# The lawyers' war: states and human rights in a transnational field

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**Abstract:** While torture and assassination have not infrequently been used by states, the post 9/11 'war on terror' waged by the US has been distinguished by the open acknowledgement of, and political and legal justifications put forward in support of, these practices. This is surprising insofar as the primary theories that have been mobilized by sociologists and political scientists to understand the relation between the spread of human rights norms and state action presume that states will increasingly adhere to such norms in their rhetoric, if not always in practice. Thus, while it is not inconceivable that the US would engage in torture and assassination, we would expect these acts would be conducted under a cloak of deniability. Yet rather than pure hypocrisy, the US war on terror has been characterized by the development of a legal infrastructure to support the use of 'forbidden' practices such as torture and assassination, along with varying degrees of open defence of such tactics. Drawing on first-order accounts presented in published memoirs, this paper argues that the Bush administration developed such openness as a purposeful strategy, in response to the rise of a legal, technological, and institutional transnational human rights infrastructure which had turned deniability into a less sustainable option. It concludes by suggesting that a more robust theory of state action, drawing on sociological field theory, can help better explain the ways that transnational norms and institutions affect states.

**Keywords:** human rights, torture, law, lawyers, transnational field, war on terror

> In the aftermath of 9/11, the White House went beyond the CIA's highly secretive practice of torture during the Cold War to its open, even defiant use of coercive interrogation as a formal weapon of the arsenal of American power – a historic shift with profound implications for this nation's international standing. (McCoy 2006: 211)

> Many people think the Bush administration has been indifferent to wartime legal constraints. But the opposite is true: the administration has been strangled by law, and since September 11, 2001, this war has been lawyered to death. (Goldsmith 2007: 68–69)

*The Sociological Review Monographs*, 64:2, pp. 170–193 (2016), DOI: 10.1111/2059-7932.12007

Published by John Wiley & Sons Ltd, 9600 Garsington Road, Oxford OX4 2DQ, UK and 350 Main Street, Malden, MA 02148, USA

## Introduction

After 9/11, American officials developed an explicit legal framework to support the use of practices such as waterboarding, sleep deprivation, and physical confinement – practices that, when used by other nations, have generally been understood as torture. While the practice of torture itself is neither rare nor fully unexpected in times of 'terror' and heightened security threats, both the literature on states and human rights violations, and the recent history of state use of torture, would lead us to expect that any such use of torture, especially by states identifying as Western, advanced, and democratic, would be cloaked within an apparatus of secrecy and denial. Yet in the post-9/11 war on terror, not only did state agents engage in torture, officials developed both political and legal justifications for the practice. Furthermore, these justifications cannot be understood as merely *post hoc* attempts to save face, as they were developed both before and after the use of torture became widely known.

This paper thus asks: why construct an explicit legal architecture for practices which, until recently, if engaged in at all, would have been subject to the highest levels of secrecy, and certainly not documented by lawyers? It further asks, how can we square this development with the spread of human rights norms over the course of the twentieth century? The key puzzle is thus not merely why did the US government make use of torture in the aftermath of 9/11, but why it did so in a relatively open fashion.[1] The conduct of the American state in engaging in practices of torture and 'enhanced interrogation' was, if not necessarily predictable, certainly comprehensible in light of 9/11 and the apparatus of 'terrorism' through which Americans made sense of the attacks. Nor can the adoption of these practices after 9/11 be seen as completely surprising, given the history of their use throughout the 20th century.[2] But why not proceed in clandestine fashion? And why has the war on terror, and particularly the use of torture and assassination, been so saturated with legal expertise? In sum, why bother developing an explicit justification for practices that, in the past, would have simply been undertaken covertly?

I argue that we can best understand the open defence of torture and assassination as a response to the rise of a transnational field of legal regulation of human rights that sought to encompass both states and individual state officials.[3] In other words, the appearance of explicit legal justification of human rights violations, at the very moment when the international human rights field seems to have attained its peak, should not be seen as a paradox, but rather as two interrelated developments. I develop support for this argument by drawing on the accounts of these events presented in memoirs of direct participants, treating these as primary sources.

The 'legalization' of torture presents a circumstance not predicted or conceptualized by the primary theories mobilized in sociology and political science to understand how human rights norms affect states. These tend to suggest that we will observe an increasing adherence to such norms, at least at the level of states' rhetoric, if not always in their practices. The general expectation has been that

states will increasingly move in the direction of greater respect for human rights, and that even when states commit violations of human rights, they will still affirm the respect for human rights treaties and norms at the level of rhetoric and ideals. Within this framework, the actions of the US in the war on terror seem almost inexplicable.

One might argue that this is simply a case of American exceptionalism (eg Mertus, 2008: 17), or that the US, as the globally hegemonic power, is not subject to the rules shaping the conduct of other states. In the view of this paper, however, these explanations are inadequate, because the quasi-open breaking of the torture taboo is not a unique event, even in the contemporary era of the human rights regime. There have been similar transformations elsewhere; perhaps most notably the Israeli 'Landau Commission' of the 1980s which ruled on the legality of torture. And earlier in the century, albeit before the adoption of the UN Convention Against Torture, both France and the UK attempted to legalize the use of torture. In France, the 1955 Wuillame report 'called for the "veil of hypocrisy" to be lifted and for "safe and controlled" interrogation techniques to be authorized' (Bellamy, 2006: 128) in Algeria, while in Britain, the 1971 Compton Commission to investigate claims of state torture in Northern Ireland heard similar claims (Bellamy, 2006). Furthermore, the claim to American exceptionalism is also belied by the fact that the US did, in fact, until quite recently, hold to international human rights norms, at least rhetorically, if not always in practice.

Others have suggested that the actions of the Bush administration should be seen as a temporary aberration. But while the Obama administration has stepped back from its predecessor's justifications of torture, the larger pattern of open justification, and legalization of violations of international law has continued (Hajjar, 2010). Furthermore, although the signature practice of the war on terror under Obama has shifted from torture and indefinite detention to 'targeted killing', the US remains engaged in a practice forbidden under both domestic and international law, and yet openly defended in political rhetoric and legalized.

A third possible explanation arises from the literature theorizing the US after 9/11 as exemplifying a 'state of exception' (van Munster, 2004; Agamben, 2005; Aradau and van Munster, 2009). This approach suggests that under conditions of emergency, the state declares itself outside, or not subject to, the law (in this case, the international laws of war and human rights), thus enabling a wider range of action. This interpretation is echoed by those critics who have cast the prison at Guantanamo, and sometimes the 'war on terror' as a whole, as a 'legal black hole':[4] a space wholly *outside* the law. But while it is true that many analyses of the role of law in the post 9/11 war on terror have focused upon the ways in which the Bush administration violated, or seemed to ignore, the law, my focus here is the opposite, the central role played by lawyers in these very developments. Recent American counterterrorism policy has been thoroughly imbued with concern for the law, and lawyers and legal experts have been among the most prominent actors in the shaping of these policies (and their subsequent contestation).

Instead, this paper develops a framework for explaining the legal justification of torture as a strategic response to structural shifts in the transnational arena.

 *The Sociological Review Monographs*, 64:2, pp. 170–193 (2016), DOI: 10.1111/2059-7932.12007

It argues that American state actors found themselves in a new strategic position as a result of the rise of a transnational field of human rights advocacy. This new field, which developed and grew in strength over the course of the twentieth century, was composed of individuals and organizations that sought to enact new human rights norms that would constrain states. Through key practices, including the enactment of international laws to protect human rights, the collection, verification, and publication of evidence of human rights violations, and the prosecution of individual state actors for violations, these actors sought to reduce the presence of torture and other violations in the world. Yet one unintended, and likely unforeseen, consequence of these developments was to shift the strategic context within which states acted. While the rise of the human rights field may have shifted the calculus made by states as to *whether* to violate or respect human rights,[5] a surely unintended consequence was that it also shifted the context within which states that made the decision to engage in violations would act. I argue that such states now find themselves in a context in which the decision to encompass torture within an apparatus of secrecy and denial is less obvious than it was before, and in which the possible choice to openly acknowledge and legally justify such practices becomes more thinkable than before.

This argument draws upon the sociological framework of field theory (Bourdieu, 1977, 1990), which has the key advantage of enabling researchers to analyse the movements of actors and social structures together. While field theory has most often been used to analyse action at the level of the *individual,* and *within* states this paper builds on a recent move to apply field theory at the transnational level, and to state and other collective actors (eg Go, 2008; Mudge and Vauchez, 2012). This field approach allows us to conceptualize not only how transnational actors and movements might not only try to constrain states, but to reconceptualize the transnational arena as a space within which states may also 'act back' upon these constraints and aim to change the so-called 'rules of the game' in response.

## Methods/data

To support the argument that the 'legalization' of torture was a purposeful strategy enacted in response to the rise of human rights norms and the overall 'legalization' of warfare, I draw on first-person accounts of those who enacted these policies, in the form of published memoirs. In studying events which are not available through the release of archival records, and whose participants are not all likely to be accessible for direct interviews, memoirs can function as a suitable proxy, providing first-hand accounts, in their own words, of those who developed these policies. While memoirs are but one possible source where one might look for first-hand accounts of those involved in the decision to 'legalize' torture, I have chosen to focus on the accounts found in memoirs rather than in alternate sources such as published interviews, or the 'torture memos' and accompanying documents themselves, first, because these are the sources where

individuals put forth their accounts for posterity, and second, because they are a presently under-utilized source.[6]

Memoirs are a complex and potentially problematic source of data. Gocek's (2015) historical study of the denial of Turkish violence against the Armenians, which relies on memoirs as its primary source, contains a thoughtful discussion of the advantages and limitations of such a data source, highlighting that memoirs will limit one to the voices of the relatively elite, and the challenge posed by the difficulty in how to 'differentiate fact from fiction, knowledge based on sources from rhetoric, and historical events from their mythified recollections' (Gocek, 2015: xxi). In the case of the present study, however, the focus on elites is a purposeful feature of the study, and while the difficulty of separating 'fact from fiction' is still a concern, the fact that this study is focused on interpretations themselves makes memoirs an appropriate source. I take memoirs as a proxy form of ethnographic data, or self-reporting on the events in question. They are not to be taken as pure fact/transparent reporting of the events that occurred, but rather, taken as a source of the individuals' framings and justification of the events as they went down – which is exactly why memoirs are useful/appropriate sources for this investigation. A list of the memoirs analysed is included as an appendix to the paper.

## Theorizing 'human rights' and how international 'norms' affect states

With the rise of human rights, there has been a corresponding rise of *studies* of human rights. Much of this literature has focused on analysing the effects of these norms, laws and institutions, with the question usually posed as, do these norms and laws have effects upon the actual occurrence of torture? (eg Hafner-Burton *et al.,* 2008; Cole, 2012; Hafner-Burton, 2013; Hafner-Burton and Tsutsui, 2013; Fariss, 2014).[7] However, such studies have come to no agreement on this question, with some studies even finding a *negative* correlation between the spread of treaties and states' adherence to norms of human rights! Rather than assuming that these contradictory findings are the result of errors in measurement or ambiguities in operationalization, I propose that these 'untidy' results should prompt those who wish to understand the effects of the new 'human rights regime' to look in an alternative direction.

In more general form, this is the question of how international norms and international laws affect states. The extant literature is dominated by two theoretical frameworks, international relations theory (including both realist and constructivist variants), and sociological 'world-society' theory. A key weakness of realist IR theories is their inability to grapple with the power of culture. Constructivist IR theories, on the other hand, give culture central significance, but tend to lack a developed theory of exactly how culture has influence, particularly over relatively powerful states, or under what circumstances states might be able to resist cultural norms.

World-society theory has been a key theoretical approach for much of the sociological work on states and human rights. For example, Meyer *et al.* trace 'the

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rise of human rights themes in secondary school social science textbooks around the world since 1970', finding support for 'the arguments of institutional theories that the contemporary "globalized" world is one in which the standing of the participatory and empowered individual person has very great legitimacy' (Meyer *et al.,* 2010: 111), while Levy and Sznaider examine 'how global interdependencies and the consolidation of a human rights discourse are transforming national sovereignty' given that 'adherence to global human rights norms confers legitimacy' (2006: 657). The key weaknesses of the 'world-society' approach is that it tends to assume that all states will eventually (and consensually) shift towards an agreed upon set of norms and practices, and further, it tends to assume that norms will diffuse outward from more powerful to less powerful states (Go, 2008). There is thus little room in such a theoretical framework for reactive shifts, *away* from a norm, particularly when such shifts are taken by a powerful state.[8]

The dominant conceptualizations of relations between state discourse and practices on human rights presume, first, that only certain alignments are likely: those which I have labelled in Table 1 as 1 (hypocrisy), 2A (barbarism[9]), and 3 (enlightenment), and yet misses out on others (2B: brazenness).[10] Further, this literature presumes a narrative teleology; it presumes that states will progress in only in one direction, 'forward'. The unspoken teleology of this literature is that the effect of the human rights field (norms, treaties, laws, and beliefs) upon states will be to move them from status 2A (barbarism, in which they fail to acknowledge the value of human rights either in rhetoric or in practice) towards status 3 (enlightenment) in which they affirm the value of human rights both rhetorically in practice, or at the very least, towards status 1 (hypocrisy) in which states affirm the value of human rights in discourse but not in practice. The trajectory which this paper observes in the US war on terror, from status 1 or 3 *back*, to box 2, is not conceptualized as a possibility.

Rather than presuming that the rise of the 'human rights regime' has its most significant effect upon concrete violations of human rights themselves, I argue that they may instead have their most significant effects upon what I refer to

**Table 1:** *States and human rights*

| | States rhetorically affirm value of human rights | States fail to affirm (or actively deny) value of human rights[11] |
|---|---|---|
| State practices violate human rights | 1. 'hypocrisy' | 2A. 'barbarism'<br>2B. 'brazenness' |
| State practice respect human rights | 3. 'enlightenment' | 4. 'naivete' |

as states' 'strategies' towards the protection and/or violation of human rights. I suggest that the Bush administration turned to the strategy of 'brazenness' not because they were oblivious to the rise of the international human rights field, but rather, as a conscious strategic response to it.[12] By using the term 'strategy' here, I intend to encompass not just states' violations (or positive protections) of human rights, but also the ways in which a state negotiates, frames and defends these actions in both its domestic and its international political contexts.[13] In other words, extant studies of human rights have been missing out on a significant effect of human rights 'culture/discourse' upon states, because they have a relatively constrained conceptualization of 'practices'. This is different from arguments suggesting that states' 'speech' about human rights, and their concrete 'practices' of respect or violation are disjointed – that is, that there is no necessary connection between the two, although it is generally assumed that, since 'talk is cheap', the usual pattern will be either for states to affirm their respect for human rights rhetorically yet violate them in practice, or to respect human rights both in speech and in practice. My argument instead is that the line of effect from norms to action is not so direct. Rather than assuming that the norm of respect for human rights is settled, second, that norms exert a fairly strong and unilateral power upon the speech of both states and publics (ie, that once the norm of respect for human rights is settled, actors will necessarily at least give lip service to it); and third, that norms also exert a fairly unilateral, yet somewhat weaker, force upon the actions of states (that is, whether or not they will actually violate or respect the human rights of those under their domain), I argue that we need to think about how practices, norms and speech interact in more complex ways, and in which both the affirmation of the norm against torture and the rejection or redefinition of such norms can be seen as strategic.

## From denial to justification: American torture after 9/11

By the end of the twentieth century, not only had the right not to be tortured become a well-established norm, but open support for torture had become almost unspeakable, if not unthinkable. It seemed that respect for human rights had become something almost universally adhered to in rhetoric, if not always in practice. As philosopher Henry Shue wrote in his classic essay of 1978: 'No other practice except slavery is so universally and unanimously condemned in law and human convention' (Shue, 1978: 4, in Levinson, 2004), while more recently, Rosemary Foot declared that, 'While the practice of torture has been widespread, until recently it had come to be understood that no representatives of the state could openly admit that they would use torture for fear of being removed from office and of having their state ostracized by "civilized" nations' (Foot, 2006: 131). In America's 1999 report to the UN committee against torture, the US government stated clearly and emphatically that,

> torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture


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> under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture.

Katherine Sikkink quotes this passage at length, noting that, 'there was little ambiguity in US legal and ethical commitments to the prohibition on torture and cruel and unusual punishment prior to 2002' (Sikkink, 2011: 196–197).

In sum, while one may doubt the sincerity of such statements – that is, whether states were actually abiding by the moral platitudes which they officially endorsed, it appeared to be a matter of little contention that states *should* and *would* endorse human rights, and particularly, the right not to be tortured, at least in principle. By the end of the twentieth century, opposition to torture had, in the US and elsewhere, attained the status of what social scientists sometimes refer to as a norm – a settled, institutionalized, moral position. Some have even argued that the problem of torture had attained the status of a sacred boundary which might not be crossed (eg Ignatieff, 2003).

Following the attacks of September 11, 2001, however, the legal and moral permissibility of torture seemed to suddenly take on the status of an open question. Debate erupted in the public sphere, as well as within the government, over both the efficacy, and the legal and ethical permissibility, of torture. Popular magazines such as *Newsweek, The Atlantic*, and *The Economist* published cover stories arguing for and against, and a number of prominent philosophers and lawyers came out publicly in favour of the permissibility of torture, and its legalization. Newspapers reported that FBI counterterrorism agents were 'frustrated' and considering the use of 'pressure' or 'harsh interrogations'. The *New York Times* would write that it had become a topic of conversation 'in bars, on commuter trains, and at dinner tables'.[14]

Another writer notes that, '[e]arnest public discussion of the pros and cons of torture gained momentum in the United States shortly after the 9/11 attacks. . . and continued to unfold until, and beyond, the May 2004 publication of the first photographs from Abu Ghraib' (Hannah, 2006: 624). On December 26, 2002 the *Washington Post* ran a front-page story on allegations of torture and inhumane treatment. They quote officials as saying, 'If you don't violate someone's human rights some of the time, you probably aren't doing your job', and, 'We don't kick the [expletive] out of them … We send them to other countries so they can kick the [expletive] out of them' (cited in Press, 2003).

Meanwhile, public opinion surveys began to suggest that opposition to torture was on the wane. A November 2001 survey found that 32 per cent of Americans favoured torturing terror suspects, while lawyer Alan Dershowitz, one of the key proponents of the legalization of torture, reported that '[d]uring numerous public appearances since September 11, 2001, I have asked audiences for a show of hands as to how many would support the use of nonlethal torture in a ticking bomb case. Virtually every hand is raised' (cited in Luban, 2006: 35). Now, of

course, we don't know what proportion of Americans would have favoured torturing terror suspects before 9/11 – because no one was asking, which is the point: the question was virtually unspeakable. Furthermore, this shift in favour of relatively open debate over the permissibility of torture, including affirmations of its use, cannot be understood as simply a matter of post hoc justification, for it developed alongside, and in some cases prior to, the shift in concrete practices, rather than simply in response to it. Even before the revelations that the US was, in fact, torturing prisoners in the war on terror[15] the question of whether or not we *should* torture terrorist suspects came to occupy a key role in public discourse.

After 9/11, lawyers were enrolled in interpreting the law so as to give the president as much leeway as possible in working unilaterally, often explicitly against the spirit, if not the letter, of the law enshrined in international treaties such as the Geneva accords. Legal expertise was used to delineate the boundaries of exceptional treatment that could be used in a pre-emptive approach to counterterrorism. For example, Pfiffner (2010) identifies three key policy decisions on the use of torture, each of which supported by legal expertise: the first, President Bush's Military Order of 13 November 2001, 'which authorized military commissions, defined enemy combatants, and set the conditions of their imprisonment'; the second, the suspension of the Geneva Agreements, ordered by President Bush on 7 February 2002; and the third, Secretary of Defense Rumsfeld's decision of 2 December 2002 that 'allowed military interrogators to use techniques that were not allowed by the Army Field Manual on interrogation' (Pfiffner, 2010: 14). Critical geographer Derek Gregory argues that while the

> very language of extraordinary rendition, ghost prisoners, and black sites implies something out of the ordinary, spectral, a twilight zone: a serial space of exception . . . this performative spacing works through the law to annul the law: it is not a state of exception that can be counterpoised to a rule governed world of normal politics . . . it is a, at bottom, a process of juridical othering. (Gregory and Pred, 2007: 226)

Similarly, Fleur Johns has written that 'the plight of the Guantanamo detainees is less an outcome of law's suspension or evisceration than of elaborate regulatory efforts by a range of legal authority. The detention camps are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate in excess' (Johns, 2005, cited in Gregory and Pred, 2007). Similar arguments regarding the very centrality of law have also been made by Khalili (2008), Dayan (2011), and Hajjar (2011).

The final extent of openness around torture is illustrated by the fact that state officials defended the use of torture even after the practice had become a public scandal. The story of torture at Abu Ghraib prison began to break in late 2003, and in April 2004 photos depicting abuse of prisoners were published in the *Washington Post* and by the television show *60 minutes*. In May of that year, a previously internal Red Cross report on conditions at the prison was leaked to the *Wall Street Journal*. While the scandal following the release of shocking explicit photographs from the now-notorious Iraqi prison, did lead to a resurgence of condemnation, more recent surveys have actually found that increasing

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percentages of Americans now profess support for torture under certain circumstances (Zegart, 2012; Brooks and Manza, 2013). And even more puzzlingly, while the scandal was followed at first by the expected denials, the resolution took the form of overt approvals of torture (even if not always labelled as such). While the reaction we might expect would have been, 'first, an absolutely unambiguous cessation of questionable interrogation practices by the administration; and second, a major domestic political upheaval in which broad swaths of the American public loudly insist that anything smacking of torture stop immediately and that top-level officials on whose watch earlier abuses occurred be thrown out of office', neither the 'unambiguous cessation' of torture, nor the broad 'political upheaval' occurred (Hannah, 2006: 622). Exposure did not put an end to the practice of torture, nor did it lead to a clear moral and political condemnation of those who had authorized and carried it out. Instead, '[t]he system of torture has . . . survived its disclosure' (Danner, 2005, quoted in Ip, 2009: 39).

The Bush administration at first engaged in a strategy of denial, claiming that the photos from Abu Ghraib reflected only the work of a few 'bad apples'. Yet, as time went by, the administration turned to policies that would allow the continued use of the techniques exposed, and open defence of 'harsh interrogation', their euphemism for torture. When Congress sought to reign in the use of torture, as in the McCain amendment, which would ban the use of torture on any detainees in US custody, 'Vice President Cheney and CIA director Porter Goss publicly urged Congress to exempt the CIA' (Mertus, 2008: 74–75). And when the amendment passed regardless, 'The administration did little to alleviate suspicions when President Bush attached a "signing statement" to the amendment, declaring that the president had the right at any point not to comply with the ban on cruel, inhumane, and degrading punishment' (Mertus, 2008: 75). When the Army released a new field manual in September 2006, which reaffirmed the need to adhere to the Geneva Conventions and barring torture, President Bush asserted that the new regulations would not apply to the CIA: 'In a speech that sharply contrasted with the Pentagon speech in both tone and substance, President Bush confirmed the existence of a secret CIA detention program, defended CIA officials' use of "alternative" interrogation methods, and called on Congress to pass proposed legislation on military commissions to try detainees at Guantanamo Bay' (Mertus, 2008: 75–76).

A second instance of exposure followed by overt affirmation of 'forbidden practices' can be seen in the administration's reaction to the *Hamdan v. Rumsfeld* Supreme Court decision, which ruled that the military commissions set up to try those held at the Guantanamo prison were illegal, and violated both the Uniform Code of Military Justice and the Geneva Conventions. The *Hamdan* decision was issued on June 29, 2006. Two months later, on 'September 6, 2006, in a nationally televised address, President Bush acknowledged the existence of CIA black sites and the authorization of waterboarding and other "alternative" interrogation tactics, which he characterized as "tough," "safe," "lawful" and "necessary"' (Hajjar, 2011). And the following month, the Military Commissions Act, which brought back the military commissions, and allowed the use of

evidence and confessions gained via torture, was passed in Congress. The Military Commissions Act 'also amended the War Crimes Act to provide immunity for past violations of the Geneva Conventions by US officials dating back to 1997, and stripped the federal courts of jurisdiction over all prisoners detained in the context of the "war on terror"' (Hajjar, 2011).

## Analysis: why legalize torture?

Why did the Bush administration choose to govern terrorism through the law? I argue that it was in response to the rise of the transnational human rights field, which, with its key practice of documentation and exposure of human rights violations, altered incentives for states, making denial, or complete cover-ups, less viable. While the intent of human rights advocates in so doing was to eliminate human rights violations, an unforeseen consequence has been the opening up of new incentive structures, making not just open adherence to human rights norms, but also their open violation, more likely. I thus argue that the 'brazenness' of the Bush administration's use of torture in the war on terror should be understood as a response to the rise of this transnational human rights field. In this section I focus on two consequences of the rise of the human rights field: two ways in which the rise of human rights has altered the 'field' of forces in which states act, and which shape their practices and strategic moves in the international arena. First, state use of violence (both within and outside of formal 'warfare') has become increasingly legalized (subject to legal regulation, justification, and contention/pushback). Second, the possibility and practicability of keeping large-scale state secrets has shifted, making denial a less feasible long-term strategy. These developments can be traced back over (at least) several decades – concurrent with the rise of the human rights field. And while neither the legalization of warfare/state violence, nor the declining feasibility of state secrecy can been attributed solely to the rise of the transnational human rights field, the rise of human rights has had a significant effect on both of these transformations.

### *The rise of a transnational human rights field*

The latter half of the twentieth century and the early years of the 21st have seen the emergence of international law and legal expertise as spaces of contestation in which states, lawyers, human rights organizations and international institutions contest the legitimacy of states' use of violence against both citizens and foreigners (Keck and Sikkink, 1998; Dezalay and Garth, 2006). This field is transnational, but acts upon and through particular states and state and international and non-governmental institutions. And this field has a history, which entails the merging of several different fields of international law, including human rights law and the wars of law (which previously were largely separate). What is this 'transnational field of human rights', and where did it come from?

When I write here of 'fields', I draw primarily on the work of Pierre Bourdieu, who developed the field analysis as a theoretical apparatus that could include

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both structure and agency in the same framework. What is key about a 'field' is that it is a space of 'position-takings' of various actors *in relation to one another,* with conflict a constant feature of these relations: 'When we speak of a *field* of position-takings, we are insisting that what can be constituted as a *system* for the sake of analysis is not the product of a coherence-seeking intention or an objective consensus . . . but the product and prize of a permanent conflict' (Bourdieu, 1993: 34). More recently, Krause has described a field as 'a realm in which actors take each other into account … a space of shared taken-for granteds and interpretations, or, to use Pierre Bourdieu's term *doxa'*, and suggests that we might ask 'of any given space … is it fielded?' (Krause, 2014: 22). Julian Go suggests that a global field is 'an arena of struggle in which actors compete for a variety of valued resources, that is, different species of "capital" that are potentially convertible to each other' and that 'fields consist of two related but analytically separable dimensions: (1) the objective configuration of actor-positions and (2) the subjective meanings guiding actors in the struggle, that is the "rules of the game"' (Go, 2008: 206). I suggest that the transnational arena of human rights became 'fielded' in the period between the 1970s and 1990s, thus coming to exert more potential influence on state action (although not necessarily determining the particular actions of any one state) during that time.

Histories of human rights differ in when they argue the concept emerged. Although some suggest we can trace it all the way back to the eighteenth century (Hunt, 2007), most locate the key turning point either to the aftermath of World War II and the Universal Declaration of Human Rights (Borgwardt, 2007) or in the 1970s (Kelly, 2012; Moyn, 2012a; Keys, 2014). For the purposes of this article, I take the latter date to be the site of the key shift, with additional important developments taking place in the 1980s and 1990s: for while *ideas* about human rights may have begun to take shape earlier, it was not until the 1970s that the key elements of a *transnational field* of human rights, consisting of not just laws and treaties, but also significant numbers of governmental and non-governmental organizations (such as Amnesty International and Human Rights Watch), and institutional sites such as truth commissions and international courts, operating in relation to one another, began to take shape. For in order for us to say that there is a *field* of human rights, there must be not just ideas, but also actors (individual and collective) who are oriented towards one another in their actions, with some of the aforementioned 'ideas' taking the form of what is valued, or what underlies action, in the field.

Amnesty International, now one of the best known human rights organizations, was founded in 1961. According to one account, while

> The United Nations (UN) set down core human rights principles in 1948 in the form of the Universal Declaration of Human rights (UDHR) … the governmental representatives who made up the UN Commission on Human Rights ruled that it had no power to act . . . since 1961, the entire context for international human rights discussions has changed. In contrast to the weak human rights norms of the 1960s, it is now possible to point to the fruits of Amnesty's efforts to build norms and elicit behavior more consistent with human rights principles. (Clark, 2001: 3–4)

In sum, 'When Amnesty was founded, an international "human rights" regime, or complex of rules, as we now know it did not exist – and there was no good reason to expect one' (Clark, 2001: 4). In 1972, Amnesty launched the first worldwide 'campaign for the abolition of torture' (Sikkink, 2011: 40). Membership in national chapters grew quickly during this period, with the US chapter growing from 3,000 to 50,000 between 1974 and 1976 (Sikkink, 2011: 41), while the NGO, Helsinki Watch, would merge with a number of other regional groups to form Human Rights Watch in 1988, becoming 'one of the world's largest and most influential human rights organizations' (Keys, 2014: 265).

Calls for the criminal prosecution of individual state leaders for human rights violations took off in the 1980s and 1990s. In 1983, Argentinean activists began demanding trials of leaders who had engaged in human rights violations during the 'Dirty War', and in 1998, Pinochet was extradited from London. In 1990, Margaret Thatcher and George H. W. Bush endorsed the idea of a war crimes trial for Saddam Hussein after he invaded Kuwait, and in 1991 and 1992 there were calls for war crimes trials of leaders in the former Yugoslavia (Sikkink, 2011: 110). In 1999, Slobodan Milosevic would become 'the first sitting head of state to be indicted for war crimes', in 2003, Charles Taylor would become the second, and in 2009 Omar al Bashir the third (Sikkink, 2011: 4).

The rise of calls for individual accountability was in part a story about the bringing together of several previously separate fields of law: human rights law, humanitarian law/ the laws of war, and international criminal law (Sikkink, 2011: 100). It was this new merger, beginning in the 'discovery' and activation of the laws of war by human rights activists in the 1980s, and cemented by the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, and then the International Criminal Court in 1998,[16] that enabled the prosecution of individuals for human rights crimes (Sikkink, 2011: 106).

As the field developed, there came to be two core practices through which human rights advocates attempted to enforce norms. These were, first, the use of documentation and exposure of human rights violations as a key form of 'naming and shaming' human rights violators, and, second, the mobilization of law to hold states and individuals accountable. As one account puts it, '[c]urrent debates about torture are saturated with law' (Kelly, 2012: 3). Information collection and dissemination took on a central role in the practices of human rights advocates (Moon, 2012: 876), aided by new technological developments: 'It became possible to collect information about victims of repression abroad more cheaply, easily, and rapidly than before' (Keys, 2014: 10). As Moon (2012: 876) puts it, 'The single most important activity that human rights organizations (HROs) undertake to promote human rights is that of documenting human rights violations'. This practice is foregrounded on an assumption that exposure of human rights violations will lead to their elimination: that 'if only people knew they would act' (Moon, 2012: 877), with the 'human rights report . . . now firmly established as a literary genre "with its own rules of style and presentation" (Dudai, 2006, 783)' (Moon, 2012: 877).

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I argue that 'naming and shaming' – the documentation and dissemination of evidence of human rights violations – along with the rise of legal regulation and particularly prosecution, form key practices in the transnational human rights field. And while neither of these practices have been able to *compel* states to change their relations to the norms of human rights, they have, I suggest, sufficiently shifted the forces at play in the international field so as to exert leverage on states' relational approach to human rights norms. This relational approach should be conceptualized as including both concrete practices (do states violate human rights of individuals or not) as well as states' rhetoric (do states affirm rhetorically that they respect human rights). This is a somewhat different approach from those who would conceptualize 'practices' and 'discourses' as operating in distinct registers. Further, this allows us to analyse practices and discourses together. And while prior literature has largely focused on two relational modes (which I have earlier called 'enlightenment' and 'hypocrisy'), the case of the US after 9/11 presents a third mode of state relation to human rights, which is what I have called 'brazenness'.[17] My argument is that 'brazenness' (like the other relational modes) is best understood as a strategic response to the shifting forces affecting states in the transnational human rights field: in this case, the rise of 'naming and shaming' along with legal remedies, which have acted to make 'hypocrisy' a less viable option for states that wish to engage in torture.

*The 'legalization' of torture as a response to the international human rights field*

In this section, I draw on evidence from the published memoirs of participants in the Bush administration in support of this argument, demonstrating that these two shifts – the 'legalization' of state violence and the shifting feasibility of state secrecy – were on the minds of those who enacted the legal justification of torture, and, further, were often explicitly referenced when providing explanations for why torture was 'legalized'. First, there was a sense of the seeming inevitability of the release of secrets, sometimes framed as a relatively new problem. Second, there was an awareness of the rising importance of law and lawyers as a constraint on state action, which, on the part of some actors, was joined with an interpretation of international law, and the international criminal court in particular, but also sometimes extending to international treaties and laws more generally, as 'lawfare': a form of war by other means. These themes were not present in every memoir, but there were also no instances of contradictory claims: that is, none of the accounts claimed that law and lawyers had become less of a constraint on state action, nor did any of the accounts presume that secrets could easily and indefinitely be kept.

The first recurring theme in the memoirs is the seeming inevitability of the release of secrets. In his memoir, *Decision Points,* former President G. W. Bush wrote, on his decision to approve the use of 'controversial' interrogation techniques, that:

> I knew that an interrogation program this sensitive and controversial would one day become public . . . I would have preferred that we get the information another way.

> But the choice between security and values was real . . . I approved the use of the interrogation techniques. (Bush, 2010: 169)

While John Kiriakou, a CIA analyst now best known for being the first official in the US government to confirm the use of waterboarding, wrote that: 'Even though enhanced techniques were supposed to be used only on the highest-profile, toughest, most important al-Qaeda prisoners, word of their existence got out pretty quickly' (Kiriakou and Ruby, 2009: 140). And later, when discussing his acknowledgement that Abu Zubaydah had been waterboarded, noted that:

> President Bush had talked about the use of enhanced interrogation techniques on al-Qaeda prisoners, although he and others in the administration had never addressed the specifics. At that point, the torture memos were classified . . . Still, Human Rights Watch and other nongovernmental organizations had been saying for more than two years that waterboarding was one of the enhanced techniques; if it was a secret . . . it was the worst-kept secret in Washington by December 2007. (Kiriakou and Ruby, 2009: 187)

What all of these excerpts indicate are a shared awareness of the fleeting nature of secrets, and possible dangers of attempting to conceal information that would likely become public after a time.

Second, was an awareness of the increased importance of law/lawyers as a constraint on governments. Donald Rumsfeld, who served as Secretary of Defense under President Bush, writes in his memoir that:

> One of the notable changes I had observed from my service in the Pentagon in the 1970s was the prevalence of lawyers . . . By the time I returned as secretary in 2001, there were a breathtaking ten thousand lawyers . . . involved at nearly every level of the chain of command. (Rumsfeld, 2011: 557)

While General Richard Myers, who served as Chairman of the Joint Chiefs of Staff under President Bush from 2001 to 2005, observed at a meeting to discuss the question of interrogation practices that, 'I noted the government attorneys sitting along the walls behind each of their principals' (Myers and McConnell, 2009: 205).

A related, and perhaps even more important, theme that emerges from the memoirs is the rise of a shared perception of international law as 'lawfare': a harnessing of legal strategies to wage war by other means, which must therefore be resisted.[18] On law as 'lawfare', Donald Rumsfeld writes:

> Besides contending with enemy bullets and bombs, the men and women in our nation's military and intelligence services must also navigate legal traps set by our enemies, by some of our fellow citizens, by some foreigners, and even by some members of Congress and officials at international institutions such as the United Nations. . . This is a new kind of asymmetric war waged by our enemies – 'lawfare'. (Rumsfeld, 2011: 595)

Like several others, Rumsfeld points to the experiences of Henry Kissinger, who was facing threats of prosecution in the early 2000s, as well as the naming of General Tommy Franks in a lawsuit before a Belgian court in 2003, as

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a crucial turning point in his consciousness of the threat (Rumsfeld, 2011: 596).[19] Nor was the danger of 'lawfare' limited to those in high positions: the International Criminal Court was, in 2003, 'being discussed as a possible forum to try US military and civilian personnel involved in the Iraq war' (Rumsfeld, 2011: 598).

In John Yoo's account of his time in the Office of Legal Counsel from 2001 to 2003, three themes leap out: a view of law/lawyers as the enemy, and law and the courts as a battlefield; a view of the period preceding 9/11 as excessively legally regulated, so much so that it impeded national security; and a view of law itself, consequently, as a necessary defence against these constraints. Yoo repeatedly portrays the law itself as a site of conflict: for example, 'The group of us who landed that day in Cuba surely had no idea then that the front in the war on terrorism would soon move from the battlefields of Afghanistan to the cells of Gitmo and the federal courtrooms' (Yoo, 2006: 20); and lawyers as the enemy to be overtaken: for example, 'Human rights lawyers, law professors, and activists who oppose the war on terror' who 'have filed many lawsuits' (Yoo, 2006: 129). The pre-9/11 period is portrayed as a hyper-regulated era in which an abundance of caution prevented any effective action against al-Qaeda: 'Efforts to capture or kill al Qaeda leader Osama bin Laden throughout the 1990s were shelved, out of concerns that the Justice Department did not have enough evidence to satisfy the legal standard for a criminal arrest. A return to this state of affairs would be a huge mistake' (Yoo, 2006: 3). The legal restraint on counter-terrorism is presented by Yoo as a serious constraint, necessitating a legal counteroffensive to permit effective counter-terrorism action.

In the memoir of Jack Goldsmith, head of the Office of Legal Counsel from autumn 2003, until he resigned in July 2004, law is also viewed as an encumbrance upon the proper functioning of the state. Goldsmith argues, first, that the US has been subject to a rising legalization of warfare over the course of the twentieth century (encompassing both domestic and international legal regulation), and second, that these pressures particularly mounted at the end of the twentieth century and the start of the twenty-first, leading to heightened concern about prosecution among both government officials and military and intelligence operatives. The response to this was either a cowed executive (exemplified by the Clinton administration) or the attempt to provide legal cover as a countermeasure to this expanded legalization of warfare (exemplified by the administration of G. W. Bush). Goldsmith argues that there was a shift from law as a 'political' constraint on political power (in the early twentieth century) to a 'judicial' constraint on political power in the late twentieth/early twenty-first: 'When he [Franklin D. Roosevelt] considered bending the law, he did not worry about being sued or prosecuted . . . He worried instead about the reaction of the press, the Congress, and most of all, the American people' (Goldsmith, 2007: 49). The Bush administration, however, faced 'obstacles' in the form of both domestic and international laws that had come to regulate the conduct of warfare, particularly since the Vietnam War (Goldsmith, 2007: 23). Given this, the Bush administration acted in a context when 'government officials seriously worried that their

heat-of-battle judgment calls would result in prosecution by independent counsels, Justice Departments of future administrations, or foreign or international courts' (Goldsmith, 2007: 12).

Goldsmith details what he calls a 'criminalization of war', starting with the War Powers Act of the 1970s, and specific restrictions on the intelligence agencies in the 1970s and 80s, and the Torture Statute of 1994, which 'provides for criminal sanctions, including the death penalty, for perpetrators of torture' (Pfiffner, 2010: 119) passed by the US following the adoption of the UN Convention Against Torture (Goldsmith, 2007: 66). This legalization of warfare was evidenced, and 'reinforced' by 'the swarm of lawyers that rose up in the military and intelligence establishment to interpret multiplying laws and provide cover for those asked to act close to the legal line' (Goldsmith, 2007: 91). Whereas the CIA employed only a small number of lawyers in the 1970s, by 2007 they had over one hundred, while lawyers in the Department of Defense number over ten thousand (Goldsmith, 2007: 91).[20] And this was the scene which set the stage for the Bush administration's response to the attacks of 9/11.

Inside the Pentagon, this situation had begun to be conceptualized as 'lawfare': not just a neutral regulation of war by law, but a vision of law as a tool to be mobilized by the enemy. 'Lawfare', Goldsmith writes,

> is 'the strategy of using or misusing law as a substitute for traditional military means to achieve an operational objective,' according to Air Force Brigadier General Charles Dunlap, who popularized the phrase. Enemies like al Qaeda who cannot match the United States militarily instead criticize it for purported legal violations, especially violations of human rights or the laws of war. (Goldsmith, 2007: 58)

These fears rose with the implementation of 'universal jurisdiction' in the 1980s and 90s, and came to a head with the formation of the International Criminal Court in 2002.[21] The 2005 *National Defense Strategy of the United States* presented lawfare as an official threat, declaring that 'our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism' (Goldsmith, 2007: 53).

These developments led to fears both among individual government officials and the military and intelligence services. Goldsmith reports that former Secretary of State Henry Kissinger became extremely 'rattled' by the extradition of Pinochet and threats that he too would be brought up on human rights charges (Goldsmith, 2007: 57). In 2002, as various groups called for Kissinger to be charged with war crimes, 'he decided to call an old friend from his government days, Gerald Ford's Chief of Staff and the current Secretary of Defense, Donald Rumsfeld' (Goldsmith, 2007: 58). In Goldsmith's view, however, the main impetus for the development of legal infrastructure for torture was not the concerns of senior officials, but rather, 'a paralyzing culture of risk-averse legalism in the military and, especially, intelligence establishments' (Goldsmith, 2007: 94).

Other accounts of the war on terror are also replete with examples of just such demands for cover (eg Pfiffner, 2010). In sum, there is evidence that what I have called the 'legalization' of torture, or the development of an explicit, quasi-open

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legal infrastructure to defend its use, should be understood as resulting from responses to the rise of a transnational field of human rights. In order to appease the military and intelligence sector, as well as fears of top officials, the Bush administration paved the way for an explicit defence of practices that in the past might have been undertaken covertly, a strategy which while perhaps seeming more rational on its face, opened all those involved to personal retribution should their actions be exposed. The strategy of legalization and quasi-openness, in contrast, provides a pre-emptive defence against such attacks.

On reading the accounts of insiders within the Bush administration writing of their experiences of the first years on the war on terror, what first becomes apparent is the intentionality of what I am calling the 'legalization' of torture – that is, its inscription into legal documents and regulations. Jack Goldsmith describes travelling to Guantanamo on what he terms a 'plane full of lawyers',[22] and his account emphasizes the central role of legal expertise in the war on terror. His memoir of that year emphasizes the extent to which the president and his staff felt *constrained* by the rise of an apparatus of both domestic and international law governing human rights and the government use of force, and yet this constraint did not lead them to bend their actions and rhetoric to comply with international law, but instead, to argue that international law should be redefined to fit with their actions. Goldsmith writes that 'President Bush acted in an era in which many aspects of presidential war power had become encumbered by elaborate criminal restrictions, and in which government officials seriously worried that their heat-of-battle judgment calls would result in prosecution by independent counsels, Justice Departments of future administrations, or foreign or international courts' (2007: 12).

It was thus, in the view of the Bush White House, the very rise of the legal apparatus enforcing human rights and the laws of war that led them to develop an explicit legal apparatus in defence of (what they generally did not refer to, but others did, as) 'torture'. In other words, the relative 'openness' of the state with regard to torture[23] should be seen not as a bizarre aberration, but as a calculated move on the part of a government which chose to use 'forbidden practices', and which saw secrecy and denial as less plausible defences than they had been in the past, as a result of the rise of a moral, legal and institutional apparatus which aimed to root out and punish such hypocrisy. Accounts of those directly involved suggest that they were acting in response to two, related, states of affairs: first, the broader legalization (legal regulation) of warfare which had occurred in the US since the 1970s, and the (subsequent) emergence of 'demands for cover' from the military and intelligence sectors.

## Conclusion

This paper began with the puzzle of why the US war on terror has been characterized by a brazen rejection of international human rights norms, rather than, as might be expected, a strategy of either compliance or hypocrisy. I have argued that rather than a paradox, this move should actually be understood as

a strategic state response to the rise of an international field of transnational human rights regulation. Within a theoretical framework which situates human rights norms, and practices such as documentation, exposure and prosecution as key practices of human rights advocates within a transnational field, it is possible to understand how and why the forces acting upon states might have shifted so as to make 'brazenness' and legal justification of torture and other human rights violations a strategic move for the United States after 9/11.

A transnational fields framework has greater explanatory power as compared to alternate analytic approaches. Constructivist IR theories, as well as sociological world-society theories both tend to presume that norms will take on greater power over time, and fail to predict that powerful states might choose to openly resist such norms. Realist approaches, meanwhile, tend to ignore the importance of culture and norms overall, finding the cultural realm insignificant. This approach also improves upon earlier constructivist approaches to the study of norms in IR, which tended to lack a theory of agency (Checkel, 1998, cited in Scheipers, 2015).

By conceptualizing states as operating within a transnational field, together with other state and non-state actors, the approach put forth in this paper avoids the teleological assumptions of these alternate frameworks, while allowing us to better analyse the multi-directional impact of transnational actors upon states, and vice versa. Such an approach allows us to better analyse seemingly puzzling developments, such as the 'legalization' of human rights violations, as strategies, which bring together both rhetoric and practice. By conceptualizing state action as strategic moves within a transnational field, we move beyond a conception of such activities as simply 'norm violations' and can understand the *gains* states might obtain from such actions, as well as the broader contexts which make such gains possible.

## Acknowledgements

Earlier versions of this paper were presented at the Society for Historians of American Foreign Relations, June 2014, and at a workshop on 'Fielding Transnationalism' at Boston University, October 2014. Thanks to Monika Krause and Julian Go, as well as two anonymous reviewers, for comments.

## Notes

1 When I speak of 'openness' here, I do not mean to imply that there was a complete turnaround from total secrecy about government use of torture and other 'forbidden practices' to absolute transparency. Rather, the status of such practices in the war on terror is best characterized as 'quasi-open' – a status that encompassed at times quite complete transparency, at times denial, and at much of the time, rested on a strategy of creating and mobilizing legal and linguistic ambiguity as to whether the practices in question actually did constitute 'torture'. This openness,

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whether full or partial, is puzzling because it appears as the dramatic reversal of a norm that had been growing ever stronger over the second half of the twentieth century.

2 Perhaps most notoriously at the 'School of the Americas' where the CIA trained Latin American paramilitary squads in the arts of torture and disappearance.

3 While there is also an important *domestic* legal and human rights field which has been important here, this paper focuses on the role of the transnational human rights field. A fuller analysis elsewhere will be needed to tease out the distinct roles of domestic versus international law in constraining the state and its use of violence. For purposes of this article, the focus will remain on the effects of the transnational field, presuming that developments towards the legalization/legal constraint on use of force within the domestic field can, in this instance, be understood to be in large part responses to the rise of such legal constraints in the transnational arena, and thus should largely be understood as mediating the relation between the transnational field and the state.

4 'Legal black hole' is often attributed to Steyn (2004), although the term has come into increasingly common use, particularly among critics from the legal profession.

5 As I discuss below, the evidence on this question is uncertain.

6 This paper is part of an ongoing, larger research project, which will be engaging with all of these sources.

7 There is also a significant literature tracing the rise of human rights 'norms' and the institutionalization of human rights in laws, treaties and international institutions (eg Keck and Sikkink, 1998; Clark, 2001; Dezalay and Garth, 2006; Levy and Sznaider, 2006; Borgwardt, 2007; Hunt, 2007; Burke, 2010; Sikkink, 2011; Moyn, 2012a, 2012b; Brysk, 2013; Joas, 2013; Keys, 2014), but as this paper is concerned more with the response to human rights, I will mention these only briefly.

8 Although see (Shor, 2008) for an attempt to resolve some of these difficulties.

9 I purposely use the loaded term 'barbarism' here in recognition of the fact that the discourse of human rights presumes a 'civilizing' trajectory from rhetoric and action that are less to more 'enlightened'.

10 These categories were developed inductively in response to the frameworks used in most existing studies of the effects of human rights norms, although the names for the categories are my own.

11 There is, of course, a further complication here, which is that the Bush administration, during the state I am calling 'brazenness' *simultaneously* affirmed the value of 'human rights' and openly affirmed the necessity of violations of human rights; contradictions that cannot be fully explored within the scope of this paper, but which will be analyzed in future research.

12 Katherine Sikkink makes a similar argument in her recent book, *The Justice Cascade* (Sikkink, 2011), writing that, while at first: 'I assumed that U.S. officials *could not* have fully understood the implications of the justice cascade, because *if* they had fully understood, they wouldn't have adopted policies that were criminal under both U.S. and international law. . . I now believe that the very production of these memos was a response to the rise in national and international human rights prosecutions . . . the memos themselves are indications, however perverse, of the impact of the justice cascade' (2011: 190–192). However Sikkink only develops this argument briefly in the form of a speculative explanation, whereas this paper develops the theory more fully and draws on evidence to support it.

13 I use the term 'strategy' here in the Bourdieusian sense (Bourdieu, 1977).

14 'As early as 21 October 2001, a Washington Post article reported FBI agents outlining their frustrations over the refusal of suspects to provide information and suggesting they might have to use pressure to get those details. On 5 November 2001, a Newsweek article appeared entitled "Time to Think About Torture." In January 2003, The Economist published a cover story entitled "Is Torture Ever Justified?"' (Foot, 2006: 133). 'Six weeks after September 11, news articles reported that frustrated FBI interrogators were considering harsh interrogation tactics, and the New York Times reported that torture had become a topic of conversation "in bars, on commuter trains, and at dinner tables"' (Luban, 2006: 35).

15 Most notably through the release of photos from the notorious Abu Ghraib prison in 2004.

16 The treaty entered into force, actually creating the ICC, in 2002.
17 The US after 9/11 is not the *only* case in which the relational mode of brazenness has occurred: earlier cases would include the UK and Israel, at certain points in time. In other work I will explore the *relations* between these cases, although this paper focuses solely on the US case.
18 The concept of 'lawfare' first took hold in American military discourse in 2001, when 'a prominent US military lawyer proposed the neologism "lawfare", which he defined as "the use of law as a weapon of war"' (Jones, 2015).
19 Rumsfeld then notes that after Belgium asserted universal jurisdiction and Franks was named in the lawsuit, he threatened to move NATO's headquarters, and 'the Belgian government repealed their law' (Rumsfeld, 2011: 598).
20 On this 'legalization' of the Department of Defense, see also Ansorge (2012).
21 'The enforcement gap finally began to close with the development of the idea of universal jurisdiction. . . . The idea had been kicking around in human rights circles since World War II but got a big boost with two important events in the 1980s. The first was a 1980 case in New York called *Filartiga*, which allowed a Paraguayan citizen to sue a Paraguayan official who tortured his son in Paraguay . . . The second boost for universal jurisdiction came when Baltasar Garzon, a Spanish magistrate, began to investigate the South American dirty wars of the 1970s . . . The House of Lords, in a landmark decision, ruled that universal jurisdiction was a valid concept, and that England must hand Pinochet over to Spain. ... Sovereign immunity no longer stood as a roadblock to trials of government officials for gross human rights violations' (Goldsmith, 2007: 55–56). (See also Sikkink, 2011.)
22 'Perhaps the oddest thing about my fortieth-birthday trip to GTMO and the naval brigs was that the plane was full of lawyers' (Goldsmith, 2007: 129).
23 And while I have here focused on the justification of torture under the Bush administration, but would argue that while the subsequent Obama administration has moved back from the defense of torture, it has enacted similar strategies with regard to its use, and open defense of, assassination (particularly via drone warfare).

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*The Sociological Review Monographs*, 64:2, pp. 170–193 (2016), DOI: 10.1111/2059-7932.12007

## Appendix: List: of memoirs consulted

| Person | Role | Memoir title |
|---|---|---|
| Goldsmith, Jack | General counsel of the Department of Defense, 2002–3; US Attorney General, leading the office of legal counsel in the Department of Justice, 2003–4 | *The Terror Presidency* |
| Yoo, John | Deputy Assistant US Attorney General in the Office of Legal, Department of Justice, 2001–3 | *War by Other Means* |
| Rice, Condoleezza | National security adviser, 2001–5; Secretary of State, 2005–9 | *No Higher Honor* |
| Cheney, Richard | Vice President | *In My Time* |
| Bush, George W. | President | *Decision Points* |
| Ashcroft, John | Attorney General | *Never Again* |
| Tenet, George | Director of Central Intelligence (CIA), 1997–2004 | *At the Center of the Storm* |
| Feith, Douglas | Undersecretary of Defense | *War and Decision* |
| Rizzo, John | CIA Acting General Counsel under | *Company Man* |
| Rumsfeld, Donald | Secretary of Defense | *Known and Unknown* |
| Myers, Richard (General) | Chairman of the Joint Chiefs of Staff, 2001–5 | *Eyes on the Horizon: Serving on the Front Lines of National Security* |
| Kiriakou, John | CIA analyst | *The Reluctant Spy* |
| Bolton, John | Ambassador to the United Nations | *Surrender Is Not an Option* |
| Gates, Robert M. | Secretary of Defense, 2006–11 | *Duty* |