatization is often a more accurate term than normalization for the ultimate achievements of a previously stigmatized individual or group.

Despite these challenges, many former detainees have alluded to relative destigmatization—and thus a type of rebirth—post-release. Some credit this new life to God. As one man responded when asked what helped him endure his time in Guantánamo: “There were so many problems but … God has saved me and has given me the life again.”

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827 Note that even the British and Uighur former detainees have been counted among those engaging in continued hostilities against the United States post-release, because of the interviews they’ve conducted with journalists and others—not because of any physical violence that they’ve committed.
829 Ibid.
830 Ibid.
Several former detainees spoke of the day they learned they were going to be released as particularly special, a positive transition from the hell of incarceration to a state of hope. For example, when asked how he learned he was going to be set free, one man responds:

Former detainee: It was a special day when I was told about that.
Interviewer: Can you tell me about that?
Former detainee: When I was given the news I just thought I was being held in heaven … the whole condition of man was changed. I’m 39 years old. I have not been as much happy as I became happy while I was given the news.
Interviewer: Who gave you the news?
Former detainee: I had an American friend, prison personnel. She was a black woman, black girl. Cocoa. … The woman was called Cocoa. They were not giving us their real names. This girl give me the good news. She was treating me very well. She was given me chocolates, biscuits and sometimes she was giving me two plates of food when I was being held in her block. She was telling me, “I really pity on you. They destroyed your life.”

Notably, his reference to “heaven” suggests something other than normalcy, a particularly exalted state. Then, in a later passage, when asked to talk about his time post-Guantánamo, he discusses a transition that reflects a sense of rebirth:

Former detainee: This time I just feel that I have once passed away and I just started a new life.
Interviewee: Are you happy with your new life?
Former detainee: Yes. …
Interviewer: How has your community reacted to you coming home from Guantánamo?
Former detainee: People, elders, boys, young people are coming to my home to say congratulations. Some people brought sheep to my home and slaughtered them in my home. Some were bringing flowers and some were giving me money. People gave me … clothes and the turban. A lot of people gave me a lot of clothes as gifts.

Interviewer: It sounds like you were welcomed home.
Former detainee: Yes, exactly.

For others, it was their families who experienced them as reborn. One man tells how his family thought he was dead, “and then after I came out alive, they were very happy.”

Another man talks about his need to burn relics from his past as part of his transition to new life. Such an act symbolically recalls the phoenix, a mythical bird who, according to legend, is cyclically reborn from ashes. This interviewee explains that when he was released he was given two boxes that had his name on them. Initially, he thought they were gifts, but when I opened the boxes, I saw all the books and notebooks they had taken from my drugstore [where I used to work] … and they send them back to me. And they showed me all the letters [that were there and] they were saying that “You have letters from the Taliban era.” I thought, I thought it was a game, but when I got home, I just put all of those box in fire, I said “I was tortured because of you things.”
Others describe their life post-Guantánamo as producing—much like the phoenix emerging from the ashes—an even more colorful person post-imprisonment, a person finally “awake” to life’s possibilities. One individual from the middle east explained that

_Guantánamo was a big experience for me and it also provided me the willing[ness] to live. And it also taught me to think over my every step, think over my every word and think over my life. [Before Guantánamo] I was an ordinary person and I didn’t know how I live; I was not aware what I speak; I was kind of [a] sloppy person. Now, and especially in Guantánamo, I know people, I know different people and with experience I had this consciousness and caution in my life. I want to be with people. So basically Guantánamo was a big nightmare. I want to close this page and open a new page with my family and my children.

Another man, now an anti-American activist based in the West, speaks of similarly shaking off nightmares and bringing dreams to life:

_Everything’s changed, it’s changed amazingly. This is now my life and it’s a conscious decision that I’ve taken, it’s a path or field that I’ve chosen to do which involves tackling the questions of detention without trial around the world, namely in the war on terror and specifically Guantánamo and the ghost detention sites. That has overtaken my life … trying to put in the voice of reason into sides that perhaps don’t understand it at all. So those are the things that I’ve been doing as far as my public face. And my private face is just trying to continue to put into motion those dreams that I had, those thoughts that I had in Guantánamo about my family, about the future, what I plan to do, all the way from the books that I wrote, lists of what I wanted to read when I was in Guantánamo to actually going and buying them, or seeing those films that I wanted to see … . Any of those things that I’d planned to do, I have, for the most part, been able to do them.

ii. A Cross-Cultural Consideration of Normalization and Rebirth

While members of the three predominate categories of interviewees—men from Afghanistan, from East Turkistan, and the West—have reported feeling disappointed by the lack of support provided by the United States and their home governments (and many of them by non-government organizations, as well), their sense of support from their communities has been mixed. Here, the Afghani prisoners seem to have fared the best, reporting more instances of social support from their communities than other cultural groups. Twenty-five out of thirty-four (74 percent) expressly stated that they had been warmly welcomed upon their return. Several described coming home to celebrations attended by thousands of neighbors and family members.

_It was a very big reception when I got home because people in my community never thought that I would be released. Because during the Soviet Union, the Russians took a lot of Afghans and just they’re still disappear[ed]. The Russians took my, they took my uncles who are still missing. So the reception was very big._

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833 In many cases, former detainees were promised support by their home countries and by the United States government, which never came. There is a strong sense, in many of the narratives, of having been dumped or abandoned like trash, post-release.
… So before I got to Khost my brother had bought a very big cow and they slaughtered the cow before I got there and give it to people. When I got to my village, a lot of my villagers were firing in the air [with] happiness. So the police from our district … came to our village, and even our villagers told the district police to find their happiness.

Another man explains that when he returned home “my family members were really happy and excited and my villagers all were coming to my home and visiting me and they were saying that I was innocent and jailed without any crimes.” And yet another said that 4,000 people visited him post-release, giving him “flower circles.”

Tales of their communities recognizing and explicitly affirming their innocence permutated most Afghani former detainees’ coming-home narratives. As another relates, “[p]eople in my community still trust me, and they think I was … honest, and still am … honest, and they trust me, and they still like me. … And even from the first, they believed that I was innocent, and still they say that I was innocent. A lot of government officials in Paktia province, they send me certificates like acknowledging that I was—I am—innocent, when I was still in Guantánamo. [And] when I was released, they all came to receive me.” Many spoke of learning that demonstrations had been held on their behalf during their detention, of letters having been written, and of continued respect being shown post-release.

Despite this social encouragement, however, several still suffer in their new lives: most have experienced a significant financial hit. Their government has largely ignored their pleas for assistance (when made) and the American government has failed to compensate them, despite alleged promises to do so. In many cases their lands were sold or stolen during their detainment, destroying their identities as landholders, and they too have found it almost impossible to find employment, when sought. Thus, although their sense of community has prevailed, other key aspects of their identity remain buried.

For former detainees from the West, support at home and attendant opportunities to rebuild one’s life have been mixed. While a few men have secured jobs and resumed or established relationships with partners, their narratives are marked by a struggle to overcome a perceived stigma from surrounding populations. Consequently, as detailed above, many express their anger at both the United States and their home country that government officials haven’t done more to publicize their “innocence.”

Their experiences may be further complicated by the fact of being Muslim in predominately non-Muslim communities; racial tensions may reinforce the stigma of having been in Guantánamo, and vice-versa. One man explains that soon after his return several news reports featured stories in which locals complained that former detainees should have been released to domestic prisons, not set free. According to those news stories, even local Muslims were ambivalent about their return: “I think they were mainly scared of the backlash if we came back here and what would happen.”

Another man from the west describes the continued impact of detention on his life post-release, and the difficulties he has had accepting his new life due to the perceived stigma of having been in Guantánamo:

Like, if, [for] example, I got to work harder. Just in case I lose my job. That I can't get another job, like that. Always before, it would just be a matter of just applying for another job. But I gotta write, just in case I go out somewhere and they say "oh, what was you doing?" And I say "oh I was in Guantánamo." It's like,
it's like, even though I didn't do nothing wrong, but having Guantánamo, it's like something wrong. That you did something wrong. Like, I, example, I was in, I was doing a course in the training center and the film was going to be shown. The Road to Guantánamo. And for one whole week, I couldn't sleep properly. Cuz the ... all them guys, I had to tell them that, "oh I was in Guantánamo," in case they watch the film, and they say "oh you was in Guantánamo?" So for one week, I couldn't sleep properly. Everyday I was thinking, oh what should I do, what should I do, what should I do, like that. And it was one, the day before the film was gonna show, they was all chilling out, talking, and [I] got to say, I got to tell you something, "I was in Guantánamo." And one of the guys, he's a fat guy like a bit of a joker, he goes "what, did you take it in the piss?" Like, in a serious way. And the others, the other guys start laughing, and they go, "oh we already know, we seen you in the advertisement." And I thought, fucking-a! You don't even know what I've been going through, and they go "we don't care." And it was like, oh it's just back to normal. But it's like, the whole thing, even when I work, when I have to go to people's houses. It's like, oh, they might be thinking oh this guys is from Guantánamo, blah blah blah. And its, some houses you go on, and it comes on Guantánamo, it's on the TV. And you think, oh maybe this person recognizes me that I was in Guantánamo. But it's kinda like, all right-ish.

Thus, despite his colleagues being relatively accepting of his history, a sense of the potential for social death hovers like a ghost around all he does, a perpetual whispering from the past. There’s a sense of rejoining life, but a separateness remains.

Another former detainee from the West reports having had a predominately positive experience post-release. His observations suggest that some of the stigmas he and his comrades have faced may fade with time. Indeed, there is hope that his post-release notoriety—the “charisma” noted by Warren—may eventually morph into something more mainstream:

Yeah, I don't think there's anybody in my community that when they, you know, and I don't mean this in any facetious way, but whenever I do a speech now, and somebody introduces me, they say and here's somebody who needs no introduction, so it's, but that's part of the job that I do. That's because I've chosen to do this. And the response I've had from the community has been fantastic, and it's not just, I mean, by no means by any stretch of the imagination has it been the Muslim community, it's, the Muslim community is part of the wider community that's been very, very receptive. In fact, when I returned first, the Muslim community was quite frightened, quite scared, worried. You know, we've given the platform to this guy who was in Guantánamo and what's everybody going to think and so forth, whereas the, what I would call the indigenous population, or parts of it, were very, very receptive, media even. And hostility has been minimal, I mean, hostility that I get more often than not is never to my face. It's, if I write something for the, for a newspaper in a comment piece, the response I get here, that's when the hostility comes about.

Overall, the Uighurs seem to have fared the worst in terms of being able to rebuild their lives. This imbalance is due in large part to their inability to return to their families because of the very real possibility that China will torture and/or kill them if they return home. Their family ties are severed: because of this, many have divorced their former wives and/or fear that they
will endanger their families if they try to contact them. While Uighurs around the world have voiced their support, former detainees have found themselves isolated in countries with alien languages and cultures, countries they are entering with multiple stigmas—as foreigners, as former detainees, and as destitutes.

For example, several explain how they went to work for a pizza parlor, only to have the surrounding community protest when it was discovered that former Guantánamo detainees were working there. As a result, they were all fired. While at least one maintains a desire to open his own restaurant, a lack of community understanding challenges his prospects. With no family or friends to underscore their efforts, or to take them in when the limited support provided by the United States runs out, the obstacles ahead loom large.

Contact theory holds some promise for changing attitudes about stigmatized populations. This theory suggests that increased contact between members of different groups facilitates relations between those groups—presumably by undermining the stereotypes upon which continued stigmatization depends—and thus places some degree of power and control in the hands of the marginalized. G. Allport, the “founding father” of contact theory, has argued that four factors are required to ensure that prejudice is effectively reduced with increased contact. First, the parties must have an equal status in the context in which they interact; second, the activity must be cooperative (the parties must share a common goal); third, there must be personal interaction, such that the parties’ work is interdependent; and finally, the parties must share social norms. While some scholars have criticized the ability of interracial contact to lessen prejudice, the theory has not been disproved and remains popular: a recent meta-analysis concluded that 94 percent of relevant studies “found an inverse relationship between contact and prejudice.”

Allport’s observations may help explain the differing post-release experiences of former detainees, and why some cultural groups have tended to experience release as a form of rebirth, while others remain relatively stuck. For an Afghani man who returned to abundant support from his family and community, his previous status was more likely to be attained; his goal of destigmatization was aligned with many of those around him; his degree of interaction with family and community members was relatively high; and social norms were largely shared.

For Westerners, while they often returned to their families and original communities, their Muslim identity has meant that the sharing of social norms is more diffuse. Interestingly, though, destigmatization (or even charisma, per Warren) seems to have occurred more with non-Muslim than local Muslim populations, which seem to have had a harder time embracing former detainees’ return. This makes sense, though, when one considers the probability that former detainees would be rejected by the broader society once they returned home, and any potential, attendant fear by other Muslims that the stigmas these men brought with them could further “stain” their already marginalized community.

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As for the Uighurs, for whom rebirth has proven most challenging, few of Allport’s conditions have been met. They have been sent to foreign countries with foreign cultures with few overlapping social norms. They have also had relatively few opportunities to interact with locals: in many cases, they don’t speak the local languages and have had few or no jobs that enable cooperative acts and personal interactions. For social life to resume, such barriers must be quickly overcome.

E. Conclusion

“When I remember Guantánamo, I feel that I woke up from [a] grave or a tomb.”

Ultimately, the relationship between prison and death is an intimate one. As suggested by both the literatures and empirical findings detailed above, the experience of social death seems to operate most through the devolution of identity. The potential blows to identity are myriad; they can manifest through physical damage (the lost eyesight or hearing, the amputations reported by interviewees); damage to one’s social position within his familial unit (as husband, father or provider); damage to one’s professional identity; and damage to one’s overall social standing.

One former detainee, when asked to reflect back on his time in Guantánamo, references his experience of social death particularly eloquently, stating simply, “When I remember Guantánamo, I feel that I woke up from [a] grave or a tomb.” Post release, many former detainees have labored to negotiate new identities, to regain a hope for the future, as part of their struggle to return to social life. As Claudia Card has reasoned in a discussion regarding the intimate relationship between genocide and social death, “[l]oss of social vitality is loss of identity and thereby of meaning for one’s existence.” It is only by recovering that meaning that a cycle of life, to death, to rebirth can conclude. While contact theory offers some promise for better understanding how that cycle operates, how destigmatization can occur and lives be renewed, further research is sorely needed. In the meantime, the interviews, speaking engagements and writings effectuated by former detainees may offer the greatest promise for being noticed, and thereby reclaiming some small piece of social space.

838 Card, “Genocide and Social Death,” 63.
Interviewer: [At Guantánamo], did you become friends with any of the prison personnel, any of the guards?
Former Detainee: No, this is impossible.
Interviewer: You say it was impossible, can you say why it was impossible?
Former Detainee: The and the wolf cannot be friends.\textsuperscript{839}

VIII. The Lamb and the Wolf: Resistance at Guantánamo

Anwar is a “troublemaker.” First introduced in chapter four, during his on-camera interview he tells numerous stories of resistance against exercises of institutional authority. As one example, he explains how every time he’d be released from isolation, the guards would locate him far from the other Uighurs. In response, Anwar would incessantly berate the soldiers: “Move me next to the Uighurs, move me next to the Uighurs,” chanting to drive them crazy. Anwar bows his head and grins as his translator explains that he was known in Guantánamo as a problematic prisoner: “[H]e was always in trouble,” she declares, simultaneously fond and exasperated.

Although the United States realized early on that Anwar and other Uighur detainees were not the terrorists they sought and had simply been “in the wrong place at the wrong time,” the Uighurs have been some of the longest-held detainees.\textsuperscript{840} This is despite the U.S. government having long ago dropped its allegation that the Uighurs were enemy combatants, and a 2008 district court judgment ordering the remaining Uighurs’ release.\textsuperscript{841} The Washington Post has credited the continued detention of a handful of Uighurs to a series of “unlucky turns and remarkable congressional cowardice.”\textsuperscript{842} As of spring 2012, three remain at Guantánamo.

Perhaps the U.S. government’s early acknowledgement of Anwar’s innocence, when paired with the relative length and severity of his captivity, especially motivated Anwar to resist by providing him with a certain moral authority. Regardless of the reason, however, his interview touched on almost every category of resistance identified in this chapter.

Thus, Anwar’s story is overwhelmingly one of resistance: resistance against a criminal identity that was forced upon him at a premature age, and against which he continues to struggle

\textsuperscript{839} Former detainee, interviewed by researchers at the University of California, Berkeley.
\textsuperscript{840} Anwar was released relatively early compared to the other Uighurs, in 2005.
\textsuperscript{841} Kiyemba v. Obama, Case 1:05-cv-01509-UNA, Oct. 9, 2008. For background on this case, including related legal documents, see the Center for Constitutional Rights Website at http://ccrjustice.org/Kiyemba-v-Obama.
post-release. His story—like that of many former detainees—is at its heart the story of a battle for social life over social death. As noted in the preceding chapter, not only is social death a relational concept, but it is “dynamic, fluid and contested;” this contestation appears to have regularly manifested in resistance.844

This chapter offers an analysis of former detainees’ resistance stories to explain when resistance occurred at Guantánamo, when it failed to occur, and why. These resistance stories help elucidate which practices former detainees felt were particularly unbearable and thus worthy of resistance. This chapter also provides detail to the outline this dissertation sketches around cruel, inhuman and degrading forms of treatment, including the ways in which resistance to institutional practices can operate as a means to assert positive self and social identities in contravention of such treatment.

In summary, drawing on the story-based models utilized by Ewick and Silbey,845 Maynard-Moody and Musheno,846 and Morrill et al,847 this chapter reveals former detainees’ experiences of institutional practices and abuse, and the ways in which they resisted violent treatment. Specifically analyzed is who and what former detainees resisted against, the forms their resistance took, and perhaps most importantly, why they resisted, focusing on the meanings with which resistance was endowed. Thus, this chapter elucidates how former detainees recognized and made evident the relative power of the state, endowing it with meaning and using it against itself, “attempting to unsettle, if only momentarily, [those] same relationships of power.”848

A. Theoretical Approaches to Resistance

Four literatures particularly apply to this chapter: 1) sociological studies of institutional resistance; 2) theories regarding the nature of “power” and its role in resistance; 3) analyses of

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844 Indeed, the experiences of detainees can be compared to the struggle once faced by slaves. For example, John Edwin Mason explains that for slaves in early 19th century South Africa, a contestation and fluidity around social death resulted from slaves refusing to accept the permanency of their condition. John Edwin Mason, Social Death and Resurrection: Slavery and Emancipation in South Africa (University of Virginia Press 2003): 7. In the era immediately preceding emancipation, slaves “struggled against social death, ‘sometimes noisily, more often quietly; sometimes violently, more often surreptitiously; infrequently with arms, always with the weapons of the mind and soul.” Ibid., 7-8. Similarly, the social death of former and current detainees is fluid, relational, and contested; tales of a vehement resistance to both social death and a state of incarceration, more generally, is something almost all former detainees communicated during their interviews.
845 Ewick and Silbey, “Narrating Social Structure.”
848 Ewick and Silbey, “Narrating Social Structure,” 1349.
the relationship(s) between resistance and meaning-making; and 4) case studies that describe various types of prison resistance and their relationship to identity.

i. Sociological Studies of Prison Resistance

One of the most seminal analyses of institutional resistance takes place in the classic monograph *Asylums*, in which Goffman defines the total institution as an organization that attempts to “encompass” the social, psychological, bodily, spatial and temporal experiences of its custodial members. In few organizations has such an attempt at total control been more evident than at Guantánamo, which (as established in chapter four) was framed from the outset as a means to take control of an out-of-control situation. The desire to control detainees through military might—and to do so in part by impacting detainees’ identity—is particularly evident in the above quote attributed to Major General Geoffrey Miller, the previous commander at Guantánamo, that “if you allow [detainees] to believe at any point that they are more than a dog then you’ve lost control of them.”

Foucault has similarly described such attempts at totalizing control as a key aspect of “complete and total institutions,” especially prisons. As he has explained,

in several respects, the prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual … his everyday conduct, his moral attitude, his state of mind …. Moreover, the prison … cannot be interrupted, except when its task is totally completed; its action on the individual must be uninterrupted: an unceasing discipline. Lastly, it gives almost total power over the prisoners; it has its internal mechanisms of repression and punishment: a despotic discipline.

Indeed, upon becoming custodial members of such total institutions, individuals often find themselves embarked on moral careers that are cut off and decidedly different from the lives they led on the outside. They are compelled to re-orient themselves to invasive rules and procedures that govern their daily routines, and in so doing have their identities and selves remade in the institution’s image.

What Goffman has observed, however, is that total institutions never quite embrace their custodial members as completely as the above descriptions would suggest. Custodial members engage in what Goffman calls “secondary adjustments” as a means of “getting around the organization’s assumptions as to what [they] should do …. [and] … be.” Secondary adjustments include efforts to re-define the self apart from official definitions. Some secondary adjustments are contained in the sense that they simply give alternative internalized meanings to individuals, while others are externalized in that they are intended to disrupt official structures and activities.

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852 Ibid., 199.
More recent research has expanded on Goffman’s concept of secondary adjustments to show how the inhabitants of multiple kinds of organizations covertly and overtly resist abusive authority and perceived injustice, and in so doing attempt to establish and reify identities other than those which prison personnel impose.\(^{853}\) For example, resistance scholars have identified both material and symbolic forms of subversion in total institutions, including sabotage and theft designed to “punish” the organization, noncooperation (as occurred in Nazi-run institutions during WWII),\(^{854}\) nonconformity, gossip and jokes that constitute a “hidden transcript” used to ambiguously challenge the hegemony of the powerful,\(^{855}\) and “symbolic escape” in which custodial members use both material props (books, card games, etc.), and daydreams to psychologically and socially remove themselves from the harsh realities of their institutionalization.\(^{856}\)

ii. Resistance and Power

What all these forms of resistance have in common is a tacit acknowledgement of, and a struggle for, control over one’s situation, and thus for power. But what is power? And how does it operate? In general, sociologists and social psychologists have sketched four “faces” of power in an attempt to explain what power is and how it is operationalized in social space.

Robert Dahl notably commenced and encouraged the effort to outline the characteristics of “power” by observing that “A has power over B to the extent that he can get B to do something.”\(^{857}\) Peter Bachrach and Morton Baratz expanded on this conceptualization by arguing that power not only lies in motivating someone to do something, but also in preventing him from doing something (a second side to the same coin).\(^{858}\) Next, Steven Lukes explained that power is at work even when an actor, B, subjectively “wants” to act in the way A desires and does so, if such an action conflicts with B’s “objective, real interests” (emphasis added).\(^{859}\) Foucault is responsible for sketching power’s fourth “face,” theorizing power relationships as far more intricately embedded in society than previously acknowledged.

According to Foucault, power is at work in individuals’ thoughts and actions, even those which seem divorced from power. Thus, power often operates outside of conscious awareness and understanding. As for how it operates, power first creates “subjects”: from birth, individuals are molded and pressured to conform to certain norms; power discourages individuals’ ability to “have desires, form goals, and act freely” outside what is expected and idealized. Second, individuals will, on some level, resist this normalizing pressure (an expression of power in itself). Further, power is omnipotent. That is because power lies in “deeper values and norms”

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\(^{858}\) Ibid.
\(^{859}\) Ibid., 979.
that operate magnetically on people’s understanding of others, their role in society, and even their understanding of themselves. Because of this omnipotence, and contrary to the first three faces of power, Foucault’s power is not a resource that belongs to any one actor, “A,” but resides in interactions and potential interactions.

Digeser, a political scientist, has further extended this discussion to explore power’s relationship to 1) intent, and 2) knowledge. These concepts become particularly salient in the conclusion to this dissertation, which discusses intent as an element of torture, and proposes that any intent-based analysis be supplemented with a knowledge-based standard. Importantly, Digeser first explains that intent is subjectively at play in the liberal conceptions of power, objectively at play in the radical conception of power, and potentially irrelevant under Foucault. Second, he describes the relationship between knowledge and the fourth conception of power as having two parts: “there is no power relation without a field of knowledge[, and] there is no knowledge that does not presuppose power relations.”

Digeser describes Foucault’s power as “totalizing” and “individualizing.” By totalizing, Digeser means that Foucault’s power is all encompassing—it acts on all people and all institutions in all ways, to mold individuals and organizations toward idealized norms. However, it is individualizing in the sense that individuals are identified by how much—and in what ways—they deviate from those norms. It is individualizing, as well, in the sense that human beings can internalize norms to the point of becoming their “own jailers,” disciplining their behavior to conform with generally accepted patterns.

Digeser concludes that Foucault’s analysis is helpful to a political conception of power in several ways. First, it can help to “shift[] the object of theoretical inquiry away from describing or clarifying current political practices,” alerting society to the ways in which norms influence all government action. Second, it reminds political scientists that their efforts to produce and increase knowledge give birth to their own norms, which, in turn, create new avenues of power. Third, Foucault’s power expands society’s understanding of what power is and how it operates, not eliminating the other three faces, but enabling “a different layer of analysis.” While Digeser does not find Foucault’s conception of power helpful for figuring out how governments should be organized or behave, he does find it helpful for illuminating the role of power in every action, every government structure.

A prison clearly exercises power over its inmates; indeed, it is the paradigmatic example of a totalizing institution. While a prison’s exercise of power manifests in all its faces, however, it is perhaps the fourth face that works most insidiously in such contexts, and seems to haunt detainees the most.

Of course, any discussion of power raises the critical question of “power to do what?,” a query that is closely related to understanding resistance. Importantly, resistance to assertions of power can take many forms: it can materialize through physical efforts to prevent certain actions from being satisfied, just as it can materialize (at the opposite extreme) as complete submission to institutional demands. For example, if the ultimate goal of many prisoners is to endure the prison experience, to refrain from being “broken” for interrogation purposes (the frequent

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860 Ibid., 986.
861 Ibid., 994.
862 This is especially true post-release, when the power of prison is less direct, yet still impacts former detainees’ social relations and future possibilities.
justification for abusive prison practices), then to submit may often be the “best” option for endurance, and thus serve as an unrecognized form of resistance to interrogators’ expectation of a rigidity that will ultimately “break” the prisoner.

A few former detainees have reported a collective belief that Guantánamo personnel were directed to keep detainees busy with relatively petty grievances in order to distract detainees from the uncertainty of their legal status and their release. As explained by Anwar, one policy for guards was “always to provoke detainees so we will fight back, to resist, to solve this immediate trouble that we are facing, something to keep us occupied were these little incidents of daily life, so we don’t ask for our freedom.” In such cases, to refuse to “take the bait” and thus to offer no response can be, in itself, an act of resistance.

Conversely, inaction can fail to become resistance when it operates as an expression of “learned helplessness.” A number of government documents and additional sources establish that engendering helplessness was one of the primary goals of the harsh interrogation methods and prison conditions to which detainees were subjected. Thus, there is no way of identifying resistance without first asking, “resistance to what?,” since the same action could, at times, operate as resistance, and in others, as capitulation to institutional demands. Indeed, such ambiguity may well have worked to the “advantage” of detainees; as Morrill et al have noted, much institutional resistance is covert, in order to maximize impact while minimizing negative ramifications.

Covert resistance, while perhaps making little external “difference” with regard to the material conditions of daily life, might be quite critical to identity maintenance within institutions. As Ewick and Silbey, Maynard-Moody and Musheno, and Morrill et al have demonstrated, interview-based stories can be particularly fruitful for identifying how particular institutional behaviors are interpreted by individuals. Here, they can be used to illuminate the ways in which detainees were able to recognize opportunities and use resistance tactics to push back against abuse. They can also be used to illuminate forms of resistance that might not

863 Learned helplessness is a term first coined by Martin E.P. Seligman and his colleagues. See, e.g., Christopher Peterson, Steven F. Maier, Martin P. Seligman, Learned Helplessness: A Theory for the Age of Personal Control (Oxford University Press 1993). It has been defined as “a laboratory model of depression in which exposure to a series of unforeseen adverse situations gives rise to a sense of helplessness or an inability to cope with or devise ways to escape such situations, even when escape is impossible.” See, e.g., “Law of Torture” (as presented in an email dated April 3, 2012, sent by Law of Torture on Behalf of Scott Horton to the WWWS-TORTURELIST@Princeton.edu regarding DOD Guidebook to False Confessions Released, on file with the author) [Law and Torture Email] (quoting the American Heritage Medical Dictionary).

864 Law of Torture Email. This can be seen as in contrast to the stated need, in the PREAL Operating Instructions that were designed to train military personnel how to resist interrogation methods, “not to push the student beyond his means to resist.” Pre-Academic Laboratory Operating Instructions, 11.

865 Morrill et al, “Covert Political Conflict.”

866 Ewick and Silbey, “Narrating Social Structure.”

867 Maynard-Moody and Musheno, “State Agent or Citizen Agent.”

868 Morrill et al, “Covert Political Conflict.”
otherwise be recognized as such. Indeed, Ewick and Silbey have created a typology\(^{869}\) to investigate the ways in which individuals use techniques of “masquerade, rule literalness, disrupting hierarchy, and colonizing space” to redistribute power and advantage and create meaning in social life, meaning that can provide an important safeguard for positive social- and self-identities.

Ewick and Silbey especially focus on the ways in which stories of resistance confer information about power relations. As they have noted, “[t]he ways in which social structure is invoked as a strategy of resistance include a manipulation of social roles, exploitation of hierarchy, responses to rationalized rules and regulations, and responses to the disciplining of social interactions along time and space.”\(^{870}\) As Ewick and Silbey observe, individuals, when confronted with legal injustice, often feel “they [are] subject to a power that [can] render the familiar strange, the intimate public, and the mundane extraordinary.”\(^{871}\) And because law is structured bureaucratically, people generally confront legal authority within impersonal, rule-governed, functionally-organized hierarchies that obscure the exercise of power.\(^{872}\)

Despite this, many institutionalized individuals use their understanding of both the law and their specific institution to facilitate resistance and other responses to bureaucratic oppression,\(^{873}\) including blatant exercises of authority. As noted by Morrill, Zald and Rao, individuals may turn to “master frames”\(^{874}\) to help them interpret their experiences. Such frames may be structured around religion, gender, national identity, and even a sense of one’s guilt or innocence, each of which may imbue situations with meanings that encourage or discourage resistance to oppressive institutional behaviors.

iii. Resistance, Meaning-Making and Identity

David A. Snow and Leon Anderson have investigated meaning-making by stigmatized persons. They identify two kinds of meaning—existential and identity-oriented—in their discussion of the ways in which marginalized individuals (such as homeless people or prisoners) use various tactics to “salvage the self.” Salvaging the self “refers to the kinds of meaning they attach to self in interactions with others.”\(^{875}\) Emphasizing the need for individuals to make sense of their existences when faced with “suffocating social structures, unanticipated turns of events, dehumanizing living conditions, or the specter of death,” they explain that for those who face such burdens, the quest for meaning becomes especially pressing. Referencing Goffman, they note that stigmatized people tend to engage in secondary adjustments to distinguish themselves from the demeaning social contexts and accompanying roles to which they are subjected. Such

\(^{869}\) Ewick and Silbey, “Narrating Social Structure.”
\(^{870}\) Ibid., 1350.
\(^{871}\) Ibid., 1347.
\(^{872}\) Ibid., 1347.
\(^{875}\) David A. Snow and Leon Anderson, Down on their Luck: A Study of Homeless Street People (Univ. of California Press 1993): 203.
adaptive behavior can include psychological diversions, which offer a mental escape “from a brutalizing world out of which physical escape seems unlikely.”

Snow and Anderson have also observed that the marginalized may claim or assert an identity that attributes meaning to themselves, meanings that help them resist the meanings and identities institutions attempt to impose. A primary tactic for asserting such identities is “identity talk,” which may take one of three forms: 1) distancing (whereby individuals distance themselves from institutional roles or associations; 2) embracement (“verbal ... confirmation of acceptance of and attachment to the social identity associated” with a particular role, such as embracement of one’s self as a prisoner, or as a religious adherent, or as a friend); and 3) fictive storytelling (embellishment of the past and present, and fantasizing about the future, through stories). Ultimately, Snow and Anderson have underscored—much like Frankl, who wrote in the wake of World War II—that within institutions, resolving issues of meaning and self-worth can be at least as important as satisfying physiological needs.

iv. Prison Identities

Several scholars have identified when institutional control is most likely to engender resistance and how that resistance reflects a number of specific “identities” or roles frequently embraced by prison inmates. For example, Sykes, in his seminal *Society of Captives*, carefully considers the “internal logic” of prison society. As noted in the introduction to his book, Sykes’ study is particularly important for the observation that “the legitimate use of force by prison officials is an inadequate source of social order” and the social struggle that produces that order.

In addition to pointing out the limits of prisons to control inmates, Sykes has noted a scholarly disagreement as to when resistance occurs in such facilities. For example, with regard to prison riots, Sykes has observed that such events can often be “response[s] to a repressive phase in prison management.” As prison routines are tightened by prison personnel, the “informal” power of inmates may be severely curtailed, resulting in rebellion. This observation suggests that an escalation of external control on the part of the prison will incite resistance.

In tension with this understanding, John DiIulio has lauded “a bureaucratized, paramilitary style of prison management which maintains order through strict control.” As noted by Bruce Western in the introduction to Sykes’ study, “[w]hereas riots for Sykes resulted from tightening control and displacing the real men from the inmate leadership, prison riots for DiIulio were due to insufficient official discipline.” While support for each of these theories “is

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876 Snow and Anderson, *Down on their Luck*, 213.
877 Ibid.
878 Ibid., 223.
879 Ibid., 229-30.
881 Sykes, *Society of Captives*, at x.
882 Ibid., x (introduction to the 2007 edition by Bruce Western).
883 Ibid., xii.
884 Ibid., xvi, xvii.
mixed,"\textsuperscript{885} former detainees’ stories suggest that resistance—at least collective resistance—became greatest during Guantánamo’s period of most severe repression, which occurred when General Miller assumed command of the detainment facility in November 2002, lending some support for Syke’s approach.

John Irwin has also analyzed “the prison experience”\textsuperscript{886} although he looks more carefully at the relationship between identity and resistance. He notes that the “first stage of a criminal career is … acquisition of a criminal perspective and identity.” While former detainees rarely frame themselves as criminals—perhaps not surprisingly, one of the most prolific themes that emerged during this dissertation’s interviews was “innocence”—as even Irwin notes, not all men who are confined to prison assume a criminal identity. Yet even those individuals take on various alternate institutional identities, subscribing to particular world-views.\textsuperscript{887} For example, for the “lower class” inmate (an identity framed in non-criminal terms), “fate” is especially important,\textsuperscript{888} much as many former detainees in the Guantánamo context repeatedly reference God’s will. Another non-criminal identity, “the square john,” is similarly reflected in detainee narratives: this category of individuals tends to talk about its purported criminality in terms of “mistakes” or “problems,” again identifying with the conventional world instead of a criminal one.\textsuperscript{889}

Atul Guwande, author of “Hellhole,” the now-famous article on solitary confinement, has also identified the importance of resistance to prison authority for identity maintenance. In his article, he shares a story communicated by an interviewee—“Dellelo”—who spent more than five years in isolation in a Massachusetts prison. Dellelo explained some guards were “decent guys,” decent being defined as men who didn’t trash his room while he showered, or trip him when escorting him in chains, or write him up for contraband if he kept food in his cell. “But some of them were evil, evil pricks.” As Guwande explains,

\begin{quote}
[O]ne correctional officer became a particular obsession. Dellelo spent hours imagining cutting his head off and rolling it down the tier. “I mean, I know this is insane thinking,” he says now. Even at the time, he added, “I had a fear in the background—like how much of this am I going to be able to let go? How much is this going to affect who I am?”
\end{quote}

As Guwande explains,

\begin{quote}
He was right to worry. Everyone’s identity is socially created: it’s through your relationships that you understand yourself as a mother or a father, a teacher or an accountant, a hero or a villain. But, after years of isolation, many prisoners change in another way … They begin to see themselves primarily as combatants in the world, people whose identity is rooted in thwarting prison control. As a matter of self-preservation, this may not be a bad thing. According to … Navy P.O.W. researchers, the instinct to fight back against the enemy constituted the most important coping mechanism for the prisoners they studied. Resistance was often their sole means of maintaining a sense of purpose, and so their sanity. Yet resistance is precisely what we wish to destroy in our supermax prisoners.
\end{quote}

\textsuperscript{885} Ibid., xvii.
\textsuperscript{887} Ibid., 7.
\textsuperscript{888} Ibid., 31.
\textsuperscript{889} Ibid., 32-33.
Other scholars have looked at the ways in which holding *multiple* identities can be instrumental to protecting one’s psychological well-being, and thus serve as resistance to institutional efforts to break down individuals. For example, Peggy Thoits has looked closely at the phenomenon in relation to the issue of social isolation. She defines isolation not in physical terms, but as “the possession of few social identities.”\(^890\) She explains that an individual’s various identities are critical for giving meaning and guidance to one’s behavior, and thus can play a key role in minimizing anxiety, depression and disordered conduct. She ultimately finds that the accrual of multiple identities can help stave off psychological distress. Thus, creating multiple identities for one’s self in opposition to an institution’s singular imposed identity as “terrorist” or “animal” may become critical to the survival of a detainee’s metaphysical self. In this chapter, therefore, it becomes important to consider to what extent the formation and strengthening of multiple identities through resistance and other practices may have resulted in greater endurance and psychological wellbeing for detainees, both in Guantánamo and afterwards.\(^891\)

Finally, a number of scholars have looked at the phenomenon of resistance quite generally in order to better understand how it operates and the various forms in which it manifests. Richard A. Brisbin has provided a particularly helpful overview of the social science resistance literature. He lumps resistance strategies into two particularly helpful categories: inside tactics—those that “pit legality against itself” and thus treat legal mechanisms as legitimate resources that can be mobilized by resisters—and “outside tactics”—those that “reject[] the faith in legality and the legitimacy of the legal complex.” Such outside tactics are frequently phrased in terms of “rights claims,” and “reject the power of the institutions and text of legality that protect people and institutions that socially marginalize or arbitrarily regulate resisters’ lives.”

Outside strategies can include such practices as “subversion by individuals” (such as outright violations of law, justified with ethical or religious claims), civil disobedience (collective nonviolent violations of civil and/or criminal law based on moral or religious values), physical violence (singly or in groups), and finally “exit.”\(^892\) Both inside and outside tactics can take individual and collective forms.

Similarly, Morrill, Zald and Rao have identified and discussed the relationship between voice and covert resistance to institutional power and authority. As they explain, at the organizational level, two theories predominate as to when resistance will or will not occur. The *substitution hypothesis* predicts that mechanisms that facilitate voice within institutions will


\(^{891}\) Sociologist Stephen Marks has argued that subjective commitment to such identities can increase when 1) enjoyment of role performance increases, 2) loyalty to role partners increases, 3) rewards are anticipated due to role enactment, and 4) avoidance of punishment increases through role enactment. See Thoits, “Multiple Identities,” 184-85 (discussing Stephen Marks, “Multiple roles and role strain: some notes on human energy, time and commitment,” 42 American Sociological Review 921-36 (1977)).

\(^{892}\) While Brisbin discusses exit as a literal exit of the geographic space controlled by a legal complex, because literal exit is not typically available to prisoners, other options were found to satisfy this drive, such as suicide.

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lessen covert conflict; presumably, therefore, a lack of voice will increase the likelihood of covert conflict. The *complementarity hypothesis*, however, predicts that facilitating voice will actually increase covert conflict.\(^{893}\) As they point out, empirical research has largely supported the substitution hypothesis, a conclusion that seems further supported by the evidence below.

What all resistance stories represent are efforts on the part of individuals to exercise power and control both during the resistance and during its retelling.\(^{894}\) Many of these stories, of course, may be partially or totally fabricated; however, resistance may still be at play. As Ewick and Silbey have noted, “all stories are social events.” In addition to extending “temporally and socially what might otherwise be a discrete or ephemeral victory,” they are also independent facts in the world, and can be mechanisms through which the teller works to create and convey meanings and identities.

Metin Basoglu and his colleagues have noted the importance of prisoners being able to assert some form of control as another means to mitigate the traumatic stress that can result from psychological and physical torture.\(^{895}\) In prison settings, where institutional control is particularly salient, prisoners’ assertions of control through resistance can prove particularly protective. As he explains,

> [H]umiliating treatment and attacks on personal integrity, cultural values, morals or religious beliefs may induce feelings of helplessness in the individual through not being able to act on anger and hostility generated by such aversive treatment. Evidence shows that animals and humans respond with anger, hostility and aggression to threats to physical and psychological well-being. Furthermore, the ability to aggress during uncontrollable stress can dramatically reduce the impact of the stressor in animals. This idea is also supported by anecdotal reports of some torture survivors that suggest that expression of anger and hostility toward the torturers alleviates distress during torture.\(^{896}\)

Thus, regaining some measure of control over one’s physical or psychological condition by engaging in covert and overt forms of resistance may be critical for prisoner well-being.

Altogether, these literatures suggest that resistance can take many forms. It can be individual or collective; it can embrace or push against institutional rules and practices; it can be internal to the individual, or externalized; it can occur instantaneously or resonate across time and space (as when former detainees share their stories of resistance months or years after they occurred). Resistance can rely on law, or it can reject law. Ultimately, though, these literatures also sketch a powerful connection between resistance and meaning, and the ways in which individuals will rise to defend a closely-held identity, when that identity is threatened.

The primary question I attempt to answer below is how, why and to what extent do detainees resist institutional practices in the most extreme of detention settings, when there are arguably fewer formal avenues of resistance than in other contexts? And then, what do these practices mean for a victim-centered approach to cruel, inhuman and degrading treatment?

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\(^{894}\) Ewick and Silbey, “Narrating Social Structure.” 1331.


\(^{896}\) Basoglu et al, “Torture vs Other Cruel, Inhuman and Degrading Treatment,” 283-284.
To help answer these questions, the next section provides a typology of resistance that can be compared with resistance typologies developed in other contexts. That typology offers an overview of the many ways in which former detainees reportedly resisted institutional practices, helping to illuminate when and how the imposition of “total” authority at Guantánamo proved not so total, after all.

B. Resistance at Guantánamo

Consonant with one interviewee’s estimate that two-thirds of his fellow detainees engaged in some form of resistance, resistance stories appear in 88.5 percent\(^{897}\) of the interviews analyzed for this dissertation. While this number suggests the importance of resistance stories to former detainees, even more striking is that an average of 3.7 such stories were told within each of these 69 interviews, ranging from a low of one to a high of twelve.

Particularly interesting is the cultural background of those who told a number of resistance stories well above the mean. When analyzing the eleven interviews in which seven or more resistance stories are shared, a pattern quickly becomes apparent: the overwhelming majority of “high resistance” interviews were conducted with individuals who identify as Uighur (five), or come from western Europe (three), and thus countries strongly rooted in national identities that relate to independence, democracy and free will. What both the Uighurs and European cultures have in common is a relatively strong sense of rights consciousness. For the Uighurs, particularly, “resistance” may have been a core facet of their identity, even prior to their detention at Guantánamo. In its modern connotation, Uighurs are united by a political, as opposed to tribal, identity; they are an ethnic minority from China that has faced severe persecution from the Chinese Government.\(^{1}\) See Guantánamo and its Aftermath, p 122, n. 10. Many of the Uighurs who were captured were outside their native country to try to find jobs or gain additional schooling to support their families back home, and thus build a better life for their loved ones. The animosity between China and the Uighur community becomes especially clear in the Uighurs’ description of their interaction with and resistance to Chinese government officials at Guantánamo. While the United States had promised to keep all information the detainees told them confidential—the Uighurs were afraid that if revealed the identities of their family members to the United States, the Chinese government would find out and punish their family members. They discovered during their meeting that despite the United States promises and assurances, U.S. officials had revealed this sensitive information to the Chinese. Because of this betrayal, and the terrifying threat that such a betrayal posed to the wellbeing of their family members,\(^{2}\) many Uighur detainees reported this experience as the catalyst for ending their cooperation with the United States government. As one interviewee explained, in China, punishment is not limited to the individual accused of wrongdoing, but extends to his or her family.

Perhaps unsurprisingly, each of the forms of resistance that former detainees reported had a counterpart in the institution’s “totalizing” attempts at controlling them. In Guantánamo, prison personnel labored to control detainees’ voices, their bodies (temporarily or indefinitely), their possessions and material space, their autonomy (by demanding their complete cooperation),

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\(^{897}\) Sixty-nine out of seventy-eight interviews.

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their identities, and their futures; it was toward these efforts that resistance seems to have most significantly been directed.

Accordingly, detainees’ resistance stories typically fell into one of six types: 1) voice (which involved making one’s grievances known both inside and outside the prison); 2) physical violence; 3) material sabotage; 4) non-cooperation (such as refusing to eat, refusing to shower, refusing to leave one’s cell); 5) hyper-morality and rule literalness (refusing to tell interrogators what they wanted to hear; insisting on speaking only “the truth”; or illuminating the perversion of rules when taken to their extreme); and 6) exit (either through legal battles designed to engender their release, symbolic escape, or suicide).

More specifically, stories of resistance were typically framed to counter 1) a lack of “voice,” both within and outside the institution; 2) isolation (whether physical or psychological); 3) non-recognition of their physical needs; 4) violence perpetrated against themselves or others; 5) the United States’ claim to moral superiority; and 6) the indefiniteness of their detention.

Resistance, as manifested in these stories, also typically resulted along several dimensions, which can be envisioned on a matrix that categorizes tactics across four dimensions. The first two dimensions are based on people, the third on time, and the fourth on physical space.

The first dimension was whether resistance was collective or individual, or, alternately, lay somewhere on a continuum between the two. For example, a typical pattern that emerged was for an individual to resist some effort on the part of the institution and to have the institution respond with harsh treatment, which would, in turn, be met with collective resistance on the part of detainees.

A second dimension was whether a resistance story positioned a former detainee or a non-detainee as protagonist. Examples of the latter include mention of lawyers who took on detainees’ cases and amplified detainees’ causes to the greater world, and journalists from outside the prison who similarly transmitted their complaints. Occasionally, even sympathetic guards were conveyed as heroes.

Stories also ran along a temporal dimension, centering on whether the resistance occurred in Guantánamo or post-release. Because most (if not all) former detainees suffer the “Mark of Guantánamo,” they continue to struggle against an externally-imposed identity, one that perpetually mitigates their full participation in society.

Finally, and relatedly, stories took on a geographic dimension based on whether they focused on activities inside or outside prison walls.

The chart below offers a few, select examples of how resistance tactics could vary across these four dimensions:

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898 Fletcher et al, Guantánamo and its Aftermath, 4-5 (mentioning a Guantánamo stigma).
<table>
<thead>
<tr>
<th>Individual</th>
<th>Collective</th>
</tr>
</thead>
</table>
| **Internal** (typically detainees, but occasionally non-donatees, such as sympathetic prison personnel) | hunger strike  
noncooperation  
suicide (exit) | mass hunger strike  
mass noncooperation  
mass suicide (voice) |
| **External** (prior to release when resistance was by non-donatees, or after release, when by former detainees and/or non-donatees) | autobiographies (donatee and/or non-donatee)  
interviews (donatee and/or non-donatee)  
individual lawsuits (donatee and/or non-donatee) | documentary films (donatee and/or non-donatee)  
development of organizations (donatee and/or non-donatee)  
collective lawsuits (donatee and/or non-donatee) |

An overview of each of the six types of resistance stories that were told, and their relationship to these four dimensions, is provided below. The next section also offers a summary of when resistance did not occur; the relative effectiveness of individual and collective resistance; and preliminary findings regarding the relationship between prison resistance and wellbeing.

i. Voice

The most prevalent category of resistance stories centered on resistance to a perceived lack of voice both inside and outside the institution. Forty-two percent of interviews featured at least one story (and an average of two stories) that focused on the interviewee’s efforts to be heard, either by another detainee, prison personnel, or the world at large. The voice used to communicate these stories and resist institutionally-imposed silence consisted either of interviewees’ voices, or the voices of proxies, such as lawyers, humanitarian workers and reporters who could communicate detainees’ stories to audiences outside the facility.

a. Detainees’ Voices

Guantánamo was designed to minimize detainees’ voices as much as possible, especially in relation 1) to one another and 2) to the outside world. This is evident from the requirement that detainees not speak with one another, which has been abundantly described in previous literatures as well as detainee interviews, as well as sharp limitations placed on their access to attorneys, family members and the media. Detainees struggled to be heard in two contexts: inside and outside the prison.

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899 The arrows represent the extent to which the collective/individual dimension might be conceived of as a continuum, as opposed to a binary.
900 Such as lawyers, reporters, or guards.
901 Thirty-three of seventy-eight.
902 Sixty-five such stories reflected the theme of “voice.”
903 This number is based on counts within the code “voice.”
One mode of resistance through voice was framed as resistance to the social and/or psychological isolation of detainees inside Guantánamo. For example, one tactic designed to mitigate isolation by facilitating communication was to learn languages, especially English (the language of guards) and Arabic (the language of the majority of prisoners, and as one former detainee explained, “the unofficial language” of the prison). There was tremendous currency to be had by knowing English, since it enabled detainees to understand what guards were saying, which could prove tactically advantageous. In addition, it could encourage empathy and some degree of comradeship from guards, as well as enable detainees to more readily comply with demands when compliance was in their best interest.

Anwar, an especially “high resistance” interviewee, was particularly prolific with learning languages. His translator theorizes his language skills benefited from his youth and the fact that he was more isolated than the other Uighur detainees, who often had each other to talk to. This provided him with a greater motivation and opportunity to learn the languages of others. Also, learning languages might have fed into his previous (and anticipated) self- and social-identity as a student. Thus, learning languages apparently served as a means to combat his institutionally-imposed isolation, and his stigmatized identity as an ignorant (yet conniving) “terrorist.”

A collective version of this was for detainees to teach other detainees how to read and/or write various languages in groups; such practices endowed the teacher with a fairly high-status identity and a raison d’être, and facilitated relationships between inmates. Teaching also helped detainees bridge the “social islands” that many found so difficult to bear. As noted in chapters five and seven, at Guantánamo isolation typically occurred in one of two ways: 1) through physical isolation (separation of detainees from others), or 2) through “social islands” that were created when detainees found themselves located far from others who spoke their language and/or shared their cultural identity. Because isolation was so difficult to endure, many resistance stories reflect means for combating its demands.

For example, several detainees quickly learned that when a detainee would be sent to isolation, he would never be released to the same place from which he was taken. Thus, committing a disturbance (which was usually punished with ERFing and/or physical isolation) became an important tactic for moving through the prison, and hopefully ending up close to others with whom they could communicate. Teaching each other languages, and learning languages, was perhaps one of the most powerful means of resistance, as was being tactical about disclosing what languages one spoke: one British former detainee reports how he would sometimes keep his mouth shut so that the guards would speak more freely around him; in this way, he learned quite a bit about what was going on that he would not have otherwise learned.

Learning languages not only allowed detainees to speak with one another, but with guards, as well. In general, English-speaking detainees most frequently reported having something akin to “friendships” with guards, presumably because they were able to communicate with them, and thereby establish some degree of empathy and rapport. Such consequences helped them battle dehumanization. These relationships also sometimes led to something many detainees craved and many former detainees continue to crave—an apology for the way they had been and were being treated by the U.S. government. Such apologies validated
their need to be recognized as someone who was treated unfairly, an “innocent,” and therefore someone worthy of such a powerful act of acknowledgement.

The role of language as resistance to isolation is particularly evident in an interview with one Afghani man, who reports having been the only Shiite educated, non-Pashtun prisoner in Guantánamo who previously worked for the Afghan government and thus against the Taliban. He was terrified that he would be attacked by Taliban prisoners. He explained that the first thing those prisoners did was “cut their relations” with him, telling all the other prisoners not to talk to him. “So I started teaching most of the Afghans in the cell.” In this way, he made “a lot of Afghan friends.” He claims to have taught 24 Afghan prisoners how to read and write, as well as taught them the Koran, Arabic, English, Persian and mathematics. This kept him extremely busy. By facilitating communication and friendship, as well as giving him a purpose, his tale becomes one of both resistance to his fellow inmates’ efforts to isolate him, as well as resistance to institutional efforts to similarly isolate him and frame him as ignorant. It also provided him with an identity beyond that of “terrorist.” His identity as a teacher was not only more positive than that which was being institutionally-imposed, but expanded the number of self- and social-identities he could plausibly claim, a phenomenon identified by Thoits as particularly valuable for countering a sense of isolation.

Another example of mass resistance through voice occurred in the form of interrogation strikes; such strikes were characterized either by individuals or by entire blocks of detainees refusing to speak during interrogations. In this way they functioned as something of a corollary to learning languages: while one involved resisting institutional efforts to minimize communications (between detainees), the other resisted institutional efforts to maximize communications (between detainees and interrogators).

Indeed, within the prison, there is some evidence that interrogators cared less about what detainees had to say, than getting them to say what they wanted to hear, which ultimately frustrated and angered detainees. This is evident from the “more than 200” interrogations to which some Arab detainees were reportedly subjected; after realizing the futility of providing the same answers over and over, many reportedly stopped talking at all, a noncooperation tactic. As noted by one interviewee from Germany, “I wasn’t talking to people who wanted information, I was talking to people who had already made up their minds.” Such noncooperation spoke volumes about detainees’ anger and frustration.

Thus, both talking and not talking could operate as a form of voice and thus as resistance to institutional demands within the prison complex.

2. Voices Outside Guantánamo

On an individual level, many detainees also fought to be heard outside the prison. Several stories tell of voice as resistance occurring through written correspondence. A couple of former detainees describe having drafted letters that they believe helped impact prison conditions for the positive. For example, one Uighur man claims to have written to Condoleezza Rice: he says his lawyer ultimately gave the letter to a judge, and that his condition soon improved.

For example, and also on an individual level, many former detainees have written books about their time in Guantánamo. Certainly, interviews with reporters and scholarly institutions (such as the interviews underlying this dissertation) offer rich examples of a means through which to exercise one’s voice, and thereby help determine social identities—perhaps even self-
identities—as individuals who “have the power” to impact the future development of their lives, and even the lives of others.

Interviewees also tell stories of resistance to their home governments’ efforts to curtail their communications with media representatives post-release, probably as a means to save face. For example, several detainees released to Afghanistan report having been directed not to speak to journalists. One man explains that once he was released, he and his fellow former detainees were taken to the Afghan Supreme Court, where a press conference was held. They were told by Afghan security not to talk to reporters because “they will create troubles for you.” While he initially complied, such compliance was short-lived. He explains that at the conference, the Chief Justice insulted the newly released prisoners by reciting a verse of the Koran that suggested the former detainees had insulted others, which is why they were “insulted back” in the form of their detainment. As a result, “during the press conference we said that we also want to say something …. Then the journalists also said, ‘Yeah, yeah we want them to say something.’ [The] security guy was pinching [us] saying ‘don’t talk.’”

When the journalists asked the Chief Justice how many Afghans [were] still being held in Guantánamo and when they would be released, the Chief Justice had no choice but to admit that he couldn’t answer that question. “Then we, again, said, ‘Look, what kind of leaders do we have that they have no information about their own Afghans?’ We told them, ‘What the Afghan nation can expect from you? … [And then] we told the Chief Justice, ‘instead of making these released prisoners happy you still insult them.’” In this way, they reclaimed their voice. At the same time, they attempted to reframe the public image of detainees for the positive and of the Afghan government (with which they were sorely disappointed) toward the negative.

Indeed, most post-release communications were indirectly or directly designed to 1) counter the stigma interviewees had acquired as the “worst of the worst,” a stigma most found difficult to shake, and 2) to bring awareness to their plight, that of their colleagues still in Guantánamo, and inmates hidden away in other political-military prisons. Many detainees, especially those released to countries in the west, told of having participated in documentary films, given group interviews, or formed (or joined) organizations dedicated to these purposes. Collective efforts to bring or support lawsuits against United States officials and officials within other countries might also be seen as a means to give voice to their struggles and to right the “record” regarding their identity as innocents versus terrorists.

Thus, much of what “voice” as resistance seems to have been doing was reframing social identities by making others aware of detainees’ situations. In addition, it could minimize social distance by lessening their isolation from the outside world.

b. Non-Detainee Voices

While a struggle for control raged inside Guantánamo, another heated up outside. Non-government organizations, a select handful of reporters, a few individuals who had formerly worked at Guantánamo, and defense lawyers were leading an external charge to 1) challenge legal maneuverings by the United States government to secure the detainees’ indefinite detention; 2) improve access to Article III courts; and 3) investigate the conditions in which prisoners were being held. While these external actors’ stories are not the focus of this chapter,

904 A key example is Cageprisoners.
such sources gave voice to the presumed needs of detainees early on, and later, when outsiders had access to detainees, their actual concerns.

For example, journalists Seymour Hersh \(^{905}\) and Jane Meyer \(^{906}\) helped to break the story of prison abuses at Abu Ghraib, while key attorneys such as Candace Gorman, Clive Stafford Smith, Erwin Chemerinsky, Gitanjali Gutierrez, Sabin Willett and several others actively voiced their complaints to anyone who might listen. Several former detainees told stories in which these individuals served an important role in challenging Guantánamo’s totalizing effects. One former detainee reports how “the one thing” his lawyer did for him was to get a friend of the lawyer—a reporter for *Newsday* magazine—to write an article about his condition while he was imprisoned. While not much happened in response to the article (other than its claimed translation into “twelve languages”), he explains “we were happy that there was someone who knows about our situation.”

Speaking out on behalf of detainees often had consequences, however, as is evident from interviews with non-detainees. For example, Guantánamo’s chaplain, James Yee, who has written about detainee abuse, was imprisoned for alleged espionage and accused of adultery and storing pornography on a government computer after a list of Guantánamo detainees and interrogators was found in his possession (despite having earlier been commended for his “outstanding performance” and despite the fact that all the charges would eventually be dropped). Other “insiders” like Lt. Col. Darrel Vandeveld, a U.S. prosecutor, would resign his job working for the government for unspecified “ethical reasons” that spoke volumes.

One of the most active “outside” resisters was also one of the world’s few Uighur translators. She started as an interpreter inside Guantánamo working on behalf of the United States government. Once she realized the conditions and suffering faced by detainees, she “switched sides” to serve as an interpreter for detainees and their attorneys. As she recalls in an interview with Witness to Guantánamo regarding why she made this switch,

> The men always say that they had so much faith and trust in the United States government, but it turned out … it was not what they expected, and they were disappointed. I was too. I was disappointed in the legal system in the U.S. And, the Constitution we have in this great country, how our forefathers built this country, based on what values? What happened in Guantánamo was not what I understood of the Constitution. … But … I always have my faith and trust in the government, that they are going to correct this mistake and do the right thing. Especially when President Obama came to office, almost, like, the next day he announced that he was going to shut down Guantánamo within one year. And, I was so excited. I had tears in my eyes. Finally. Finally it’s going to be corrected. You know, everybody makes mistakes, but the most important thing is who’s willing to correct that mistake.\(^{907}\)


\(^{906}\) See, e.g., Jane Mayer, “A Deadly Interrogation: Can the CIA legally kill a prisoner?,” New Yorker, Nov. 14, 2005.

Through her translations she quite literally became a “voice” for detainees who were unable to communicate their needs and concerns to a wider public, as well as through later interviews she conducted with researchers and the media to help broadcast the plight of detainees.

ii. Physical Violence

A second major category of resistance took physical form. This was one of the rarer categories of stories, perhaps because physical resistance was commonly met with ERFing, isolation and other extreme forms of punishment, perhaps for moral reasons.

Most stories of physical resistance feature detainees throwing urine, spit, or water on guards (ten percent of interviews908). However, one former detainee (a martial artist in his home country) boasted of having beaten guards a “few times” to protest institutional treatment. He tells the story of how detainees would be in the shower and guards would turn off the water while detainees still had soap in their hair (a frequently reported form of harassment). One time, he protested, saying that he was supposed to get five minutes and only got one; an officer was called to resolve the dispute. When the officer got there, he said the interviewee was lying, that his soldiers don’t lie. When the interviewee responded that it was okay, they could take him out, “they took me out [and] I beat up the guard who didn’t give me my five minutes.”

While he resorted to physical violence, he did not use that tactic often, since it reportedly resulted in him getting less to eat and time in isolation. But more importantly, “I am not a person who likes to beat up people … but sometimes to protect a person you have to do it.” His story was repeated by other interviewees who observed and/or heard about the beating, which became legendary.

Other physical practices, like spitting on guards, or throwing urine or water on them, seem to be attempts to degrade the guards much as detainees felt themselves being degraded. One man explains how he would speak in English to get the guards’ attention; when they would come up to him, he would spit in their faces. He would do this both to get back at the guards and to be sent to the mental ward, where he felt he received better treatment.

Physical violence was also directed at one’s self. In line with this, many former detainees report having committed physical violence against themselves—for example, banging their heads against walls, cutting their arms, or attempting suicide—which proved a relatively successful means of bringing attention to their needs and inciting some recognition from personnel. In one instance, an interviewee reports banging his head against the wall to protest a doctor’s refusal to give him medicine; another did the same thing so that he could “see other human people” (in this case, psychiatrists) and thus end his isolation. In a third instance, a former detainee who was in the medical ward ripped out the IVs in his arms to resist his relatively poor treatment; he reports that the consequence of this act was medical personnel trying to please and placate him.

Food refusals were also mentioned quite often. These could take both individual and collective form. Individual food refusals were reported in at least 13 percent of interviews.909 As

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908 Eight out of seventy-eight.
909 Ten out of seventy-eight.
noted by Hernan Reyes, prisoners refuse to eat for a number of reasons.910 Here, some food refusals seem to have resulted from depression, with anorexia a symptom of that depression; these are not considered hunger strikes, which are food refusals that are explicitly effectuated to protest treatment or achieve some other objective, but medical conditions.911 Other food refusals appear to have been tactical (avoiding food so as not to be drugged when it was suspected that medication was being slipped into detainees’ meals). However, still others were designed to protest treatment, for example to protest not being given needed medications, and thus could be categorized as hunger strikes. These efforts were often relatively unsuccessful; if individual hunger strikes were deemed too threatening to a detainee’s health, he would be force-fed.

However, collective hunger strikes were both more common, and more effective in achieving particular aims. Mentioned in thirty-two percent of interviews (25 interviews), the duration of participation ranged dramatically, from one individual who says he lasted for “five minutes” and another who said he made it through breakfast and then gave up, to individuals who lasted days. In most cases, hunger strikes were reportedly motivated by the need to get external attention from the world at large or to try to get the institution to change various practices (both attempts at voice). Importantly, the purpose with the vast majority of hunger strikes—as with all collective hunger strikes—was not self-harm. However, because such strikes have the potential to injure one’s health, I mention them here.

The reason collective hunger strikes—and attempts at self-harm, in the form of physical violence by detainees against themselves—were likely so successful is because of the potential legal ramifications for the institution if a prisoner died or was seriously injured and the world found out. This is the predominate reason torture tactics in most (especially democratic) parts of the world have been designed or modified to minimize their “visibility,” even while maximizing their “effect”912—to avoid public condemnation, and conflict between the way a particular government identifies itself publicly (for example, as a defender of human rights), versus the way that government may act behind closed doors. By contrast, force feedings (which are incredibly uncomfortable and can be both psychologically and physically traumatizing) are rarely conducted behind “closed doors,” at least at places such as Guantanamo.913 Detailed SOPs are issued, restraint chairs are photographed and publicized on the Internet, and the Department of Defense is explicit about its intention that detainees not “kill themselves”—even though death is never the objective of hunger strikes but may be a tragic by-product of detainee efforts.

iii. Material Sabotage
Other interviewees report having acted out physically against objects, not personnel. This is a particularly interesting category of resistance since the control of objects and possessions is such a major feature of incarceration, and total institutions more generally. Notably, the items that detainees were allowed to have was tightly controlled by the institution. A strict system of rewards and punishments was designed around the “comfort items” that detainees were allowed to have. As discussed earlier in this dissertation, too, there were various “levels” of housing to which detainees were assigned; good behavior (i.e., non-resistance to institutional demands) was rewarded with a greater number of comfort items, while “bad” behavior resulted in items being taken away.

For example, one Uighur man who was in a minimum security camp in anticipation of release shares how he was unable to get a commander to listen to his complaints—specifically his need for medical assistance—so he broke a television. As he reports, “I asked … bring your person in charge, bring the commander; I want to talk to them. And I kept asking them to bring the commander … and they wouldn’t call it for me. So I went in and grabbed the television, and brought it out, and throw it over, and broke the television. They took me back to [isolation],” where he was held for fifteen days.

While he was relatively unsuccessful getting his needs met by destroying physical property, he did end up getting the commander’s attention a short time later when he made a suicide attempt. This reflects the relatively positive results that came from self-harm versus harm against physical objects.

Another former detainee engaged in resistance when a guard tried to take away something that he was technically permitted to have. He had been writing words on a scrap of paper as part of an attempt to learn English; when the guard claimed the paper did not belong to that individual but to another detainee who was no longer even in Guantánamo, the interviewee responded with uncharacteristic outrage and spoke back to the guards for one of his first times, ever, calling them on their “game.”

iv. Non-Cooperation

Non-cooperation was another major category of resistance. Almost all non-cooperation reflected identity-based struggles that either 1) related to individuals’ identities as devout Muslims and stemmed from their refusal to betray the rules of Islam to satisfy the rules of the prison, or 2) emphasized detainees’ identities as “innocents” and thus as non-criminals who should never have been in Guantánamo in the first place.

This category encompasses a wide range of tactics, from refusing to wear certain clothes, to refusing to take off one’s clothes, to refusing to stop praying when ordered to do so, to refusing to see a lawyer, to refusing to talk (either during interrogations or generally, individually or collectively), to refusing to go to the bathroom due to the humiliation of being exposed to others, to refusing to “thank” a guard after being told he had been found innocent, to “refusing” to leave Guantánamo.

Two stories relate to this final tactic. One Uighur man relays how he would not agree to his planned release to Albania. In response, the International Committee of the Red Cross told him he had no choice but to go to Albania or remain in Guantánamo. To this he declared, “I prefer to stay here.” When asked why, he answered, “Because I have heard too many things, bad things, about Albania. … They have no job, they have no money to live … and Albania language
is very difficult to learn. … [B]efore … [my lawyer Chris] told me they’re try to release me to Brazil or Chile or Bolivia. … I will stay here and wait.”

He explains that this “decision” was met with counter-resistance:

*And I think beginning of November 2006, Chris came to talk to me, at that time I was very angered at him, I said, “I don’t want to see you, go away,” to Chris. And he said, “Why? I have new news, very good news for you.” I said, “why?” “In 21 days you will release.” “Where?” “To Albania.” I said, “I don’t want to go to Albania.”*

The week before his scheduled release, the ICRC told him it was decided, and that he had no choice but to leave. After being flown to Europe, “as soon as we came down the plane, the Albanian forces came up and cut off the plastic shackles, says ‘you are free.’” When I arrived, when they were trying to take off all the shackles, I said, ‘No, I want the Albanian people to see how I came, how I arrived, and how I was being suffered like this. … So I don’t want you to take it off, do not remove all these. … But they forcefully removed it.”

While at first this story seems to be one of resistance and of a relative lack of “power” on his part to meet his ultimate objective of not being sent to Albania, he suddenly adds a caveat that shifts the meaning toward his having control: “I know that these Americans, they … always do the opposite; if you tell them do it they don’t, if you tell them don’t do they do it, so I told them ‘don’t take it off,’ they take it off.”

A second former detainee, , explains that he too refused to leave Guantánamo, although his narrative is framed as strategic from the outset, suggesting his opposition was less literal, although no less directed toward resistance.

He begins by explaining that French detainees left in two groups, a first group of four, and a second group of three. After the first group left, the remainder were taken into interrogation and told that

*there was a plane with French people on it and if you tell us what we want you can get on the plane and leave with them. … For me, I told them I had no interest getting on that plane. So I was in Guantánamo for another eight months after the first French people left and after that time they interrogated me quite often. They would say all you have to do is give us information we will let you leave, but since I had already seen people leave I knew it was political and it was only a matter of time. So I would say it’s okay, I’m in no hurry, I’m fine here you can send me home or you can leave me here, and I’m fine. Even if they put me in isolation I knew that I would adapt, if they woke me up every two hours I knew I would adapt, I was fine. About eight months later they moved me to Echo camp, I think, where they had little small houses and inside each house was its own prison cell,*

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914 This tactic recalls the cleverness immortalized in the American folktale “Brer Rabbit and the Tar Baby,” in which Brer Rabbit escapes certain death at the hands of his adversary, Brer Fox, by begging Fox to do anything with Rabbit “except” one thing that Rabbit frames as particularly horrific. When Fox deliberately does that one thing, Fox learns to his dismay that Rabbit has tricked him: that one thing turns out not to be fatal to Rabbit, but the one thing that could save him. See, e.g., S.E. Schlosser, “Brer Rabbit and the Tar Baby: A Georgia Folktale,” American Folklore Website, at http://americanfolklore.net/folklore/2010/07/brer_rabbit_meets_a_tar_baby.html.
so they put me into this prison cell and people who went there usually left within a few days. Two or three days later some military officials came and asked me to sign a document. I said sure is it okay if I read it? And they were happy because they thought that I was going to sign it. So I read it and this document authorized the American government to capture me anywhere in the world if they ever decided that I was a threat to the United States or to any of their allies, so I told them I wouldn’t sign it and they said no, you have to understand, if you want to leave you have to sign the document. I said that I wouldn’t. And the next day a major came by and tried to explain, well you have to sign it because of this reasoning, and I said no, I will explain to you, this is political and did you ask me to sign anything when you captured me? No. I didn’t sign any thing then, I won’t sign anything now. If I’d signed I would have signed, but I didn’t so I won’t. And eventually I went back to France without ever having signed anything. I left two days later.

Such non-cooperation stories were typically individualistic, with one major exception: several detainees told of mass strikes during which detainees collectively refused to speak during interrogations, or collectively refused to leave their cells when ordered to do so. While individualized noncooperation seems to have had predominately psychological, symbolic or constitutive effects (helping to preserve detainees’ self-esteem and positive self-identities), collective non-cooperation was often directed at more external results, such as a change in detainee treatment.

There were also a few—less frequent—examples of mass resistance that had largely cultural implications. One was designed to address the issue of forced nudity, which was perceived as an insult to Islam. Specifically, at least one interview mentions detainees entering into a pact not to look at one another when forced to be naked around one another in the showers. By diverting their gaze—one of the few things they could control in the showers—they could mitigate the degradation they felt was being imposed by the institution, and uphold the modesty required by their faith.

v. The “Truth”: Hyper-Morality, Rule Literalness, Bluff-Calling and Identity

This category of resistance stories seems designed to counter the United States’ inhuman treatment of prisoners (as criminals, the “worst of the worst,” as animals, etc.), and to challenge the United States government’s reputation (and thus its own identity) as a leader in the fields of human rights and legal justice. In such ways, this category of resistance tightly relates to the struggle that ensued for self- and social-identity, and who got to claim the ethical and moral high-ground. In several instances, calling the United States’ “bluffs” was framed as exposing lies, and thus was used to assert detainees’ moral superiority.

With regard to this last phenomenon, bluff-calling, the example provided above of the man who refused to sign the release paper is representative. Thirteen percent of interviews communicate how detainees, when they left Guantánamo, were told they had to sign a letter before they could be released. Written in English, many couldn’t understand what it said. However, they quickly learned, when they pressed for more information, that it was a “release

915 Ten out of seventy-eight.
agreement” that they would not engage in hostilities against the United States or affiliate “in any way” with al Qaida or the Taliban once out of the facility.

All interviewees who mentioned this letter took this letter to be an admission of guilt; many refused to sign the letter despite threats that they could not be released without doing so. Some recognized this claim as a bluff (as in the narrative above); others purportedly refused to sign on principal. This refusal is particularly meaningful given the near-global use of signatures to stand in as a proxy for one’s identity, and the intimate symbolic relationship between signing that piece of paper and tying themselves to an identity—terrorist—which they had spent months or years denying.

Aware by then that whether they stayed or left was due more to political and diplomatic considerations outside Guantánamo than rules meted out by the institution (made obvious by the fact that many European detainees were released before their Middle Eastern peers, likely due to the influence of their home countries), many never signed. With their refusal, they essentially pulled back the metaphorical curtain to reveal the limits of institutional power, the relatively small stature of “The All-Powerful and Mighty Oz.”

In an extreme version of a refusal to sign documents, one former detainee tells how the American government tried to get him to sign confession papers at Kandahar. He says the United States started to use “all kinds of tortures” to make him sign, including electroshocks and hanging him by his wrists from handcuffs. During this process, doctors would regularly check to see if he could survive continued abuse; if the doctor said it was okay, he would be strung back up. His interrogator came twice a day to try to get him to sign the papers, claiming if he signed they would stop the process. While dangling, he would purportedly fall unconscious, only to be revived by water thrown in his face.

When the process finally ended, he asked other prisoners how long he had been suspended, and they said five days. When asked why he thinks his torment finally stopped, he said, “I was passing out; I couldn’t sign anything.” He explains how he watched a fellow prisoner die from similar beatings, saying “I was sure they can do the same thing with me. After three days I was sure it was close, that I can die any time, but it was better for me to die than to sign those papers, to agree that I was a terrorist.”

With regard to the moral high-ground and its relation to identity, it is important to note that the United States government has repeatedly and consistently framed the men at Guantánamo as the “worst of the worst,” as guilty of horrific and incomparable crimes against the United States—both as fundamentalists, and as fundamentally weak. Resistance to such externally-imposed, negative identities is apparent in the following narrative attributed to a former detainee from Great Britain:

I don’t want to be crazy, cuz like, I’ve seen people whose committed suicide, I don’t want to put myself in that position, I don’t want to one day be taking my sheets, ripping it, tying it, putting it around my neck and hanging it, no way … even if I have to live the rest of my life in prison, I’ll live it … but I won’t take my own life, because that’s like, you giving up, you’ve gave up, to the Americans, you show them they’ve won, something I don’t want to do is show them that they was winning. Even though I was a prisoner, but I was a free man, mentally, inside me.

For an article that paints President Bush and his administration as the men behind that curtain, see Chuck Baldwin, “The Man Behind the Curtain,” Philadelphia Jewish Voice, March 2008.
Spirituall, I was free, and I mean I would come to my cell and we would laugh. And the best thing about it was the soldiers could not comprehend, or could not believe, that we would come back from such a bad treatment and come back to us and laugh … they would say, how do you do it? All of your freedoms have been taken away, like, this is the worst place on earth, how do you come back and smile? How do you come back and pray? And yet the soldiers were having problems, some soldiers were taking their lives, some soldiers were finding it extremely hard because they was in Guantánamo, and they would say to us … you’re in a prison but we’re in a bigger prison. I mean how ridiculous does that sound to me? I would laugh and I would say is that a joke? … It was out of your own will, you’ve joined the military, okay yeah it might not be your will that you’ve gone to Guantánamo [but] you signed up knowing that it can happen, so now you’re crying? And some of them would have … this thing called combat stress team, which is like the soldiers would actually go every week to this psych dude and talk about their problems [and] talk about their pressure – what pressure? For me it was a joke, so ridiculous. … One [American] guy shot himself … because he got a dear john letter … because his wife was having an affair, and he was a Marine I think, and he shot himself in his mouth and he killed himself… [A]nother one took his own life, drowned, they couldn’t find his body. … According to the soldiers, the information we got, I don’t know if it’s true … but some of the soldiers would say this has happened.

He then goes on to say how they made one particularly despised soldier cry by labeling him “plunger”: after guards ERF’d one of their friends from Qatar, that friend flushed all his comfort items down the toilet in protest. This particular guard, who had participated in the ERFing, was tasked with flushing the items out. From that day on, whenever the guard walked by, the detainees would chant “Plunger! Plunger!” When the whole camp started chanting one day, the guard reportedly threw his black bag in the air, “stamped his feet like a baby,” and ran off the block crying. “Even the other soldiers couldn’t believe it, that we actually managed to, like, put so much pressure and stress on him that we actually made him cry. … Nobody liked him, ‘Plunger.’”

Interestingly, this story paints detainees as strong and in control, and guards as the ones who are weak, vulnerable, trapped. In contrast to many stories told by former detainees, in which they report having felt dirty or contaminated, here it is a guard who is labeled “Plunger,” having an identity forced upon himself that relates to toilets and a tool.

As noted in chapter four, innocence was one of the most prolific themes to emerge from the interviews. Accordingly, many resistance stories paint detainees as innocent and the United States as criminal or weak, inverting the identities the U.S. imposed on them. Many stories seem an attempt to either position one’s self on the same moral plane as military personnel or invert the moral hierarchy that placed the U.S. on top of the world, and detainees on the bottom.

For example, one former detainee from Afghanistan relays the following story: “I was asked several times [by the guards], what do you think about us …? I just told them that I don’t think you are from this world, because I’m also human being …. And human beings should be

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917 Two hundred and nine quotations, as compared with an average of seven quotations per code.

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treated as a human, not as an animal. I saw a prisoner in Bagram who was chained with 20 meters of this big chain. And I don’t think even an elephant is being chained with that big a chain.” In this narrative, he turns the American personnel into non-beings, while humanizing himself and his fellow detainees.

Another man, from a relatively small middle Eastern country, describes the guards as being “like children”—infantilizing them—or as “stupid” and “idiots.” He explains how he didn’t see the Americans as enemies until the guards began insulting their religion, at which point “everything changed.” He told several stories that emphasized his intelligence, his education, his knowledge of history and languages. He even told stories of turning isolation into something restorative, explaining that when the detainees were in solitary they could sit and pray and turn to religion, “so it wasn’t punishment.” “At this time we could memorize a lot of the Koran so we weren’t affected.” Thus, instead of being the worst of punishments, isolation became a “mercy from God.” He explains how when the Americans and detainees would clash on religious issues, “after a while they got tired, the Americans they got very tired and some of them were telling them like ‘we’re very tired now and just keep quiet and don’t make all these problems.’” When asked to reflect back on his resistance stories, he said there were two main things that stand out to him: first, that the American personnel are idiots, and second, that the personnel have a lot of hatred.

This individual also told stories that functioned to challenge America’s symbolic status in the world: “When we read about the British colonialists and their relationship with the Arabs, we see that they were very careful not to insult someone’s religion and how to deal with people and their culture. That’s how they gained a lot of people and some people even felt sad when the British had to leave. Some people felt that during the British colonialism period, they had more rights than they did at other times.”

He also spoke of the American personnel as naïve, as deceived by their own government. As explained by his translator,

*He says that some of the military men would talk to them, they liked to talk and one woman and one man specifically, they actually give us a lot of psychological training. They would be told, like the Americans would be told about the prisoners, that these people are monsters, they like blood, they are uneducated, don’t give them any chance because they will try to kill you the minute they have a chance to do that. And he says that some of them [would] talk to them and they said they were surprised because they told all these things about them and they said “well a lot of you like are educated and some of you are better people than some people we know in America.” So they would tell them about their stories and how they got arrested and the American guards would be really surprised and shocked.*

In response to the stereotype of prisoners as monsters and liars, several former detainees communicated stories of hyper truth telling designed to resist the judgment imposed on them. For example, at least one Afghani man says he threatened to tell everyone about the detainees’ treatment once they were released. “Telling and disclosing the reality is not a crime ….” He described himself as an educated person, who “will tell you the reality and I’m not afraid from anybody in the world.” He went on to claim, “once a person knows the human rights … I think he will not be able and he will not allow anybody to oppress or to tease or to torture an animal as well.” In this way he painted the American government as uneducated and anti-human rights.
This same man, when asked later how his morale had been at Guantánamo, responded “[m]y morale was very good and I wasn’t desperate because I was a Muslim and as I had gained the experience from watching films … I realize that I’m a human and this is just a condition I have faced … and I should tolerate it.”

The tactic of truth-telling seems to be something of a cousin to the “rule literalness” resistance category previously identified by Ewick and Silbey. According to Ewick and Silbey, “rule literalness is based on an appreciation that all transactions are governed by rules.” As they have observed, “rules create both opportunities to resist and means of resistance. … The incompleteness and openings in any rule system provide opportunities that the resister can exploit. … By its very conformity to the explicit language of a rule, this form of resistance challenges and disrupts power by holding it accountable to its own rationality, subverting the purpose of a rule by rigidly observing it.”

Former detainees provided several examples of ways in which such “rule literalness” could operate as a form of resistance in captivity. The following provides an example of one such time when a former detainee from Afghanistan used rule literalness as a means to simultaneously resist and comply with his questioning by interrogators:

[T]hey’re asking us “answer our questions,” and we were saying “yes.” They asked me “what do you think of Al-Qaeda?” Qaeda in fact is the beginning of the Koran, like when they’re newly learning, you know, the crown, like the principals, they learn the Koran, that’s called Qaeda. And I was telling them that Qaeda is the beginning of the Koran, and they were saying “what are you talking about?” I was telling them that Qaeda is the principles to learning Koran so when our children are learning Koran, we first teach them the Qaeda or the principles. Then they became silent and then interrogate me for one month, and after a month they again took me to an interrogation room. Then they brought me those pieces of Qaeda or principals to learn in Koran, you know, pieces of that, and there was a Koran which was put like upside down, but when I entered the interrogation room, I just put the Koran the other way, like right. And then they said, why did you do that? I said it was just disrespect the Koran, and I put it on its right place, and they said, “very good, thank you.” Then they told me, they said, “well, did you mean this Qaeda or principals?” They showed me the books, and I said “yes.” And they said “no, no, we don’t talk about this.” They said “we didn't mean this principal book, the Koran, we meant Al-Qaeda, which is a terrorist network who are killing innocent people.” I told them “Islam hate more than you those who kill innocent people.”

This example of covert resistance demonstrates the extent to which such tactics can be “successful.” Here, the interviewee tells a story of having been able to avoid punishment for not conforming with his interrogators’ demand—that is, to explain his understanding of the Al-Qaeda network—while simultaneously managing to avoid compliance.

A similar, albeit somewhat less successful, example appears in an interview with another Afghani man, who used rule literalness to technically comply with interrogators’ demands but at the same time conform to competing rules of Islam. During a particularly violent interrogation, as shared in an earlier chapter, he refused to reveal his mother’s given name because of

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918 Ewick and Silbey, “Narrating Social Structure,” 1353.
prohibitions against doing so in Afghani culture. Instead, he insisted that she was called “aday,” the Pashtun word for mom. Ultimately, he protected his mother’s honor—and thus his own—despite the beatings that ensued.

vi. Exit

Researchers have found that the single hardest thing for many detainees was the indefiniteness of their detention and thus knowing when they would be able to leave. This finding parallels that of holocaust researchers. As stated by one terrorist suspect who had been held in Great Britain for the last eight years and was facing extradition to the United States, “Eight years without trial is like living on death row. It’s like you are living every day for a tomorrow that might or might not come. And it has been very, very difficult. It’s just not knowing: there are prisoners all around me who have release dates. Even if it is ten years ahead of them, they have a date. Detention without trial is the most unimaginable type of psychological torture.”

This particular practice engendered significant resistance on the part of detainees, taking the form of what Richard Brisbin calls “exit.” In his overview of the ways in which individuals resist “legality,” he discusses how one resistance strategy is to “seek … an exit from the regime.” In the case of Guantánamo, the regime was the institutional complex, and the “laws” of that complex were the rules to which detainees were subject. Brisbin explains that “[i]f a resister finds legal options closed and outside strategies ineffective or unpalatable, a final tactic is simply to leave the geographical space controlled by legality of a legal complex.”

Former Guantánamo detainees told stories that suggest two primary means to resist the indefiniteness to which they were subject: a hyper-engagement with legality (an “inside” tactic, per Brisbin), and/or its opposite extreme, exit. With the former, they countered their non-release and the indefiniteness of their “sentence” by engaging with law (for example, by working with attorneys to employ legal tactics to effectuate their release). With the latter, they rejected the law and legality by attempting a non-legalistic form of exit—symbolic escape—which was psychological, not physical.

Symbolic escape is defined by Morrill, Zald and Rao as “acts that aggrieved parties use to remove themselves from official organizational authority by carving out psychological, social, temporal or physical niches in organizations … to reintroduce a measure of control into their lives that is beyond the reach of official routines they deem unfair or intolerable.” At Guantánamo, going crazy—or seeming to go crazy—could provide detainees with at least the mental escape they craved. Other examples include learning languages to escape the monotony of prison life, purportedly growing a garden in a section of the facility for detainees who had been rewarded with a certain degree of autonomy, or keeping some kind of “pet.” Such symbolic escape could be either individualistic or collective.

A final, non-legalistic, and more literal form of exit was suicide. Some suicide attempts, as framed in former detainees’ stories, were collective attempts to protest prison acts or change prison conditions. In such cases, dying was a possible consequence of the particular method they

920 “Covert Political Conflict,” 398.
had chosen to effectuate social change, specifically acknowledgement of their situation and relief from overbearing institutional authority. However, these collective suicide attempts are less about exit, than voice: specifically, expressing disapproval of particular prison practices and using one of the few tools at their disposal—their bodies. This collective voice was not only directed inwardly, however; in some cases, the focus was external, part of an attempt to bring outside attention into the prison—and thus generate notice of their treatment—by grabbing the attention of reporters and human rights, humanitarian and government investigators.

Guantánamo officials attempted to frame collective attempts at suicide not as acts of despair but as creative forms of warfare; infamously, Rear Admiral Harry Harris claimed with regard to one reported suicide, “[Detainees] have no regard for life, either ours or their own. I believe this was not an act of desperation, but an act of asymmetrical warfare waged against us.”

Instead of detainees being framed as victims, or being permitted sympathy for their distress, this official narrative reframed the United States as the victim. However, human rights narratives challenged this conception: Ken Roth, head of Human Rights Watch in New York, explained that “these people are despairing because they are being held lawlessly,” continuing, “there’s no end in sight. They’re not being brought before any independent judges. They’re not being charged and convicted for any crime.” This suicide ultimately occasioned one of the first mentions by then-President Bush of the possibility that Guantánamo should close, and inmates tried by courts in the United States.

What was actually going on, however, seems to have been a little bit of both. Some suicide attempts were driven by a need for voice—a need to bring outside attention to detainee conditions. In other cases, escaping the prison environment was the apparent objective of a suicide attempt. This form of “suicide as exit” was more likely to be reported as individual, not collective. Eight percent of interviews mention detainees engaging in such “legitimate” suicide attempts.

However, there is yet a third category of “suicides,” ones that were successful, but do not seem to have functioned as resistance at all. The media generally reports that six deaths have occurred at Guantánamo, three simultaneously, and three individually. While some former detainees confirm these deaths as suicides, others have begun to question whether this is, in fact, an accurate classification. Instead of “asymmetric warfare,” several of the suicides have begun to be described as potential murders.

The impression that these deaths may have been homicides is supported by testimonies from individuals who worked inside the prison camp. As reported by one former guard,

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922 Ibid.
923 Ibid.
924 Six out of seventy-eight.
926 The media have also questioned whether these were, in fact, suicides, or whether they were cover-ups of homicides. Ibid.
There were two suicide attempts, I think, that took place when I was down there. I didn’t necessarily see them, I wasn’t on the block when it happened, but you hear it over the radio, you hear everybody respond. Um, there wasn’t a successful suicide, nor do I ever think there will be a successful suicide. When I was there, we were walking up and down the block every five minutes. You, now, there’s always somebody within ten to thirty feet of a cell. And other detainees obviously aren’t going to stand by and let their brethren commit suicide. If they see somebody try to commit suicide, they’re going to start screaming and shouting and yelling. As soon as they do, we’re going to respond. So, I don’t think a suicide can take place in Guantánamo. I know it’s … it’s happened. I don’t think it can be a suicide.

When probed as to whether he’s saying that these weren’t, in fact, suicides but homicides, he responds, “I simply just can’t fathom the possibility of a suicide taking place. There are entirely too many individuals, there is entirely too much monitoring going on, there’s too much hands-on viewing of detainees all the time. They don’t have privacy. Even when they’re in the shower, they’re still being watched.”

Anwar tells a similar story. He explains how he became very good friends with a Yemenese guy who was similarly a teenager when he was captured. His friend taught him Arabic, even giving him his home phone number and telling him to contact his family once he got out. Knowing that Anwar, as a Uighur, could never return to China, he said “they will help you with whatever you need.” After Anwar’s release, he heard that his friend had died. While Anwar initially suggests that the death was a suicide (as it was reported), later he explains, “I don’t believe that he committed suicide because his religious faith is extremely strong…his faith was even stronger than mine.” Earlier in the interview Anwar had explained that while he had contemplated suicide, he had never taken that step because of Islam’s prohibition against taking one’s life. He emphasized that his friend had gone so far as to memorize the Koran. While his friend did go on hunger strikes, “I don’t think he killed himself.”

His friend’s death occurred just weeks after Anwar’s release. When asked to speculate about how his friend might have died, he explains that he doesn’t know, but that “when [ERF teams] come in with a force like that for one person” and the subject has a small frame, and eight, nine, ten MPs come in with “the force, their harshness, some people can’t breathe when they do that.” He explains that they often felt as if they were going to die, but “who knows what happened.” Another detainee, now in Germany, who also knew the deceased, finds it similarly implausible that this individual would commit suicide.

Such claims are further supported by a 2011 article that notes the heavy redaction of a Naval criminal investigation into the deaths of the first three detainees who died. A handful of observations cast doubt on the probability that these were suicides. For example, the deceased were found with their hands tied behind their back, their mouths gagged, and hoods on their heads. Circumstantial evidence strongly suggests that the three men died not from hanging, as

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was officially reported, but from having rags shoved down their throat, a torture practice known as “dryboarding.”

C. Non-Resistance

Former detainees also told multiple stories of non-resistance. The reasons they gave for not resisting tended to be phrased in terms of 1) identity (describing themselves as religious or moral, and therefore patient and willing to endure); 2) futility, including physical impossibility; and 3) manipulation into stopping resistance tactics they had commenced. The concept of non-resistance has an interesting corollary in the legal mobilization literature, which considers the reasons why people do not pursue legal solutions to rights violations when legal solutions may be available. In places such as Guantánamo, where few legal solutions are available, it makes sense that legal mobilization would be swapped for tactics of resistance and non-resistance.

i. Identity and Non-Resistance

With regard to identity, a couple of interviewees said that they did not participate in mass forms of resistance because those efforts were designed and coordinated by Arabs, and they were not Arab. Such culturally-oriented frames reflect and emphasize both self- and group-identity. Identity-based explanations could also adopt religious tones. Several former detainees explained that (unlike others) they never attempted to commit suicide because to do so would violate a tenet of Islam. Others explained that whatever happened to them in prison was “God’s will,” and thus to oppose what was happening would be to oppose God. Notably, not only did such frames underscore an individual’s identity as one who is obedient to religious dictates, but operated simultaneously as a form of resistance to institutional efforts to denigrate detainees’ religion. Other interviewees underscored the need to be patient as a reason for non-resistance, identifying patience as a central teaching of the Koran.

The next most prevalent identity-based frame that contributed to non-resistance was an identity as “innocent.” For example, one former detainee explained there was no need to resist questioning by interrogators, as he didn’t have anything to hide. Another individual, a former military officer from Afghanistan, explained that he followed rules, clinging tightly to his former identity as a military authority, and thus positioning himself—albeit indirectly—as identifying with the institution itself. Another explained that responding to a wrong with another wrong

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wouldn’t be the “right thing to do,” further suggesting his self-identity as a particularly moral person, and contrary to the institution’s initial (and externally transmitted) image of him as a criminal.

ii. Physical Impossibility and Non-Resistance

The second major reason interviewees gave for “not resisting” was because of the physical impossibility of doing so. For example, several interviewees explained that they couldn’t “hack” resistance techniques such as hunger strikes: while one endured for several hours, another explained that he caved as soon as he was offered the extra food that others weren’t eating. Another explained that it was pointless to resist; in one instance, he was told he would be shot if he failed to comply. Several others report having given up attempts at resistance, because such attempts were not effective.

iii. Manipulation and Non-Resistance

Finally, and third, several interviewees claim to have refrained from or ended resistance-related practices because of manipulation. This category fell into two types: “hostile coercion” (manipulation by institutional actors), and “friendly coercion” (typically by other detainees). For example, many explained they were “tricked” into stopping some practice when institutional personnel told them that the underlying situation they were protesting would change (it rarely did). Friendly coercion is evident in stories in which fellow detainees begged resisters to stop their practices to preserve the resistor’s health or safety (for example, by abandoning a hunger strike).

iv. Non-resistance as Resistance

Some stories are ambiguous as to whether they are tales of resistance or non-resistance. Importantly, however, even these stories reveal the extent to which non-resistance relates to identity formation and preservation, and thus how various acts may potentially operate as a form of resistance on a much deeper level than is readily apparent. For example, Hernan Reyes, an expert on hunger strikes, has pointed out the extent to which prisoners might use doctors’ orders or friends’ orders as a cover to stop a behavior that has serious health consequences, yet save face. In such cases, instead of portraying one’s self as weak and having failed in his or her attempt, they can define themselves in terms of group cohesion, as someone cared for and supported, who complies with the wishes of those who wish them well.

This particularly resonates in the stories of former detainees who explain why they did not attempt suicide, despite the helplessness of their situation: one man explains that the “last thing that I wanted was to show them that they’re winning.” His approach to endurance—which in itself can be a form of resistance when the goal of an institution is to break someone—was to

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930 Most interviewees who said they ended their participation in a mass hunger strike after a relatively short time were from western countries.

maintain a sense of humor. This individual summed up his philosophy by explaining that life is a test of one’s faith.

D. Effectiveness

Stories that paint resistance efforts as effective may help counter the relative “helplessness” of prison life. Overall, interviewees reported a relatively high degree of effectiveness; when stories were told of ineffective resistance, it was usually to set up a second story in which the speaker ultimately prevailed, or to underscore the futility of resistance and thus the inhumanity of the institution.

Only a couple of stories were told where efforts did not work or even backfired. For example, one former detainee shared how he insisted on getting a shower; however, when he finally got that shower, he was forced to be naked around other men, a violation of his religious beliefs. Thus, he found that getting what he wanted had resulted in an even “bigger” problem. Another reported how he refused to talk to and cooperate with a government official from his home country, insulting him, only to discover post-release that the official was a “huge human rights person” who may well have had his best interests in mind.

Most interviewees were quite clear that “complaining” about their treatment or condition through official channels was ridiculously ineffective. One interviewee explains how a guard would regularly come around and ask, “You got any complaints?” as part of official procedure. He explained that he’d reply, “Fuck yeah, I’m in fucking Guantánamo,” underscoring the futility of lodging any kind of formalized protest.

Ultimately, while both individualized and collective resistance efforts were usually described as effective, for larger-scale, structural change, group resistance seems to have yielded the greatest effect. A mass hunger strike that took place in 2005, for example, proved effective not only by causing problems within the prison—a problem with which guards were forced to deal—but by grabbing attention outside the facility and thereby increasing external pressure on personnel and higher-ups to treat detainees humanely. As reported by the New York Times (and mentioned by several detainees during their interviews), up to a third of the camp—approximately 200 prisoners—refused to eat as part of the strike. Per the article, an earlier strike had resulted in the establishment of a grievance committee comprised of detainees (as called for in the Geneva Conventions) although the committee did not last long: a mere few days and thus likely as a pretext to shut down the earlier strike. The Times reported that “[a] senior military official … speaking on the condition of anonymity, described the situation as greatly troublesome for the camp’s authorities and said they had tried several ways to end the hunger

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932 He went through Guantánamo with several close friends from his hometown. He also spoke the same language as most personnel. Consequently, it may have been easier to maintain his sense of humor than it was for those who experienced a greater sense of isolation.

933 Bringing such external attention to conditions inside prisons is precisely what hunger strikes are about. Notes from Hernan Reyes to Alexa Koenig, May 2013.


According to interviews with former detainees, different kinds of mass strikes would be triggered by different kinds of mistreatment.
According to one of the detainee’s lawyers, the strike had commenced to protest “their long imprisonment without being charged with any crime as well as the conditions of their confinement,” and was triggered by the abuse of a prisoner following an interrogation session, and disrespectful treatment to the Koran. In further evidence of a possible link between resistance to prison conditions as resistance against social and/or literal death, one detainee was reported as having told his lawyer, “Look, I’m dying a slow death in this place as it is. I don’t have any hope of fair treatment, so what have I got to lose?”

In addition to mass hunger strikes, mass suicide attempts also created substantial “trouble” for guards because of the disruption to official routines and the tremendous manpower it took to cut detainees down before they asphyxiated when multiple detainees were trying to hang themselves at once; detainees also knew that suicides had the potential to bring tremendous attention to their situation through media and NGO responses. Early in 2005, the New York Times reported that 23 detainees had attempted suicide as part of a mass protest that took place in August 2003 (which, as discussed above, was the period that former detainees generally report as having been the most oppressive). Notably, General Miller—who oversaw Guantánamo during a portion of this particularly repressive phase—was sent to Abu Ghraib that same month, where many notorious prison abuses would soon occur. According to a military spokesman, the mass suicide attempt at Guantánamo was among 120 “hanging gestures” (the military euphemism for suicide attempts), and 350 “self-harm” incidents that took place that year.

Not all mass attempts at resistance were collective or premeditated, however. Anwar explains how he once got in trouble for having a small piece of soap in his cell that a fellow detainee had provided him. When the guards called him on the soap, he said he didn’t see any soap, playing the same “game” they had played on him earlier when they had said that he had a spoon in his cell that he had never been given (an assertion he initially found surreal, but eventually realized was being used as a pretext to “punish” him). When he found out they were going to take him to the mental ward, he resisted, because he knew that in the mental ward he would be kept in his underwear, a condition he found embarrassing; he far preferred being sent to isolation. When the cell block realized what was going on, the entire block began threatening to “make problems” if Anwar’s clothes were removed; ultimately, he was taken to isolation instead of to the mental ward, and thus these efforts “worked.”

Even more prevalent than stories of mass resistance, however, although less likely to result in major structural change, were stories of individualized resistance. Many of these resistance stories culminate in some degree of success, such as moves to “better” parts of the detainment complex. Many categories of individualized resistance, and the extent to which they were or were not successful, appear, for example, in the following back and forth between a U.C. Berkeley interviewer and a former detainee from Afghanistan, “Atash.” The following section comes right after Atash has relayed how investigators at Guantánamo asked how old his son was, early in his stay. When he replied “one,” the investigator said that “by the time your son starts to walk the ground, for the first time, [you] will be released … maybe in six months.” “However,
this period … passed .. and I have lived there for almost five years." Those five years would be peppered with constant conflicts with the institution’s personnel.

**Interviewer:** So what block did you go to in Guantánamo?

**Atash:** November block, first I was taken to November block which was like isolation. I've been there for one month.

**Interviewer:** Which camp?

**Atash:** Camp three.

**Interviewer:** Camp three. … So they took you to an isolation block.

**Atash:** Yes. Then I was taken to my block. Then I have been there for almost eight month[s].

**Interviewer:** And how was the treatment there?

**Atash:** It was better than Bagram. And it was just like grade one, grade two, grade three the treatment especially. I was in grade three.

**Interviewer:** What does that mean? Is that good?

**Atash:** It was just like in first, second and when you were in first grade you would receive enough stuff. In grade two you would receive … little bit good stuff. In grade three you would receive just insufficient stuff.

**Interviewer:** You were in the bad grade.

**Atash:** Yes. Absolutely.

**Interviewer:** Why was that?

**Atash:** I, they've provided me with [simply a] blanket and a mat and just a Holy Koran. And I've been there for eight months almost.

**Interviewer:** Were you resisting them?

**Atash:** No, I didn't resist them at all that time. Then they've transferred us to Kalo block and they haven't introduced me to any investigation for almost eight months. And after eight months and when they introduced me to the investigator … I just exchanged some words with the investigator and I just quarreled him.

**Interviewer:** You quarreled with him.

**Atash:** Yes.

**Interviewer:** About what?

**Atash:** He asked me about my sisters, how many sisters I had. I told him three sisters. He told me... he asked me about their names but I refused to tell him my sisters' names because of our culture and our rules in Afghanistan. It is considered as great shame when you mention your wife or wives' names or your sisters' name to somebody. He just wanted to hit me with some chairs. But I also scolded him in English.

**Interviewer:** In English, that's good. What did you say?

[Up to this point the responses have been provided through a translator, however here Atash began to respond to questions directly in English, perhaps suggesting an added desire to communicate what happened. From here on out the responses marked with an asterisk were made directly in English.]

**Atash:*** I said you are bitch and fuck your mother.
Interviewer: Oh really.
Atash:* I said everything.
Interviewer: So what, did he hit you?
Atash: No, but tried to, he yell and beat his chest threatening.
Interviewer: So did they punish you for this?
Atash: No. Then somebody came like...
Atash:* O.I.C. 939
Interviewer: O.I.C.
Atash: I told him that I didn't like.
Atash:* Yeah, he in charge of the camp.
Interviewer: O.I.C. Was it I.C.R.C?
Atash: No. O.I.C.
Interviewer: Who are they?
Atash:* Somebody I don't know. Some guy I don't know he's in charge of the camp.
Atash: And then he changed the investigator for him. Then they've introduced another investigator who is only nineteen years old and he treated me well. And then he granted me the second stage in the camp. They've provided me insufficient food there as well. And the food wasn't enough for me. One day I asked the soldier to give me an extra apple but he refused. As a result of refusal I slapped him on face. And then they have second punishment. Then they have send me as result of my clash with the soldier to Romeo block and I joined other Arab detainees there.
Interviewer: Romeo block? How was that in there?
Atash:* Same block just it just meant I couldn't speak to anybody.
Atash: He couldn't speak to anybody else. It was like isolation.
Interviewer: He couldn't speak...Oh I see...solitary.
Atash: They were...all, most of them were Arabs and I couldn't talk to them. Then I decided to hang myself.
Interviewer: You did?
Atash: Yeah. Two times.
Interviewer: Two times.
Atash: In order to commit suicide for two times.
Interviewer: Three times?
Atash: Yeah three times. Two times in Romeo block and one time in another place.
Interviewer: Were you trying to kill yourself?
Atash:* Yeah.
Atash: Yes.
Interviewer: And what happened?
Atash: I couldn't tolerate anything because of my deteriorated mental status.

939 Officer in charge.
Interviewer: Your mental status was bad.
Atash: Yes.
Interviewer: Angry? Frightened?
Atash: I wasn’t afraid from anybody at all. Then they send me to crazy block.
Interviewer: What’s the name of the crazy block?
Atash: Delta Block.
Interviewer: Delta Block
Atash: It was Delta Block.
Atash: And I have been there for twenty days then. Then I was taken crazy block from there.
Interviewer: What was it like in the crazy block?
Atash: Crazy block is good.
Interviewer: It’s good?
Atash: I like.
Interviewer: They treated you well?
Atash: Yeah, yeah.

Here, Atash’s resistance takes many forms: a refusal to act, verbalized responses, physical responses, and suicide attempts, demonstrating his creativity in finding ways to resist practices in a total institution where—by definition—the opportunities for resistance and control are few. However, all of these acts are also quite reactive, signaling the narrowness of the range of opportunities and a general reluctance to avoid resistance unless deemed necessary. The examples he gives are all relatively unplanned, further suggesting a need to think quickly and to rapidly assess the “spaces” within which resistance can occur.

The acts also reflect a diversity of needs: to provide both material and physical relief (as when he asks for an apple to satiate his hunger), but even more often, to preserve his sense of honor and self (as when he refuses to give his sisters’ names, and when he slaps the officer for refusing to give him food and thus treating him as less than human).

As for the relative “success” of these acts, he actually achieved quite a bit. Although he never did receive his apple, he did manage to secure a new investigator, protect the identities of his sisters, honor his religion, vindicate a perceived insult, and be released into a block that he preferred.

E. Resistance and Well-Being

This final section considers whether there might be a connection between multiple episodes of resistance and social / psychological wellbeing, either while in prison, or post-release.

While the average number of resistance stories per interview was 3.7, the five interviews in which resistance featured most prominently range from nine to twelve. To acquire some sense of how these five “high resisters” are faring post release, and whether there might be some correlation between reporting high levels of resistance and subsequent wellbeing, this section considers their answer to the question “what impact has Guantánamo had on your life either positively or negatively?”
One of these respondents—a British former detainee, who is reunited with his wife and has a small daughter—argues that Guantánamo has had more of a positive effect on his life than a negative one, despite his difficulty getting a job because of his Guantánamo affiliation. He explains, “I don’t regret going to Pakistan, getting arrested, my time in Guantánamo. I believe in my religion, it was part of my faith, God tests you, that test is not over. … It’s made me grow up, I think, made me more mature, I have more life experience than most 27 year olds. I know the world isn’t such a nice place as people make it out to be.” He also notes that in contravention to the Americans’ efforts to squash Islam in Guantánamo, like many people, “now being in Guantánamo I’ve become more religious … they tried their best to make people not pray … but it’s had the opposite effect,” a phenomenon he declares has been positive for him, but “obviously negative” for the Americans.

A second former detainee, also from Europe, has dedicated his post-release life to informing the world about the abuses he witnessed and endured. He has engaged in speaking tours with international non-government organizations, spoken at public events, written a well-known book, and participated in documentaries. While he suffers physically from his beatings and mourns the loss of the “best years” of his life, he praises the fact that he is alive and can now use his “voice” to make a change for the future. Ultimately, he claims to be doing what he can to make the best of his situation, and from an outside perspective seems to be doing relatively well, as someone who is engaged with society and employed on at least a volunteer basis.

A high resistor who identifies as Uighur has similarly committed himself, post-release, to sharing detainees’ experiences with the world. Unfortunately, however, he seems to be doing less well than the others: he is located far from his home community, unable to secure work, and worries for his family back in China. However, this particular population of released detainees—those who were sent to Albania—are in a particularly unique position, since they are one of the few groups who have not been able to return to their original homes. This may complicate how he’s faring post-detainment, suggesting the relative importance of post-release social support for overall wellbeing and/or one’s impression of wellbeing.

A fourth high resistor, from Afghanistan, seems to be doing relatively well compared to his peers. In his interview, he explains that he is a tribal elder who has much respect in his community. His narrative is peppered with references to his high stature, and thus his relative importance. When asked to reflect on Guantánamo and what it has meant for his life, he does not dwell on the negative ramifications on his financial, physical or psychological wellbeing. Instead, he gives a speech about his hope for lasting peace, and the importance of ending war in his country, and rebuilding his country through negotiations, a relatively positive outlook.

Finally, the fifth high resistor, Anwar, seems psychologically raw, despite the fact that he has been out of Guantánamo for several years by the time of his interview. In response to the question above, he answers “There is absolutely no any kind of positives came out of this …. but negative? Everything has been negative.”

Notably, he is Uighur like the third interviewee, and also far from his family and home community. Life post-incarceration for these two high resisters has been reported as subjectively hard. However, despite this, at the time of his interview he was the only former detainee in college, where he was studying computer science. He comes across as so clear-headed, so thoughtful, that his interviewer ends their discussion by saying simply “I want to thank you for your courage – you are amazing.” He seems to have been engaging in and building relationships (he speaks of his “friends”), although his probable depression seems to be moderating his
awareness of this relative success. Despite his negative claims and his apparent depression, from an objective perspective he seems to be functioning at a relatively high level compared with other former detainees.

While these summaries suggest a potential correlation between telling resistance stories and wellbeing, what is unclear, of course, is whether 1) the proportion of resistance stories correlates to actual resistance; 2) whether pre-determined traits determine the propensity for telling resistance stories, and whether those pre-determined traits also dictate subsequent wellbeing; and 3) whether the high number of resistance stories reflect individuals’ propensities towards having a more-positive-than-average outlook, and thus to telling more-positive-than-average stories, which in this case would understandably be ones in which they manage to eke out some measure of control.

While the number of high resisters is too small and non-representative a sample to extend any findings beyond these specific individuals, a careful look at their interviews suggests there may be a relationship between resistance and wellbeing, and that this may be an issue worthy of future, and more systematic, exploration. Such future research would be particularly helpful if researchers could control for a range of potentially confounding factors, such as a former prisoner’s race, culture, gender, length of time in detainment, and post-resistance social support.

F. Conclusion

The two sources of endurance reported most by former detainees—a belief in one’s innocence and a faith in one’s religion—are phenomena that directly relate to their self-identities. Importantly, it was threats to these two things that often triggered the most vehement resistance. These responses strongly suggest that 1) resistance plays a constitutive role, and that 2) almost all resistance may have been, in some way, a refusal to embrace negative, institutionally-imposed identities, and thus to succumb to social death.

More specifically, resistance stories seem to have operated as part of an effort to retain and shape one’s identity in contravention to the identity “forced” upon detainees, both as “terrorists” and as the “worst” of humanity. Consequently, they also seem to have operated as a means to counter institutional practices that could be perceived as inhuman or degrading, and thus as threatening to one’s self and social identities. Instead of bowing to symbolic, psychological and even physical efforts to put detainees in their place, detainees—as framed in their stories and as enacted by those stories’ telling–repeatedly took control of their lives in direct defiance of the institution’s overarching efforts toward total control. This struggle appears to reflect and have been motivated by a need to retain hope: hope for better circumstances and for a more positive

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940 Metin Basoglu and Ebru Salcioglu, in their studies of torture and war trauma survivors, have found that long-term distress may have more to do with each individual’s resilience than with the severity of the treatment to which they were subjected. They note that “repeated exposures to trauma cues and risk-taking behaviors appear to have resilience-building effects,” suggesting those who best recover from trauma are those who are best prepared for it in the first place, such as those who have received military training in ways to endure torture, etc. A Mental Healthcare Model. In the case of the Uighurs, they had relatively little pre-Guantánamo exposure to such training, at least per their interviews, compared with men from Afghanistan, for example, who had long lived in a culture marked by military conflict.
future, either for one’s self or others. Indeed, many interviewees spoke of the importance of 
holding on to a hope that they would one day be released, and the role of their faith in their 
ability to retain hope.

It is particularly interesting that Anwar tells so many resistance stories, when he was 
released fairly early compared with other Uighurs (in 2005, after three years of captivity). There 
are three facts that may help explain this phenomenon. First, he was quite a bit younger than 
many of the other detainees: psychologists have repeatedly noted a correlation between youth 
and crime; this may similarly extend to other examples of institutional “rule breaking.” Thus, 
psychological considerations may come into play. Of course, the reasons could also be structural: 
as noted above, he was often kept separate from the other Uighurs, a fact that engendered 
significant distress and frequently motivated acts of resistance, whether in the form of learning 
languages to facilitate social interaction or causing disturbances to motivate a move to be closer 
to other Uighurs. That suggests the extent to which structural facts—such as social and physical 
isolation—may play a significant role in prison resistance and the very practical desire to find 
ways to be around others who speak one’s language and understand one’s culture.

Finally, Anwar’s prison term almost perfectly correlates with the period of “worst” 
treatment at Guantánamo. Several authorities—as well as interviews with former detainees— 
establish that the rules became especially harsh and that practices more overbearing during those 
early years when General Miller assumed control over the camp. After the Abu Ghraib scandal 
broke in late 2004 (following Miller’s transfer to Iraq) and increased attention subsequently 
came to be paid by the media to detainee treatment at Guantánamo, prison conditions generally 
“improved.” Anwar’s release in mid-2005 means his experiences were concentrated on 
Guantánamo’s most restrictive period. A subsequent relaxation of practices and procedures and 
more respectful treatment of detainees may have lessened the perceived need for resistance.

This is supported somewhat by a review of the entrance and release dates of other “high 
resisters.” Out of the ten interviews in which resistance stories were most prevalent, all 
interviewees (except for one who could not remember his dates of detainment) reported entering 
the prison in 2002. While release dates varied, all of those who remembered them mentioned 
2004, 2005 or 2006. This finding lends some support for the substitution hypothesis noted by 
Morrill, Zald and Rao, and as described in section I(d), above. Thus, structural / institutional acts 
likely play a significant role in the frequency of resistance, as well as the duration of its salience.

Thus, Anwar’s and other former detainees’ stories of resistance suggest that when 
military personnel push too hard on key identity and endurance markers or excessively restrict 
detainees, a struggle will ensue. This has critical implications not only for the safety of 
detainees, but prison personnel, who are often the subjects upon which resistance is enacted, and 
are usually the individuals who have to deal with its aftermath and results—whether by cleaning 
up a mess, dealing with a violent prisoner, or having to answer for a prisoner’s death. Thus, the 
wellbeing of prisoners is directly tied to the well-being of prison personnel, who suffer the 
consequences when prisoners shut down or otherwise resist.
“[E]ven the most violent criminal remains a human being possessed of common human dignity.”

IX. Toward a Revised Jurisprudence of Cruel, Inhuman and Degrading Treatment

This chapter summarizes my empirical findings, sketches the key implications of those findings, and recommends modifications to the jurisprudence relevant to torture, cruel, inhuman and degrading treatment. These modifications promise a richer, more nuanced jurisprudence, one that better reflects the experiences of detainees than current case law, and thus better fulfills the promise of dignity that underlies the world’s collective prohibition of institutional abuse.

A. Summary of Empirical Findings

Former detainees’ narratives offer rich examples of how political-military prisoners experience life during—and following—incarceration. They reveal that institutional practices that may seem relatively benign when considered by non-prisoners and when taken out of context can have an extraordinary impact on the incarcerated. This finding has several important implications for better protecting individuals from torture, cruel, inhuman and degrading treatment, and better ensuring accountability when such treatment occurs.

First, what these stories suggest is that the terms “cruel,” “inhuman” and “degrading” actually do reflect the lived experiences of detainees, especially those institutional practices they denigrate as the “worst.” As illustrated in chapter five and expounded upon in subsequent chapters, stories that reflect former detainees’ worst experiences can be roughly grouped into three types: those that feature physical cruelty, those in which detainees are treated as less than human, and those that emphasize practices designed to undermine detainees’ social standing. Each of these groupings has a striking corollary in lay understandings of the words cruel, inhuman and degrading (although with meanings that, in practice, deviate from their legal and political interpretations). This suggests that the trend towards lumping abusive institutional practices together as “cruelty” may inadvertently result in overlooking practices that are experienced by detainees as particularly egregious, by discounting practices that are psychologically and/or symbolically harmful in favor of those that are physically abusive. This would not be a problem if physical abuse was the only and/or primary practice about which detainees complain; the narratives above strongly suggest the opposite is true. If the law hopes to be responsive to 1) those practices that detainees report as most harmful, and 2) the changing tactics of institutions, including the modern-day emphasis on psychological control, furthering the trend toward prioritizing physical abuse would mean missing a significant portion of the harms these prohibitions can potentially address.

Second, physical cruelty, inhuman treatment and degrading treatment all appear to threaten individuals’ self and social identities: former detainees’ stories reveal a powerful nexus between the experience of institutional abuse and the construction of identity. Interviewees’ worst experiences consistently included practices that constituted a serious threat against their

carefully guarded identities as “innocents,” as devout Muslims, and as men. Identity-oriented practices also produced the most frequent stories of resistance—resistance that railed against the threat of biological, psychological and/or social death. Thus, it is in practices that threaten identity that cruel, inhuman and degrading treatment may especially be found.

Third, the stories above strongly suggest the iterative, contextual, and cumulative nature of institutional violence. Variations in the ways in which interviewees experienced particular practices appear to have been informed by the cultural frames they brought to their experiences; the full range of practices to which they were subjected; the fact of being held by a purported “enemy;” and the cumulative nature of any abuse. Thus, the extent to which various practices might be deemed cruel, inhuman or degrading cannot be considered in a vacuum, if society cares as much about preventing individuals from experiencing extraordinary harm as it does about preventing institutional actors from inflicting such harm. Embracing a contextual approach to the analysis of cruel, inhuman and degrading treatment not only allows for consideration of the “complete picture” surrounding abuse, but creates space for a jurisprudence that is culturally-responsive—one that is as likely to protect detainees from the East and South, as from the North and West.

Fourth, it appears that even in modern-day prisons, there is an integral relationship between physical and psychological violence, and with such facilities’ day-to-day operations. This finding suggests that the shift from physical to psychological tactics of control as theorized by Foucault and noted by Leo cannot be conceived as a continuum: although many of the physical tactics used by prisons to control detainees have changed over time, many (such as shackling for long periods, hoisting, etc.), have not gone away. Instead, psychological tactics have been layered on top of those existing physical technologies.

Importantly, each of the empirical findings presented above has theoretical and/or doctrinal implications. As articulated below, there is, first, a theoretical story about prison dynamics: this includes a micro-level story about the importance of relationships for prisoner well-being and the ways in which such relationships moderate the prison experience, as well as the ways in which the cultural models that individuals bring into prisons impact impressions of proper and improper institutional conduct. There is also a macro-level story about the various tactics of control used within political-military prisons, the ways in which they impact prisoners’ lives during and after their detainment. Third, there is a legal story, one that strongly suggests the need to interject subjective experiences into legal doctrine. Each of these stories is discussed in greater detail below.

B. Key Theoretical Implications

Numerous scholars have noted the shift in punishment and interrogation from control over the body to control over one’s soul or psyche. As noted in the introduction to this dissertation, several decades ago Foucault illustrated the change in western societies’ practices from focusing on corporal punishment toward imprisonment. This shift was accompanied by a concordant rise in psychological technologies of control, reflecting and encouraging a move away from physical torture to psychological torture, most notably in the democracies of the

942 Foucault, Discipline and Punish.
At its best, that shift enabled the theoretical possibility of rehabilitation; at its worst, it facilitated the destruction of prisoners’ psyches, just as bodies were once destroyed. And because psychological damage is far less visible that physical harm, institutional abuse moved away from that which could be readily detected, to something far less apparent.

This dissertation reveals how the shift from corporeal to psychological control is both supported and contradicted by former detainees’ stories. On the one hand, this dissertation provides many examples of the ways in which political-military prisons attempt to control detainees’ psyches; on the other, it reveals the significant extent to which the body continues to be a focus of institutional power and control. At Guantánamo, Kandahar and Bagram, psychologically-oriented practices often operated in conjunction with corporeal practices, such as chaining detainees, using hoods, nakedness, beatings, etc. While these practices may not desecrate the body in the same way as earlier forms of physical torture, the way into the “soul” was frequently through a detainee’s body, or by witnessing harms inflicted on the bodies of others. Thus, institutional violence is not only discursive in the Foucauldian sense, but also corporeal in the service of destroying prisoners’ physical, social and psychological identities.

In addition, the stories above offer substantial evidence of attempts at symbolic control. Institutional actors aimed not just at the iterative relationship between detainees’ bodies and minds, but attempted to control their entire social existence. Importantly, the institution’s efforts were not just confined to the institution, but radiated out across time and space—aiming not only at detainees’ bodies and minds, but their pasts and futures. This is evident in institutional attempts to silence former detainees post release; refusals to clear their names; their banishment to foreign countries; and their frequently-imposed statelessness. Ultimately, the individuals held in political-military prisons—as well as released from them—have not been publicly presented as men, but “terrorists.” Even when they are released from detention and that institutionally-imposed identity, therefore, the result is rarely freedom.

From a more “micro” perspective, it appears that culture plays a significant role both in interpretations of prison phenomena (for example, whether a cavity check is a standard, non-sexualized institutional practice versus sexualized violence), and in motivating (and inhibiting) various types of resistance. Similarly, the relationships that detainees have in political-military prisons apparently impact detainee well-being, although the ways in which those relationships are shaped by institutional structures—and how such relationships moderate interpretations of institutional practices—are poorly understood. Further inquiries into how the longer period of detention in Guantánamo versus other facilities moderated relationship formation, and exacerbated the importance of social contact with others who spoke one’s language and understood one’s culture, would be particularly helpful.

Another, related micro-theoretical implication is that emotion plays a crucial role in mediating impressions of ones’ experiences. Basoglu notes that those who best survive torture (i.e., have fewer indicia of post-traumatic stress disorder) are those who are most prepared to endure it (for example, those who have received relevant military training). Similarly, Bettelheim has noted that those who were best able to survive Nazi internment camps were those who had the most social and psychological—and thus the most emotional—support. Frankl adds to this that the populations were most likely to endure—physically and psychologically—were

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those that were able to hold onto hope. These observations collectively suggest that for many who are detained, one’s emotions can play as critical a role in one’s well-being and even survival as other, more structural factors.

As for organizational-level implications, some practices seem to have occurred more frequently in Guantánamo than elsewhere: thus, it would be helpful to analyze the formal organizational policies and structures of prisons to understand how those mediate both institutional practices and prisoners’ experiences. Which tactics are more likely to occur in makeshift prisons that are designed to hold prisoners for relatively short periods, as opposed to formal, permanent prisons modeled after supermax prisons here in the United States, such as Guantánamo, which might house detainees for years, if not decades?

Ultimately, torture, cruel, inhuman and degrading treatment were key mechanisms through which control could be exercised over the bodies, minds, and futures of detainees at Guantánamo, largely because of such practices’ impact on identities. Such practices may ultimately be impossible to disentangle from the institutions themselves, however, which may explain why it has been so difficult—even impossible—to eliminate abusive treatment in prisons. Indeed, instead of discouraging such violence, laws appear to have merely driven abusive practices underground. This observation leads to the rather cynical conclusion that institutional abuse cannot be eliminated through law. Only changing the nature of punishment—divorcing punishment from total institutions—offers the possibility of ending such abuse.

However, while this may be true (and recognizing that total institutions are not going away anytime soon) there do appear to be ways in which the laws applicable to torture, cruel, inhuman and degrading treatment can be interpreted and/or modified to be more responsive to the realities of institutional violence, including prisoners’ lived experiences.

C. Recommended Jurisprudential Modifications

As illustrated in earlier chapters, the domestic and international jurisprudence relevant to torture, cruel, inhuman and degrading treatment have struggled in terms of 1) internal and external consistency; 2) defining the meaning of intent as it appears in the prohibition against torture in a manner that adequately prevents abuse; 3) effectively incorporating victims’ subjective experiences into legal analyses; and 4) reflecting the full range of harms that result from institutional violence.

As a first step toward remedying those shortcomings, four suggestions are offered, which reflect the legal and political histories of the prohibitions, and former detainees’ experiences. These include:

1) clarifying the meaning of “intent” as it appears in the prohibition against torture;
2) lowering the degree of mental culpability required for cases concerning torture and other forms of cruel, inhuman and degrading treatment;
3) expanding the substantive factors that should be considered when determining whether the prohibitions against torture, cruel, inhuman and degrading treatment have been violated; and
4) recognizing the symbolic effects of institutional abuse.

Each of these recommendations is explained in greater detail, below.

i. Clarifying the Meaning of “Intent”
As articulated in the Convention Against Torture, torture is “any 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 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.”

As explained above, in its Reservation to the Convention, the United States has stated that “intent” is not to be understood as a general intent to use abusive interrogation techniques, but that acts “must be specifically intended to inflict severe physical or mental pain or suffering” to be criminal. Thus, without a specific intent to inflict severe pain and suffering, individuals’ actions cannot be considered torture, no matter how awful. This has enabled personnel at Guantánamo and other political-military institutions to escape accountability for any wrongs that may have been committed. Thus, if we hope to ensure accountability for the types of experiences described by former detainees, we need to start by tackling this issue of intent.

An impressive body of philosophical literature has begun to grapple with the question of intent: what it is and when it should be determinative regarding an act’s legal permissibility. As T.M. Scanlon and Jonathan Dancy have pointed out, there are two ways to think about the phenomenon of intent: narrowly and widely. In the “wide” sense, “[w]hen we say that a person did something intentionally, one thing we may mean is simply that it was something that he or she was aware of doing, or realized was a consequence of his or her action.” This conception is “the sense of ‘intentionally’ which is opposed to ‘unintentionally,’” the latter of which is to claim that one did not realize what he or she was doing. This is arguably the form of intent that a broad theory of torture would embrace.

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945 CAT, art. 1 (emphasis added).
947 This position has repeatedly generated fierce criticism, both from international and domestic sources.
950 Ibid.
However, as they point out, “intention” can also be construed more narrowly: “This narrower sense is much closer to (perhaps even the same as) the idea that is involved in the distinction between the consequences of one’s action that are intended (as ends or chosen means) and those that are merely foreseen.”\(^\text{951}\) It is this narrower conception that the United States seems to have embraced when it made its Reservation in the early 1990s. However, this conception is problematic both legally and philosophically when one considers the moral and ethical underpinnings of the law, a conclusion that has been underscored by criticisms from the Commission Against Torture.\(^\text{952}\)

Ultimately, there seem to be three options for embracing a broader conception of torture, cruel, inhuman and degrading treatment: 1) remove the intent requirement, 2) add to the intent requirement a knowledge / foreseeability standard, or 3) keep the phrasing as-is, but broaden society’s understanding of what the existing phrase encompasses. In the next few paragraphs, I make a case for the latter two options. First, I argue that a broader notion of intent should be embraced—not only for moral reasons, but for legal ones, namely to comport with the United States’ own understanding of torture and cruel, inhuman and degrading treatment as analogous to the Eighth Amendment’s prohibition of cruel and unusual punishment, as well as to comply with international understandings of the prohibitions against torture, cruel, inhuman and degrading treatment. Second, I argue for the addition of a knowledge or foreseeability standard, in order to help secure these objectives.

To place all three options in context, this chapter turns first to an overview of philosophical understandings of the concept of “intent” and its relationship to an act’s legal permissibility.

a. Philosophical Analysis of the Relationship Between Intent and Permissibility

In his article *Intention and Permissibility*, Scanlon argues that relying on “intent” to dictate the permissibility of an act is an easy trap into which one might fall, but a trap nonetheless. There, Scanlon addresses the relationship between intention (“the idea of the intended consequences of an action”) and moral principles. Specifically, the question he poses is this: Can intentions “figure in moral argument … as considerations that can make the difference between an action’s being permissible and its being impermissible?”\(^\text{953}\) His ultimate conclusion is that intent cannot be used to fulfill that role, at least from the perspective of morality.

To illustrate his point, Scanlon provides an example of a hospital, a paradigmatic total institution:

The idea would be that one enters a hospital, putting one-self in the care of its staff and permitting them to manipulate and even invade one’s body in ways that are not generally allowed, only because one has certain expectations, which one takes to be shared, about how one will be treated. These include the understanding that hospital employees will use approved medical techniques with the aim of improving one’s health. It is understood that the hospital has similar duties to other patients, whose needs may have to be balanced against one’s own—one

\(^{951}\) Ibid.


\(^{953}\) Scanlon and Dancy, “Intention and Permissibility,” 310.
may not, for example, be able to get an operating room right away if it is needed for others. ... But it is also understood that hospital staff will not, without one’s permission, aim at making one’s medical condition worse, even if other patients would benefit form this.\footnote{Ibid., 315-16.}

As he explains,

The basic moral idea is the wrongness of violating the understanding (supposing it to be reasonable) on the basis of which patients have placed themselves in the care of hospital employees and given them permission to manipulate and invade their bodies. Intentions have at most a derivative importance insofar as they figure in the content of this understanding.\footnote{Ibid., 316.}

Despite his mention of a possible “derivative” importance of intent, Scanlon then raises doubt as to whether intentions can even “have this derivative role.” He proposes, instead, eliminating any reference to intent when considering the rightness or wrongness of an act:

When we place ourselves in a hospital’s care, we do so with the understanding that they will do what they can, according to contemporary medical standards, to treat our illness. We recognize that the competing needs of other patients for scarce medical resources may limit what can be done for us. This is one exception to the duty to provide us with care. But the fact that others would benefit from a worsening of our condition does not constitute the basis for another exception.

That is to say, such benefits do not (without our consent) justify hospital staff in knowingly bringing about, or failing to prevent, a worsening in our condition.\footnote{Ibid.}

As Scanlon argues, “when these duties are violated it is not the fact that the agents have certain intentions that makes these actions wrong. If a doctor were to withhold medicine … in order to make my organs become available for transplant [and thus, in Scanlon’s hypothetical, to save the lives of five others], what would make this action wrong would not be the fact that the doctor intends that I should die, but rather the fact that what he does violates his duty to treat my illness (a duty to which the need for transplants does not justify an exception).”\footnote{Ibid.}

Scanlon’s hypothetical lays out a compelling argument for eliminating a consideration of intent in cases where individuals have been placed at the mercy of total institutions, especially those institutions that have been charged with a duty of care over their inmates. While a political-military prison such as Guantánamo has presumably less of a duty to safeguard the well-being of its inhabitants than a hospital—its underlying purpose being not to heal but to hold adversaries who are deemed to be a “threat”—there remain sharp limits as to what any institution can do with inmates, as discussed in greater detail below.\footnote{Cases such as \textit{Brown v. Plata}—a U.S. Supreme Court case that delineates domestic prisons’ responsibility to inmates with regard to providing health services—provides relevant and potent examples.}

b. Legal Argument Favoring a Relatively Broad Notion of Intent
Similar reasoning to that presented by Scanlon above seems appropriate to detainees entrusted into the care of an institution such as the United States military. In such an institution, the underlying duty—both as expressed in international and domestic law—is to treat prisoners humanely, and thus in a manner that comports with basic notions of human dignity. Phrased as a negative, this means that states may not torture or otherwise treat prisoners in a manner that is inhumane. As a *jus cogens* requirement, and thus one from which no derivations are permitted, this is a legal limitation, which, *per law*, permits of no exception. By ratifying the Convention Against Torture, the United States presumably bound itself to this “no exception” principle and the debate should end there. However, because this issue of intent (per the torture memos and per the U.S. reservation) is a contested one (and can be make or break with regard to liability and accountability), it continues to be critical to engage with whether the intent of the perpetrator should and/or could be understood as permitting of an exception.

To illustrate my second argument that the United States’ Eighth Amendment *itself* demands the inclusion of a broader conception of intent, I rely on the United States Supreme Court’s recent decision in *Brown v. Plata*, referenced above.\(^{959}\) There, the Court declared that “[a]s a consequence of their actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.”\(^{960}\) Setting aside for the moment that political-military detainees are not necessarily in prison for punishment but because of actions or potential actions attributed by their captors, dignity is the underlying moral value at stake when protecting prisoners from torture and other forms of inhuman and degrading treatment.

In *Brown v. Plata*, the Supreme Court emphasized that

> [t]o incarcerate, society takes from prisoners the means to provide for their own needs. Prisoners are dependent on the State for food, clothing, and necessary medical care. A prison’s failure to provide sustenance for inmates ‘may actually produce physical “torture or a lingering death.”’ … A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."\(^{961}\)

Much as patients are submitted to the mercy of hospitals based on certain understandings of those hospitals’ duties, so too we permit states to have a monopoly on the lawful conducting of violence\(^{962}\) such as capturing and even killing individuals, subject to the limitation that torture can never be an exception to the duty of states to treat prisoners humanely.

This perspective—that intent should be construed broadly and *not* as specific intent—is further supported by the text of the Convention. Indeed, as specified there, intent relates to three


\(^{961}\) Ibid., 12-13.

\(^{962}\) The classic exposition on this phenomenon is Robert Cover’s “Violence and the Word,” 95 Yale L.J. 1601 (1986).
prohibited purposes, namely the purpose “to derive intelligence, otherwise influence behavior of the victim or others, or to discriminate.”

This idea that a broader notion of intent should be embraced certainly comports with other paradigms in U.S. law. For example, negligence theory holds individuals responsible for both the direct and proximate causes (the foreseeable consequences) of their actions: certainly, if some sort of foreseeability standard can be applied to relatively “minor” wrongs that can be remedied through monetary compensation, shouldn’t a similar framework apply where the potential harms of criminal activity are at least as great, if not greater, than in the civil context? This leads into this chapter’s next recommendation: lowering the applicable mental culpability requirements when considering whether someone should be held liable for cruel, inhuman and/or degrading treatment.

ii. Lessening the Mental Culpability Requirement

For every criminal case, a prosecutor must prove that the accused committed both a criminal act (the “actus reas”), and had the requisite mental state (the “mens rea”). The mens rea can be relatively harder or easier to establish depending on the degree of mental culpability that the law requires. In the case of torture and cruel, inhuman or degrading treatment, that mental state is generally interpreted as one of “intent,” the most challenging to prove. The extreme rarity with which individuals are held accountable for torture, cruel, inhuman or degrading treatment—despite these acts’ relative prevalence—suggests that this standard has been interpreted in too restrictive a manner. In response, one possibility might be for courts to shift the culpability requirement to something lesser, for example, something more akin to that used in negligence law. Especially with inhuman and degrading treatment (which states are not required to criminalize, but prevent) the standard might be supplemented with one that better captures the scope of dignitarian harms to which victims may be subjected, and which are often quite difficult to prove because of those harms’ frequent invisibility.

Lowering the mental culpability requirement would not be unprecedented. For example, the standard has been kept relatively low with domestic sexual harassment cases as well as other discrimination-based cases. Accordingly, one possibility might be to replace the onerous intent standard with whether a perpetrator “knew or should have known” that cruel, inhuman or degrading treatment would result from her actions, versus whether she actually intended to be cruel for cruelty’s sake.

Such a standard would work as follows: instead of struggling to ascertain the subjective intent of the alleged perpetrator, courts would consider whether an individual knew or should have known, based on the totality of the circumstances (including such subjective considerations as the alleged victim’s age, sex, nationality, religion, etc.), that the act in which the alleged perpetrator was about to engage would be experienced as cruel, inhuman or degrading treatment by the victim.

Such a standard would help prevent an exception for excessive institutional cruelty where such excessive cruelty was not the alleged perpetrator’s primary intent (as it so rarely is) but was nonetheless a reasonably foreseeable consequence of her actions. It would also bring the jurisprudence in line with other types of dignitarian wrongs recognized domestically, such as United States law prohibiting sexual abuse and harassment\footnote{Indeed, such a standard has been applied to the military, including, for example, liability resulting from the infamous 1991 Tailhook scandal (in which 100 U.S. Navy Seal and Marine Corps officers were alleged to have sexually assaulted dozens of women), and thus to similarly high-pressure environments.} and other forms of discrimination. Indeed, as mentioned above, one of the intents that is forbidden under the express wording of the Convention is the intent to discriminate, further suggesting the standard used in discrimination cases might be appropriate here.

Sophie Moreau’s ruminations on discrimination—specifically her elaboration of what discrimination involves and why it is unjust\footnote{Sophie Moreau, “What is Discrimination?,” 38 Phil’y & Public Affairs 143 (2010).}—are particularly relevant. She has observed that the wrong underlying discrimination, which is at its core dignitarian harm, is usually construed by various jurisdictions as “a personal one, akin to a tort.”\footnote{Ibid., 146-47.} This further suggests a “knew or should have known” standard might be appropriate to similar dignitarian harms.

Moreau posits that the interest injured by discrimination is “our interest in a set of what I call deliberate freedoms: that is, freedoms to have our decisions about how to live insulated from the effects of normatively extraneous features of us, such as our skin color or gender.”\footnote{Ibid.} Interfering with the “victim’s right to a certain set of deliberative freedoms” is considered a personal wrong.\footnote{Ibid.} By extraneous traits, she means those traits “we believe people should not have to factor into their deliberations,” such as those based on race, sex, religion, etc. Thus, in the case of detainees, discrimination-based torture and other forms of inhuman and degrading treatment would be those that specifically constrain detainees’ options because of their deeply held religious beliefs, their gender, etc.\footnote{Ibid.} In addition to addressing the issue of discrimination as it appears in the statute, such an interpretation would create an opening to more effectively

\footnote{The intent issue might be conceptualized along the lines of indirect forms of discrimination. Evidence of both “disparate impact” and “disparate treatment” appear in the testimonies of former detainees, suggesting intentional and unintentional differences in the ways they were treated and the ways in which they experienced various phenomena due to their cultural and individual backgrounds. While the doctrines of disparate impact and disparate treatment traditionally apply in the context of employment law, not humanitarian or human rights law, the broader concept of discrimination certainly applies to the latter fields, suggesting such concepts may be appropriate to help legislators and courts understand how discrimination might operate in the political-military context. In addition, as Goffman has shown, there are several commonalities in the ways in which individuals experience institutions; this further suggests the potential relevance of the doctrines of disparate impact and disparate treatment to the military detention context.}
consider race, gender and culture generally and thus address a major criticism of existing laws designed to address institutional abuse.

This raises a next question, though, one that Moreau characterizes as “troubling.” She asks, “when exactly is someone excluded or disadvantaged ‘because of’ a particular trait?” She notes that

this question is relatively easy to answer in cases of disparate treatment or direct discrimination. Consider the landlord who does not want to lease an apartment to someone because he is of a particular culture, since she would lose the business of other tenants if they had to live near a person of this culture. Here, the “because” involves an appeal to the discriminator’s own reasons or motives. And although there may be difficulties of proof in such cases, it is at least clear what we are trying to prove. But in cases of disparate impact or indirect discrimination, it is much less clear when the “because” requirement has been satisfied. Suppose the operators of a public pool find that the pool is always overcrowded, and so they limit attendance to those who live in the neighborhood. It happens that the neighborhood is an affluent white neighborhood, and hence that most of the people excluded from the pool are those who live farther away in the poorer black neighborhoods. But it was not the pool operator’s intent to exclude blacks when he decided to limit pool attendance. He just wanted to limit the number of people coming to the pool. Have the black swimmers been excluded ‘because of’ their race? How are we to decide this?971

This situation might be analogized to the prison guard who burns a Koran just as she would any other book because a prisoner has written in it. Her intent could be to prevent inmates from using the book to coordinate collective forms of resistance or facilitate black market activities; it could be to psychologically aggravate Muslim prisoners; or it could be a combination of the two. To what extent might such an act be considered religious discrimination, and not a legitimate penal act? As Moreau reasons, this problem of indirect discrimination

is very similar to a standard question that arises in tort law, the question of whether a particular injury is too remote from the defendant’s action to count as his responsibility. Both questions are normative questions, and they both involve judgments about when a particular result is close enough on the causal chain to a particular action to count as something that the agent is responsible for. In my view, we can only address such questions in discrimination law in the same way that we do in tort law — on a case-by-case basis, by asking whether the connection is close enough for the agent to be held responsible for the result. By “close,” I do not mean temporally or spatially close, but rather the kind of thing that the agent can justifiably be held responsible for.972

Moreau’s reasoning supports an argument for a case by case totality of the circumstances analysis, one of several approaches that have been embraced domestically and internationally in the context of cases relating to cruel, inhuman and degrading treatment and thus would easily partner with a modified culpability standard.

971 Moreau, “What is Discrimination?,” 158.
972 Ibid., 159.
The next section of this chapter argues that what goes \textit{in} to that totality of the circumstances analysis—the factors that should be considered—should also be both 1) more thorough and 2) more discriminating than they have been to date.\footnote{Andreas Maier, in his essay, “How Denying Moral Standing Violates Human Dignity” in \textit{Humiliation, Degredation, Dehumanization}, similarly argues for the importance of embracing a broad interpretation of intent and incorporating a greater range of variables when determining whether torture has occurred. There, he explains that “on a very general level we can say that the main intention of the torturer is to enforce his will on the victim.” Ibid., 105. Thus, to build a definition of torture, he first engages with a relatively expansive notion of intent. Ultimately, using this breadth as a starting point, he recommends defining torture as “the sequential infliction of physical and/or mental suffering on a person P1 by another person P2 (or other persons P2-Pn), with the intention to enforce P2’s (or P2-Pn’s) will(s) on P1 performed in a social setting in which P2 (or P2-Pn) can fully determine everything that happens while P1 is completely helpless and fully exposed to P2 (or P2-Pn).” Ibid., 105. His definition embraces “act-level conditions,” “attitudinal conditions,” and “contextual conditions,” and relates them to an understanding that while violence is sometimes used to create a setting in which the aggressor is in control, with torture, the victim is already subject to that control, “without the slightest possibility to evade or resist the situation.” Ibid. As he further clarifies, “[w]hile the torturer’s specific intention is certainly not a necessary condition for his act’s being a case of torture, every act of torture is characterized by the torturer’s intention to break the victim’s will… [and thus] using the will of the victim for her own purposes.” Ibid., 108.} iii. Expanding the List of Substantive Factors Contributing to a Finding of Cruel, Inhuman and Degrading Treatment

As articulated in the legal history presented in chapter two, law currently takes into consideration both subjective and objective factors when determining whether torture, cruel, inhuman and degrading treatment have occurred. The types of subjective factors that have been considered have traditionally been one or both of two types. The first is the \textit{subjective intent of the perpetrator}: was the violence in which he engaged intended to punish, discriminate, or obtain information, etc.? The second looks at \textit{demographic characteristics of the alleged victim}, such as his sex or nationality.

A diagram of the factors that courts currently take into consideration looks something (albeit not consistently) like this:
While both the intent of the perpetrator and the demographics of the victim have generally been lumped together as similarly “subjective” factors, they might more appropriately be distinguished as the “perpetrator intent” and “demographic” sub-categories of subjective factors (the latter of which might ultimately be thought of as objective as much as subjective: while this category reflects subjective facts about the alleged victim, it also consists of objective facts in the world\(^{974}\). In addition, objective factors and those subjective factors related to the perpetrator point to the wrong that may (or may not) have been committed, while the subjective experiences of the victim illustrate the harm that results (or does not result) from that wrong.

As this dissertation has attempted to illustrate with its empirical findings, historical analysis, and theoretical discussion, this limited sense of subjectivity has repeatedly failed to adequately reflect the experiences of detainees—experiences that helped motivate the prohibitions against torture, cruel, inhuman and degrading treatment in the first place.

An example of this failure can be seen in the analysis of “inhuman treatment” that appears in chapter five. As explained there, courts have increasingly come to conceptualize “inhuman treatment” as an “actor-centered” term, and thus to judge it based on the actions of perpetrators to the exclusion of any consideration of the impact on victims. This has unnecessarily limited the breadth of a provision that ironically remains undefined so as to keep its parameters as expansive as possible. By refusing to acknowledge the diversity and individual circumstances of victims, as well as the context surrounding abusive practices, courts have failed to take into account cultural and individual differences among victims and the ways in which they might experience abusive treatment—even when the perpetrator has full knowledge that certain practices that may be considered less egregious in her own culture, might be experienced as especially egregious in others. By supplementing its analysis of inhuman treatment with victims’ experiences of being treated as “not human,” courts can begin to embrace both an agent and victim centered perspective, and thus better remedy the full range of both wrongs and harms that are arguably encompassed by the prohibition.

On this basis, I propose that courts’ understanding of the subjective component of this analysis be broadened as illustrated below:

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\(^{974}\) I say this aware of the debate as to whether any phenomenon might truly be considered a “fact” and/or “objective,” debates that are beyond the scope of this dissertation. Accordingly, I use these terms as typically referenced outside of those debates.
Incorporating an “experiential” category of subjective factors would 1) challenge the assumptions on which many assessments of torture have historically relied; 2) provide victims with a voice (albeit a limited one) in the process; and 3) allow for courts to better capture and reflect the changing nature—and breadth—of both physical and psychological torture techniques. This comports with the broadly stated intent of nations—including the United States—that the prohibition against torture (including the prohibition of inhuman and degrading treatment and cruel and unusual punishment) is meant to be flexible enough to accommodate changing practices across time and space, while simultaneously remaining rooted in the prohibition’s past.

This expanded understanding of relevant subjective considerations would coincide well with the “knew or should have known” standard proposed above. Instead of interpreting a perpetrator’s mental culpability as either specific intent or a generalized intent, law could alternately look to whether the perpetrator “knew or should have known” that her conduct would be experienced as torture, cruel, inhuman or degrading treatment. This would provide a critical opening through which the experiences of victims could be given greater weight in the analysis. It would also enable a more careful consideration of culture—specifically whether the perpetrator knew or should have known that practices would likely be experienced as torture, inhuman or degrading treatment given religious and other cultural backgrounds of the victims. However, because “knew or should have known” is still a fairly stringent standard, it would continue to require prosecutors to establish knowledge either directly or indirectly, maintaining important pragmatic limits as to what might be considered torture, cruel, inhuman or degrading treatment.

iv. Recognizing the Symbolic Effects of Cruel, Inhuman and Degrading Treatment

Law currently recognizes two categories of institutional abuse: physical and psychological.975 While this dissertation makes a case for a broader recognition of psychological harms in order to better capture the experiences of detainees, courts have also failed to recognize

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a potential third category of torture: that which is neither strictly physical nor psychological (which is, in itself, something of a false divide), but that which is symbolic.

It is this third category of harms that is the most difficult to express, but may have the deepest and longest lasting ramifications. A notion of symbolic harm would help clarify why certain practices that are experienced as so incredibly detrimental to detainees—such as sexual violence or social death—continue to be inadequately captured by law. First, torture and cruel, inhuman and degrading treatment are so relatively rare in terms of general, commonly-shared life experiences that they are often not recognized and/or comprehended by judicial actors, most of whom have never personally experienced them. And even when such phenomena are recognized, they are rarely articulated clearly, becoming wrongs that eternally hover just beyond law’s grasp.

Hannes Kuch’s discussion of the symbolic dimension of violations of human dignity\textsuperscript{976} is helpful for beginning to recognize a potential symbolic category of harms that operates as a companion to the physical and psychological. In his chapter on the rituality of humiliation, Kuch impressively explains the ways in which torture can have not only physical but symbolic effects. As he explains, “violence—for example, under torture—inflicts physical pain, but if the violence is mean to humiliate the victim, it has a symbolic dimension. The same is true of poverty: Of course, poverty can lead to bad nutrition, or even to hunger [the physical effects]. But the humiliating dimension of poverty lies in its symbolic impact,” what it says about the relationship of an individual to others.\textsuperscript{977} While it is unclear from his writing how, precisely, symbolic and psychological harms relate to each other (some might understandably mistake one for the other), I think it is extremely helpful to think of them as complementary.

Indeed, the potential symbolic impact of institutional abuse becomes clearer in an example even more removed from that of torture. Let’s say that a company is struggling economically, and has little money to distribute to employees when the time comes for bonuses. In lieu of giving additional money to a prized employee, it elevates her status from vice-president to senior vice-president. While there may be little material change in her physical status (meaning her ability to buy a new car or enjoy an expensive vacation), the symbolic weight of this act can be significant both psychologically and in terms of what it can mean for social prestige, as well as her practical ability to “get things done” at work due to her enhanced social status.

While some might believe the symbolic and psychological impact are synonymous, I believe they are not: while the psychological is internal to the employee, the symbolic impact radiates out across social space. Importantly, this symbolic effect has a constitutive dimension\textsuperscript{978} and thus is tied quite intimately to identity.

Thus, from a normative, policy perspective, I believe it is critical that courts begin to take into account not just the physical and psychological harms of cruel, inhuman and degrading treatment, including torture, but the symbolic as well.

At least two conceptualizations of this are possible. The first would consider the symbolic as one type of psychological harm, albeit one that is not unique to the victim but has a broader

\textsuperscript{976} Kuch, “Rituality of Humiliation,” 37.
\textsuperscript{977} Ibid., 48.
\textsuperscript{978} Ibid., 50.
social reach. However, I think that more appropriately, one might place the symbolic category of wrongs on an equal plane with the physical and psychological, as drawn below:

This conceptualization better acknowledges the constitutive and iterative aspects of torture, cruel, inhuman and degrading treatment. Instead of simply emphasizing the thoughts and feelings within a victim’s head (the long and short term psychological effects), or the harm to a victim’s body (the physical effects), it places the focus on a victim’s relational position within society (the social effects).

It also acknowledges that these various categories of dignitarian harms are aimed at different aspects of human existence, and target (in their “world destroyiness”\(^979\)) different facets of human identity. As indicated in the chart below, physical torture aims at destruction of the body by resulting in permanent or even temporary disfigurement, thereby potentially impacting one’s physical identity. This is especially evident in such cases as throwing acid into a woman’s face to erase her beauty, or cutting off a man’s hand to signify his identity as a thief. However, both of these acts obviously have psychological components as well as symbolic effects. Psychological torture (such as death threats) has as its aim destruction of the will, and at its greatest extreme, destruction of the psyche. In such a way, it aims at one’s self-identity. Finally, there are the symbolic aspects of torture, which aim at destroying one’s position in and relationship to society, whether through predominately psychological or physical means.

Diagram of Physical, Psychological and Symbolic Harms as Dignitarian Harms

<table>
<thead>
<tr>
<th>Type of Harm</th>
<th>Primary Target</th>
<th>Impact on Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physical</td>
<td>The body</td>
<td>Physical identity</td>
</tr>
<tr>
<td>Psychological</td>
<td>The psyche</td>
<td>Self identity</td>
</tr>
<tr>
<td>Symbolic</td>
<td>Relationships</td>
<td>Social identity</td>
</tr>
</tbody>
</table>

D. Toward a More Reflective Understanding of Cruel, Inhuman and Degrading Treatment

To better illuminate institutional violence from the perspective of former detainees, this dissertation aims to reintroduce two sets of voices to the discussion. The first echoes from the past through its exploration into the origins of the prohibition of cruel, inhuman and degrading treatment in the Convention Against Torture and the earlier Declaration of Human Rights. This history reveals how the prohibition was originally conceptualized based on the suffering of prisoners during the Second World War.

The second—more dominant—set of voices emanates from the present, in the context of stories told by former Guantánamo detainees about their detention-based experiences. On the basis of those stories, this dissertation provides empirical support for the normative argument that the jurisprudence of torture, cruel, inhuman and degrading treatment should be modified to recognize a greater breadth of harms, specifically those that are predominately psychological or symbolic in nature, due to their significant impact on victims. While courts do note that psychological violence can be a problem in political-military prisons, their interpretation of such violence is neither as nuanced nor as encompassing as it should be. Finally, the symbolic impacts have been almost entirely overlooked.

Thus, although earlier binding and persuasive decisions must continue to inform later judges’ determinations as to whether cruel, inhuman or degrading treatment has occurred, input from those judgments should be joined by a more thorough consideration of the intent underlying the prohibition’s (as evidenced through its drafting history) and an understanding of the empirical realities of detention (as communicated by prisoners). Conceptualized graphically, this dissertation seeks to restore the arrows on the left and right to the image below:

```
judges

prisoners  past decisions  legislative history
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Of course, this effort cannot focus on judges alone. As noted in chapters two and three, which lay out the legal and political histories underlying torture, cruel, inhuman and degrading treatment and the political context behind Guantánamo, law and policy have emerged from a tug of war between courts and Congress. Thus, Congress must also play a role in any reform. Ideally, Congress would incorporate multiple perspectives into the often-heated debates around what should be done with purported terrorists, and with the remaining men being held at Guantánamo. Of course, few legislators will find it politically expedient to engage with the detainees’ perspectives; therefore, public opinion must be tackled first. One hoped-for contribution of this dissertation is to bring the variability of detention-related abuse to the
attention of non-government actors so that they can educate the public and advocate for change.980

All of these voices—the voices from the past and the voices from the present, the voices of prisoners and the voices of judges, the voices of the public and the voices of lawmakers—are amplified with the hope of refining what we, as a national society and as a global one, consider to be cruel, inhuman and degrading treatment. Thus, this dissertation is based on the assumption that the voices of the past and the voices of prisoners, matter: that the law is not just symbolic, but can and should have very real effects, tethered to the world.

So what would make for a “good” definition of torture, cruel, inhuman or degrading treatment? I propose it is one that encapsulates all intentional acts (broadly defined) that (objectively and subjectively) severely infringe one’s right to human dignity, dignity being the underlying value protected by the prohibition. Importantly, the word “intentional” would modify the word “acts,” not “infringe,” since the latter would raise the possibility of attempted interpretations that exclude any acts committed predominately for the purpose of gathering intelligence or for discrimination, etc., in direct contravention of the Torture Convention. Liability would ensue where the actor 1) intended the act as a severe infringement of human dignity, or 2) knew or should have known that act would be experienced by the recipient as a severe infringement, because the practice would be experienced as physical cruelty, inhuman treatment, degrading treatment, and/or physical or psychological torture.

E. Suggestions for Additional Research

In addition to this dissertation’s empirical findings, theoretical conclusions and doctrinal suggestions, this study reveals several potentially fruitful areas for future research. From a Guantánamo-centric perspective, it would be especially helpful to learn about the experiences of men who have been released to Pakistan, Saudi Arabia and Yemen: these three populations make up the majority of those who have been held in conjunction with anti-terrorist efforts, and yet they are those who have proven least accessible to researchers. An analysis of their experiences holds tremendous promise for shedding much-needed light on the cultural specificity of torture, cruel, inhuman and degrading treatment, and detainment experiences more generally. Particularly needed is a better understanding of the ways in which torture, cruel, inhuman and degrading treatment are experienced universally. Conversely, to what extent do they depend on the specifics of geographic, temporal and personal contexts?

Also helpful would be research into the impact of political-military detention on the family members, friends and broader communities surrounding detainees. Concordant with a recognition of the ways in which total institutions labor to control the self and social identities of inmates, how far does the “power” of such institutions extend? An understanding of the true

980 Several people have asked me whether I am worried that in identifying these experiences I will simply exacerbate the potential for abuse by educating potential abusers as to what might prove most effective. My answer is no—ultimately, I believe that if anyone knows what is experienced as particularly harmful by detainees, it is potential abusers, which is precisely why such violence occurred in the first place. It is the goal of bringing those harms to those outside the prison context that motivated this work, so that these harms would be more universally known, and thus better watched for, and prevented.
scope of the impact of incarceration—across time, space and persons—is in its infancy. Better understanding that scope has potentially enormous implications for responsive policy-making.

Third, because Guantánamo has housed an all-male population, this dissertation fails to incorporate the perspectives of female former detainees. Research is desperately needed into the ways in which gender and gender relations impact detention-related practices and experiences, including interpretations of torture, cruel, inhuman and degrading treatment.

Finally, the time is ripe for a nuanced inquiry into the differences between torture and other forms of institutional abuse. This dissertation has predominately focused on the nature and character of cruel, inhuman and degrading treatment—how do former detainees and others subjected to total institutions understand the difference between those practices and torture? Is there a qualitative difference? And if so, what do those understandings suggest for the development of a consistent and coherent theory for that difference, including what should be penalized by law?

F. Methodological Implications and their Relevance for Future Research

There are several methodological issues that arose in the context of this dissertation that should be considered when designing future research such as that proposed above, as well as when evaluating the findings presented here. First, this dissertation makes the normative argument that we should take prisoners’ subjective experiences into consideration when determining whether cruel, inhuman or degrading treatment has occurred, and use those subjective experiences to inform our working definitions of those terms. However, this suggests a need to be very careful when deciding how to investigate those subjective experiences, and how those subjective experiences come to be imbued with meaning.

One of the most problematic issues is that many of the interviews used as the basis of this dissertation were conducted in a language other than English, and thus in a language in which the interviewers were often not fluent, let alone native. Translation has a tendency to obscure and distort meaning, since translation frequently fails to encapsulate subtleties of emotion. This is especially true for highly emotional conversations, as many of these were. Thus, it would be particularly good to pay attention to the subtleties of language and the ways in which translation can distort—even reverse—intended meanings.

Another phenomenon that would have been good to capture—and would be helpful to ascertain during future research—is the amount of time that transpired between a prisoner’s release, and his or her interview. Time can mediate impressions, as can “agents of transformation” who provide important feedback that individuals use to assign meaning to various social phenomena. Thus, it would be ideal to mark not only time since release, but the kinds of people with whom the interviewee has come into contact during that period: for example, lawyers might provide a legal frame for interpreting past experiences, which impacts

former detainees’ impressions as to particular forms of treatment and whether they constitute
torture, cruel, inhuman or degrading treatment, or something else. A closer investigation into
detainees’ relationships—both in and out of prison—could therefore provide critical insight into
meaning-making and interpretations of legal and illegal practices, and thus when detainees come
to “name” various institutional acts as improper.

Finally, as suggested above, there were various populations that were impossible to
access for political and logistical reasons. More time and the establishment of a more
geographically and culturally diverse interview team might help to overcome some of those
obstacles, and thereby enable a more complete understanding of former detainees’ experiences,
and interpretations of those experiences.
Enduring Freedom, Indefinite Detention

“Terrorism: The calculated use of unlawful violence or threat of unlawful violence to inculcate fear.”

A little more than ten years ago, the United States was a nation reeling in the aftermath of 9/11. Soon after, the country plunged into a war with Afghanistan and began taking into detention, indefinitely, those men who would end up in Guantánamo Bay. On December 31, 2011, the possibility of permanent military detention—not only of foreign nationals but of American citizens—became a reality with President Obama’s signing of the National Defense Authorization Act.984

Ironically, the war that began more than a decade ago in Afghanistan was code named “Operation Enduring Freedom.” The principle of indefinite detention as symbolized by Guantánamo seems fundamentally at odds with that title.

As discovered by Fletcher and Stover in their study documenting the experiences of sixty-two former detainees, the very worst aspect of imprisonment for many was not knowing when or if they would ever be released. Interviewees spoke of the nightmare of being innocent of wrongdoing, wrongly captured, and held indefinitely, with no voice and little power. What this indefiniteness chipped away at was any hope for release, for a future.

This observation of the horror of indefinite detention and its relationship to hope survives the test of time, as documented since the Nazi holocaust and immortalized in the writings of Bettelheim and Frankl. Indeed, what is the one thing the United States has long promised the oppressed? The hope for democracy and the rule of law, for human and civil rights. It is that loss of hope that institutions attempt to squash with rape, with torture, in their effort to “break” individuals’ resistance to institutional demands. Among the historical literature relevant to the Nazi concentration camp experience, the link between the loss of hope and a literal death is made explicit. As explained by Viktor E. Frankl, a noted psychologist who similarly spent years in Nazi-mandated detention, “The prisoner who … lost faith in the future—his future—was doomed.” He has warned that “the sudden loss of hope and courage can have a deadly effect.” And as Nietzsche has declared, “He who has a why to live for can bear with almost any how.”987

Bettelheim similarly recounts a comment by a “very prominent radical German politician,” himself a prisoner during World War II, who declared that “nobody could live in [a] camp longer

986 Ibid., 97.
987 As reprinted in Frankl, Man’s Search for Meaning, 97.
than five years without changing his attitudes so radically that he could no longer be considered
the same person he used to be. This comment suggests, instead, a psychological or social death. Perhaps to bring this social/psychological experience into concert with the physical, the
politician committed suicide on his sixth anniversary in the camp.

Conversely, when asked in 2008 whether he ever thought of killing himself, one former
detainee from Afghanistan answered, “No, I never tried to kill myself because I was expecting
that there would be a law one day.” He held on to hope that his innocence would eventually be
realized, and a just freedom would result.

Ultimately, indefinite detention is directly contrary to the sense of hope. In this way, it
should be understood—not only internationally but domestically—as a contributor to torture, as
well as a potential form of torture, itself. As noted by the Commission Against Torture in a
measured yet deeply critical critique of U.S. detainment-related practices, “detaining persons
indefinitely without charge constitutes a per se a violation of the Convention.” And as U.S.
Supreme Court Justice Antonin Scalia stated in the Hamdi case in 2004, the “very core of liberty
secured by our Anglo-Saxon system of separated powers has been freedom from indefinite
imprisonment at the will of the Executive.” Upholding and employing the rule of law to protect
against indefinite imprisonment is a far greater potential contributor to our ability to secure
Enduring Freedom than can ever be realized by removing suspects from the world.

From a practical perspective, what should the United States do to ensure that the abuses
that occurred at Guantánamo and other military detainment facilities—including post-release—
are not repeated in the future? As noted above, some British jailors have discovered that in
contrast to exerting more control or isolating prisoners to prevent violence, more positive (and
certainly less costly) results can be achieved by preventing prison violence in the first place.
Their approach “starts with the simple observation that prisoners who are unmanageable in one
setting often behave perfectly reasonably in another,” which suggests that pushback from
many prisoners results from the conditions—and thus the context—of their confinement, and not
their innate evil. As explained by Gawande in his article Hellhole, “The British noticed that
problem prisoners were usually people for whom avoiding humiliation and saving face were
fundamental and instinctive. When conditions maximized humiliation and confrontation, every
interaction escalated into a trial of strength. Violence became a predictable consequence.”

So what did the British do?

They gave their most dangerous prisoners more control, rather than less. They
reduced isolation and offered them opportunities for work, education, and special
programming to increase social ties and skills. The prisoners were housed in
small, stable units of fewer than ten people in individual cells, to avoid conditions
of social chaos and unpredictability. In these reformed “Close Supervision
Centres,” prisoners could receive mental-health treatment and earn rights for more
exercise, more phone calls, “contact visits,” and even access to cooking facilities.

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988 Bettelheim, Surviving and other Essays, 69.
989 Ibid.
992 Ibid.
993 Ibid.
They were allowed to air grievances. And the government set up an independent body of inspectors to track the results and enable adjustments based on the data. The “impressive” results from this experiment suggest, then, that by giving prisoners opportunities to maintain some degree of social life, a significant proportion of prison violence and other forms of resistance might be prevented. This, in turn, suggests that prison violence is not necessarily a struggle against the prison, so much as it is a struggle for an identity beyond the prison, a struggle for life itself.

As noted above, both at Guantánamo and afterward, the struggle for identity became a war waged at the deepest levels; the struggle was internal to the individual, as well as expressed in interactions with prison personnel and the world outside. When that identity was most threatened, prisoners were most likely to resist institutional practices; they were also most likely to perceive such actions as a form of impermissible cruelty, even torture. By returning some degree of control to detainees to shape their lives and their future—especially when their detention is long-term—much of this struggle and its ramifications may be avoided.

However, even if the U.S. begins to experiment with this approach, another, equally insidious danger has emerged. A very real concern is that our society’s policy choice for responding to criticism regarding indefinite detention has not been to 1) improve prison conditions, 2) shut down prisons like Guantánamo, or 3) release wrongly-held detainees. Instead of freedom and autonomy being selected as the alternative to incarceration, the policy choice preferred by the most recent administration seems to have been a return to targeted assassinations, both of foreign nationals and American citizens.994

As noted in the introduction to this dissertation, secret prisons originally evolved as an alternative to assassinations. As criticism of such prisons has skyrocketed, and use of detention has become increasingly problematic from a political perspective, assassinations have taken off.995 The magnitude of their rise is far greater, however, than previously, in large part because of technological advances realized over the previous decade and perfected by the demands of war.

While for some, these targeted assassinations seem promising—they mitigate the imprisonment of innocent people and any immediate physical threat to American military operatives by removing them from the battlefield996—they are also a (relatively) easy out that may have dangerous long-term consequences, both domestically and abroad. Targeted assassinations, especially as realized through drone strikes, permit the United States to avoid the difficult logistical, doctrinal and philosophical questions that have emerged in relation to its

994 See, e.g., the work of the Bureau of Investigative Journalism, which has been documenting casualties resulting from US drone strikes in Pakistan, Yemen and Somalia, at http://www.thebureauinvestigates.com/category/projects/drones.
995 Despite the fact that drone operators are largely safe from physical harm, a recent study reveals that drone operators suffer from a PTSD rate analogous to that of pilots who fly attack missions. See James Dao, “Drone Pilots Are Found to Get Stress Disorders Much as Those in Combat Do,” NY Times, Feb. 22, 2013.
detainment policies. They also help the United States evade the close scrutiny that comes from the indefinite detention of men who have caught the attention of both NGOs and lawyers, and from the general U.S. public, who worry about the wellbeing of spouses, sons and daughters in war zones, and welcome a “safer” alternative.

Ultimately, however, such assassinations cannot form the basis of a democratic system of governance, one in which the government is responsive to citizens, and not the other way around. While a detailed analysis of the history and dangers of targeted drone assassinations is beyond the scope of this dissertation, additional research on this emerging phenomenon is desperately needed. As of this writing, it appears that the era of indefinite detention is passing, and the era of drones has begun.
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Appendix

Themes that emerged during the coding process

Abducted
Activist / activism
Afghan Peace Reconciliation Commission
Age at Arrest
Age at Interview
Alice
Americans Duped
Animals
Anorexia
Apology
Arrest: where
Arrested: why
Arresting Agent
Attitude: American Government
Attitude: Americans
Attitude: Home Government
Bad: Detainees
Bad: Soldiers
Bad: Guantanamo
Band - Wrist? Other marker?
Beatings Less Bad
Betrayal
Biggest Impact / Loss
Birth while in Guantanamo
Blame
Bounty
Bribes
Cage
Change (Places or Prison Guards)
Children
Children: no
Communication: Prisoner to Prisoner
Communication: Prisoners to Guards
Community Non-Support
Community Support
Compensation
Control: Americans
Control: No
Control: Yes
Country Nationality (when different than origin)
Country Origin
Court Process / Legality
Cruel
Culture: Compatibility
Culture: Different Experience
Culture: Different Treatment
Culture: Incompatibility / Gangs
Cumulative
Date: Interview
Date: Arrest
Date: Released
Death of family member
Death Would Have Been Better
Deaths: Prisoners
Dirty
Dream
Emotion
Endurance
English (when speaks in English)
Experiment
Explanation: No
Explanation: Yes
Fair / Unfair
Faith: Stronger
Family: In Danger
Family: Missing
Family: Suffering
Fate / God's Will
Fear / Unafraid
False Confession / False Information
Flight: Bad
Forget
Freedom
Future
Game
Gaze
Gender
Good Camp / Bad Camp
Good: Bagram
Good: Detainees
Good: Guantanamo
Good: Kandahar
Good: Soldiers
Guantanamo: Social Death
Happy
Heaven
Hell
Holocaust
Hope
Humanity
Humiliation
Hunger Strike: Guantanamo
Identity
Illegal (treatment defined as)
Infantilization
Innocence
Institutional Pass-Off
Insult
Insult to Islam
Interaction: Home Government
Interpreter
ISN
Isolation: Cell
Isolation: Language
Isolation: No
Isolation: Social
Justice
Labeling
Language: Power
Language: Problems
Language: Social
Languages Spoken
Leader
Lie Detector
Lies
Life after Guantanamo
Loss of Family Member
Lost Time
Loyalty
Manipulation
Mark of Guantanamo
Married: Yes
Means Not Ends (Kant)
Medical
Message to Americans
Mistake
Monster
Muslim
No Control
No Hope
No Information
No Law
No Reason
No Release
Normal
Not Heard
Not Human
Notable
Nudity
Numbers Instead of Names
Object
Opinion of U.S.
Other Prison: Bagram
Other Prison: Bomeum
Other Prison: Kandahar
Other Prison: Miscellaneous
Other Prison: Pre 9/11
Other Prison: Secret
Outside the Law / No Law
Patience
Phase: Early
Phase: Late
Phase: Middle
Phases: Different
Physical Problems
Picture / Photo
Policy
Post-Guantanamo Wife: No
Post-Guantanamo Wife: Yes
Post-Guantanamo Wife: Separate
Post-Guantanamo: Bad Life
Post-Guantanamo: Danger
Post-Guantanamo: Good
Post-Guantanamo: Jail
Post-Guantanamo: Job
Post-Guantanamo: Life is Better Now
Post-Guantanamo: Money Problems
Post-Guantanamo: No Change Community Relations
Post-Guantanamo: No Job
Post-Guantanamo: Partner
Post-Guantanamo: Physical Problems
Post-Guantanamo: Psychological Problems
Post-Guantanamo: Social Death
Post-Guantanamo: Wrong Job
Power
Pre-Guantanamo: Job
Privacy
Property Loss
Psychological Abuse
Psychological Problems
Punishment
Punishment: Anti-Muslim
Purgatory
Psychological Prison: Guantanamo
Racism
Reason to Guantanamo
Rebirth
Release Location: Not Home
Release: Other Prisoners
Release: Didn't Believe
Release: Happy
Release: Sad
Religion
Reputation
Resistance
Respect
Revenge
Rights
Rules
Scars
Science
Sensory Manipulation
Separation
Sexual Violence
Slave / Slavery
Sleep
Social Death
Social Death: Bagram
Social Death: Guantanamo
Social Death: Kandahar
Social Death: Post Guantanamo
Status "Low"
Stigma: Gay
Stigma: Sexual abuse
Stigma: Spy
Stigma: Terrorist
Still in Prison
Suicide: No
Suicide: Yes: Others
Suicide: Yes: Self
System / Conspiracy
Taleban
Terrorists
Theft
Threat
Time (experience of)
Time in Prison
Time Since release
Time: Length of Filmed Interview
Torture
Translation issues
Treatment Worse Than G Bay
Treatment: Bagram
Treatment: Interrogation
Treatment: Kandahar
Treatment: Miscellaneous Prison
Trust
Truth
Victim
Voice
Warning
Why in Afghanistan or Pakistan
Worst: Bagram
Worst: Bomeum
Worst: Guantanamo
Worst: Kandahar
Worst: Miscellaneous Prison
Worst: Post-Guantanamo