Thinking Outside the Box:

Words and Concepts in the Underwriting of Torture

by

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As is forcefully demonstrated in the founding document of American collective will, affirming self-evident truths comes at a high cost. If truth, if truths were really self-evident, there would be no need whatsoever to invoke them; stating or claiming truths would constitute an empty, redundant endeavor. Yet truth comes into existence over against its opposite; establishing truth, which unfailingly takes the form of a struggle, whether real or symbolic, means separating it from non-truth, from its negation. Once having achieved objective existence, that is, once having been written down and collectively espoused, the most general truths - such as the equality, life, and liberty of the *Declaration of Independence* - become virtual points of reference for laying the legislative and institutional groundwork of commonality. These guiding ideals, however absolute their presumed pertinence, serve specifically as the measure to judge the inevitable imperfections of the status quo, regardless of the life domain in question. Traveling the mental distance between the ideal and its rendering in the real means interpreting; this inescapable interpretation underscores the potential relevance of the literary dimension, which concerns precisely this mediating process.

In the overarching framework of American ideals or "self-evident" truths about human nature and rights, torture or inhumane interrogation stands as an exception or apparent aberration. In this sense, reflecting on U.S. torture policy in this national and, by extension, transnational context consists in tracing the emergence of a tradition erected ex nihilo. The architects of this newly fashioned torture tradition displayed a certain discursive inventiveness; above and beyond their moral, ethical and, most notably, intellectual shortcomings, their interpretive acts revealed the tenuous nature of any polity, even one resting on the highest of "self-evident" truths. Grappling with the discursive origins of this historical anomaly of inhumanity entails awakening an aspect of literary thinking that has long lain dormant in the modern university: the notion that the critical thought underlying literary study has its raison d'être in addressing questions of worldly or tangible consequence and import. Literary understanding is involved at the outset: the numerous texts and documents seeking to justify applying unprecedented force to prisoners resides at the conjuncture of literary thinking, with its complex reflection on potential meanings as well as hypothetical scenarios, and juridical interpretation. The fleeting amalgam of these two critical practices augurs a future intellectual regime the contours of which are not yet ascertainable. Whereas the contemporary institutional version of literary understanding has relinquished its claim to universal truths and relevance in the world of actions, decisions, and consequences, the basis of legal interpretation bears exclusively on possible translations between the universal and the concrete, individual case. No less than literary thought, juridical interpretation tackles a textual tradition; rather than aesthetic or cultural ruminations, however, this latter produces interpretation with a bite. As a result, this entwinement between literary and legal understanding supplements the intellectual tools of juridical reasoning while granting the benign mental elaborations of literary criticism an impact on serious real life situations. Specifically, rendering torture conceivable, thinkable, creates a novel meld of lofty imprecision and a seemingly infinite power of authorized judgment.

In sum, I am suggesting that while torture has a history as long as civilization itself, its contemporary practice in the American venue derives from an epistemological transformation that has insidious repercussions on thought and action, on mind and body. References to this mental sea change requiring a vastly revamped global view abound in numerous U.S. administration documents that, formulated in the utmost secrecy, have now been made public. The "Memorandum from the President" of February 7, 2002 stresses the perceived newness of this situation:

> [T]he war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. (…) Our Nation recognizes that this new paradigm...requires new thinking in the law of war... (Bush 2002)

As a concept, this "paradigm change" is well embedded in the modern history of science (the best known of which is Thomas Kuhn's notions about scientific revolutions). But what is the nature of this new thinking accompanying the mutation in the modalities of warfare? This new mode of thinking bears most visibly on the constellation of force, authority, and the juridical legacy, necessarily transmitted in a textual tradition, that establishes and governs the relationship between the two first components. Representing this shift, putting it into words, engenders countless metaphorical expressions along the lines of "[a]fter 9/11, the gloves came off," an observation by Cofer Black who was in charge of CIA counter-terrorism in September 2002 (Mayer 2005). Violent response proved more painful to adversaries; there was no longer the padding between the object implementing the force and the victim receiving its brunt. While this metaphor and others like it are telling about the attitude of the U.S. governing administration, the question is as conceptual as it is literary; it entails elaborating a conceptual space the very existence of which enables certain previously forbidden actions. What the presidential document calls the "new paradigm" frames this realm that houses a new thinking. As one commentator remarks in referring to this novel paradigm, its

> strategy rests on a reading of the Constitution that few legal scholars share - namely, that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries. (Mayer 2006b)

As this passage affirms, claiming this new paradigm for articulating an unprecedented historical context has wide implications for the balance of power in the three branches of U.S. government, that is, the legislative, executive, and judicial powers (in the language of the Constitution). Though incontestably true, this observation strays from the question of how this "new thinking" might be construed and put into practice; moreover, as with other bureaucratic behemoths of the 20th century, all branches of government were accomplices, and those individuals who resisted this new thinking are still few and far between. There has not been a coup d'état, and the executive figurehead, the president, has nonetheless clung to the rule of law. That is, the presidential agent acted in the name of legal reasoning that has been set forth

in thousands of pages of memoranda and documents of legal consultation. To what extent, then, does law - comprising also the textual tradition conveying it - prove binding for action? In other words, what is a legal boundary? Virtually all the discursive conflict about torture and inhumane treatment has revolved around the issue of *limit*.

In regard to these claims of "newness," what I might term the "old" or "*passé*" paradigm of law manifests a particular, easily recognizable form. In the West, the ten commandments incarnate the very essence of legality and the ongoing transmission that keeps laws contemporary and pertinent. The commandment "Thou shalt not kill" exemplifies the original imperative that has an absolute status. This legacy becomes qualified through time, and subsequent additions to the fundamental law, which establishes an absolute limit, become part of the initial commandment. "Thou shalt not kill" - but what if it's an accident, if killing takes place during military combat, in self-defense or through negligence, and so on? These accretions - reflections and new codifications - modify the original law, creating a multiplicity of interrelated wrongs along with what is deemed appropriate or inappropriate punishments. In many countries, including the U.S., killing is wholly legal if the state executes a duly convicted individual. In a word, the legal tradition, along with the texts conveying it, imposes a series of limits, limiting as well the application of certain limits; that is the nature of collective law and its historical perpetuation.

In the American and international domains, torture and inhumane treatment have been the object of laws and various treaties that, in being adopted by the legislative branch of government, institute directives and guidelines that have the force of law. These laws form the backdrop, the previously ironclad constraints and obligations, of the paradigm shift. The novel thinking characterizing this transformed situation find its initial expression in the now infamous document by John Yoo (Deputy Assistant Attorney General). This "Memorandum for William J. Haynes II, General Counsel, Department of Defense" (Yoo 2002) spells out the basic reasoning for claiming that this new state of things does not fall under the purview of the Geneva Conventions for the Protection of Victims of War. The argument of these 40 single-spaced typewritten pages can be summarized in one sentence; neither these conventions nor others apply to the given imbroglio because: (1) Afghanistan is a failed state and therefore has signed no convention; (2) Al Qaeda, as a transnational terrorist entity, has never been a signatory of any such treaty. In other words, the "limits" and stipulations of these agreements simply do not apply, and the course of action(s) becomes unbounded by such considerations. Initially, as in this Yoo memo, the explicit limit already legally in force become the object of thinking by negation, underscoring the grounds of its inapplicability. In the pathbreaking "Memorandum for the President" (Jan 25, 2002), signed by Alberto Gonzales (at that time Counsel to the President), this reasoning becomes the lynchpin of a soon to be dominant vision of anti-terrorist thinking. The language and the reflection behind it are relatively straightforward, at least on the surface. As the Gonzales memo states:

[T]he war against terrorism is a **new** kind of war. It is **not** the traditional clash between nations.… In

> my judgment, this **new** paradigm **renders obsolete** Geneva's strict **limitations** on questioning of enemy prisoners... (Gonzales 2002) (My emphasis)

In this memo's analysis, the repeated invocation of "newness" and "obsolescence" stresses a perceived historical rupture separating the contemporary situation from past practice and constraints. But it also names what will become the real issue, until now clothed in the language of judicious reflection: that is, the lengths a captor might go to in questioning a seized combatant. The administration documents reveal that the real limits at issue are even more crucial than might be suggested by the binding prisoner-of-war clauses of the Geneva Conventions. In a convoluted - need one say "tortuous" - act of reasoning, this Gonzales memo suggests that the legitimate grounds for not following the Geneva Conventions in this instance derives from the lack of explicitly comprehensible limits:

> [S]ome of the language of the GPW [Geneva Conventions] is **undefined** (it prohibits, for example, "outrages upon personal dignity" and "inhuman treatment"), and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GPW.
>
> [I]t is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism. (Gonzales 2002) (My emphasis)

In other words, in the author's understanding, the meaning of "personal dignity" is no more obvious than what might indicate an attack on that dignity, than what might signal inhumane or inhuman treatment. These concepts, apparently so slippery as to impose no solid definition, are unbinding and without pertinence in this "unprecedented" situation. Secretary of State Colin Powell, who immediately drafted a dissident memo, takes an opposing view of the applicability of the Geneva treaties; the issue in this State Department memo concerns, once again, limits: "[W]hile no-one anticipated the precise situation that we face, the GPW was intended to cover all types of armed conflict and did not by its terms limit its application" (Powell 2002). This debate about limits goes far beyond the insignificant and benign academic reflections to which we are so thoroughly accustomed. The fundamental problem bears on the interwoven relationship between limits and legality itself. The inability to think on the basis of limitations, to think limits, means that it is impossible to remain in the realm of law, to think in terms of law. Without limits to contest and to interpret, it is impossible even to disobey. In what follows, I would like to reflect on this basic conundrum, as well as on its meaning for the transformed polity that characterizes the contemporary mental landscape.

The quandary accompanying this thinking, now exempt from the general or overarching limitations associated with existing law, brings with it a number of necessary epistemological consequences. Despite the proclaimed sui generis nature of this sociohistorical challenge, the novel reality must nonetheless submit itself to description, and additional categories must be invented. The "new" concepts retrofitted to

this new paradigm endorse a different, more oblique limitlessness. The "Presidential memo" of February 7, 2002 renders public a newly invented category that attests to a redefinition both of legality and military foe; in what has become a standard phrase in reports on the current armed engagements, this memo qualifies the enemies as "unlawful combatants," stipulating that they do "not qualify as prisoners of war" (Bush 2002). This new category, once again established by negation in accordance with the prevailing mode of understanding in this unprecedented situation, introduces a logical ambiguity to undergird the concomitant thinking as well as the policies it generates. An "unlawful" combatant is "illegal" - a synonym that will be frequently employed - while being outside the law, "un-lawful": that is, the law as it has been conceived no longer applies. This is a novel war, a new kind of war, in which the prisoners are not prisoners of war. This slippage, produced by exponential negation - new, not traditional, obsolete, undefined, and (now) unlawful -, opened up a land of nebulousness. In sum, these interpretive operations take away even virtual guidelines and efface designated limits against which actions can be measured and judged. The concluding statement that summarizes the administration position dispenses with negative reasoning without, however, dispelling the indeterminacy. This passage from Gonzales's memo of January 25, 2002, will subsequently be reiterated in virtually all documents as an expression of policy:

> [T]he U.S. will continue to be constrained by its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW... (Gonzales 2002)

It should be noted that this same memo found too imprecise the definition of inhuman treatment; moreover, consistency with the spirit but not the letter, with the "principles" but not the language of law of the Geneva Conventions, does not aid in tying down meaning or providing specific guidelines. Nor does military necessity acting as final arbiter resolve the problem of demarcating legitimate and illegitimate procedures. These qualifiers opened the door, so to speak, for a different modus operandi.

The current mental landscape comes to be in the aftermath of this thinking, and its accompanying economy of meaning and interpretation, while permeating all domains of intellectual practice, becomes most manifest in reference to the questioning of these fighters deemed outside the law. In light of this hazy legality that evaporates on the most cursory inspection, mere reference to interrogation becomes an issue. This "new" questioning procedure, aimed at a "new" species of combatant in the context of a "new" paradigm, becomes somewhat difficult to describe. Nevertheless, the various attempts to characterize the phenomenon float over a certain spectrum and include "coercive interrogation," "enhanced interrogation techniques," "harsh interrogation procedures," "aggressive methods of persuasion," "physical coercion," "coercive methods of interrogation," "abusive interrogation," "protocol of psychological coercion," among many others. As one analyst of these techniques remarks, this mode of questioning takes the form of "torture-that-isn't-somehow-torture"; this same analyst unearths a twentieth-century historical precedent for this same protocol: the German Nazis procedure of "Verschärfte Vernehmung," which became widely

known in postwar tribunals. This idea, translated as “enhanced interrogation,” “sharpened interrogation,” “intensified interrogation” exhibits the same profile as the American practice and receives the same justification (Sullivan 2007). The upshot of this linguistic fuddling is the inability to *name* unequivocally the nature of this questioning. Above and beyond all the real and symbolic damage resulting from this fuzzy domain of lawlessness, what specifically interests me here is the institutional frame of thinking such procedures entail. Despite the general tenor of criticism and debate about this question or, rather, this questioning, the fundamental issue does not simply concern detainees at Guantanamo, ghost prisoners at so-called black sites or combatants held in Iraq. Nor does the responsibility reside wholly with the U.S. administration showing such legal inventiveness. The 2001 Patriot Act, for example, employs a similar language, proclaiming itself an act “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes” (Patriot Act 2001). The enhancement reflects a limitless upgrowth in investigation and interrogation; the effacement of the constraints of law installs a transformed regime of action that underwrites a mutation in the logic of the polity.

Rather an outgrowth of a desire to torture or to question “harshly,” to punish, this self-proclaimed new paradigm signals a permutation of thought, a shifted center of gravity for thinking collective cohesion and action. As the multitude of supporting documents glaringly reveals, language and interpretation do not simply express an intention but open up an infinite space for active deployment, for arbitrary seepage into undemarcated territory. Far from simply justifying eventual actions, the linguistic analysis effectively voiding the law, emptying it of its power to divide right from wrong, acceptable from unacceptable, human from inhuman, enabled a mass of actions that reside just beyond the realm of lawful judgment. This thinking, gradually spreading through the intellectual rank and file, engendered a subtle or even clandestine metacommentary with its own metaphorics. The figurative statements that attempt to render the significance of this new thinking wind up employing versions of the same image. In the words of White House press secretary Dana Perino, the president : “has done everything within the corners of the law to make sure that we prevent another attack on this country” (Johnston and Shane 2007). The law places a barrier that divides an inside from an outside, lawfulness from outlawed actions. With regard to intelligence gathering, this image has been prolific, but, again, in a negative sense: the corner was too confining, left no elbow room, and the container had to be pierced. In speaking about the interpretive analysis carried out by Lieutenant Colonel Diane Beaver (the top legal advisor to Joint Task Force 170 whose goal was to gather intelligence about Al Qaeda’s plans), a senior Defense Department official commended her “for trying to think outside the box” (Mayer 2006a). Once outside the box, the sky is the limit, and how far upward the launch depends on absolute arbitrariness that cannot even be measured.

Without unduly belaboring this image, I believe it is nonetheless illuminating to refer to the so-called “Bybee memo,” a heinous and very slipshod document submitted in August 2002 to Alberto Gonzales, then Counsel to the President. Bybee is concerned precisely with what he calls “the lowest boundary of

what constitutes torture" (Bybee 2002: 27). For this extremely influential document that sealed the fate of countless detainees, this boundary proved very elusive. The Bybee memo sifts through and cites dictionaries to seek out definitions that would bear on torture; in this sense, it attempts to nail down - to define: that is, to impose a limit for - diverse terms and concepts, such as "pain," "severe," "suffering," and "specific intent" (on the part of an interrogator). In piecemeal fashion, then, the memo goes on to establish that "torture" is ultimately an openended concept whose limit is extreme:

> Each component of the definition [de-fin-ition: the boundary] emphasizes that torture is **not the mere** infliction of pain or suffering on another, but is instead a **step well removed**. The victim must experience **intense** pain or suffering of the kind that is **equivalent to the pain** that would be associated with **serious** physical injury so **severe** that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result. (13) (My emphasis)

An act of torture is always beyond what might anecdotally be associated with it: it is serious, severe, intense, well removed, and so on. In sum, when a detainee dies from interrogation, we can suspect that the death may possibly have been brought on by torture. There is a certain finality to death and organ failure, even in an ambivalent world of extremely relative values. But the memo strives to curtail even this proviso: "Even if an interrogation method, however, might arguably cross the line..., we believe that under the current circumstances certain justification defenses might be available..." (39). The current circumstances refer implicitly to the new paradigm, the new thinking, and the new war against global terrorism that allow for a redefinition of reality or what one journalist called a "recalibration" of the torture definition (Rich 2007). By definition, the law draws a line; if it is wobbly or illegibly traced, there is no law.

The "Memorandum on Counter-Resistance Techniques" of November 27, 2002 (from William J. Haynes II to the Secretary of Defense Rumsfeld) constitutes the sole effort to contain the willy-nilly techniques of interrogation and reign in the inevitable drift toward excess. The innuendo circumventing the expressed purpose of this memo (which is accompanied by various documents and letters of legal support) proves an instructive example of how the new paradigm of thinking manifests and deploys itself. The guidelines for "interrogation" divide techniques into three categories: the first is relatively straightforward and contains normal, noncontroversial procedures; the second listing suggests a stepping up of the aggression; whereas the third, which in this memo was not recommended for "blanket" approval, enumerates explicitly inhumane treatments, including what is known as waterboarding (or a provocation causing the victim to live and relive the experience of drowning). Among the second group of suggested methods designed to "enhance our efforts to extract additional information" can be found the following: "(1) The use of stress positions (like standing), for a maximum of four hours" (Haynes 2002). In endorsing the memo and its recommendations, Secretary of Defense Rumsfeld adds a handwritten sentence below his signature: "However, I stand for 8-10 hours a day. Why is standing limited to 4 hours? D.R." The insinuated meaning of this sentence has been remarked on in the media; after all, handwritten

scribbling of this nature is rare in these documents that so effectively efface the authorial persona. But most striking is the perversion of its enactment: the Rumsfeld signature approves - formally and for the first time - specific techniques of inhuman treatment; as such, it imposes real, identifiable limits on interrogation methods, however repugnant they may be. At the same time, however, the seemingly personal comment, out of place in this context, belittles those limits, or any limits at all (as a matter of course, a regular working man such as myself stands on his feet from 8 to 10 hours a day!). This remark, inscribed on an official document, follows the same pattern as the de-limitation, the paling out of boundaries, that characterizes all the thinking of this "new paradigm."

Although dissident views from within the administration provoked the publication of many previously classified documents and memos, the in-house critiques were largely muted. Focusing less on the details and refraining from any inclination to pathos, these criticisms inevitably surfaced as arguing the opposing side of the limit metaphor. These respectful rejoinders defended the "old" paradigm of thinking over against the current claims of definitively releasing the strictures of law and eventual legal judgment. For example, the former head of Naval Criminal Investigative Service (David Brant) indicated that the point at which questioning techniques become abuse was readily visible: "It was pretty basic, black and white to me" (Mayer 2006a). Breaking the law, transgressing the line separating legality from lawlessness, always remains an option, perhaps, but the distinction between lawful and unlawful acts has an objective quality incarnated in the guiding documents of collective assent. In the same vein, the July 7, 2004 "Memorandum for Inspector General, Department of the Navy" renders explicit the epistemological stakes underlying the decision to implement "torture." This memo, written by Alberto Mora, who went public with his critique of the administration's legal reasoning, argues for a classical understanding of legal interpretation. In developing a different set of recommendations, it attacks the reasoning employed in the Beaver legal brief: "[T]he memo's fundamental problem was that it was completely unbounded - it failed to establish a clear boundary for prohibited treatment" (Mora 2004: 7-8); it "did not articulate any bright-line standard for prohibited detainee treatment..." (6). An advocate of the traditional legal mindset, Mora is concerned with limits: "Where does one set the threshold...?" (11). In commenting another draft paper, the Mora memo observes: "Because it identifies no boundaries to action - more, it alleges that there are none - it is virtually useless as guidance..." (17). This same preoccupation with drawing the line, establishing inalienable directives, is present in the minds of more practical observers. The public letter from Captain Ian Fishback to Senator McCain records that "Despite my efforts, I have been unable to get clear, consistent answers from my leadership about what constitutes lawful and humane treatment of detainees"; the letter adds, "...clear standards only limit interrogation techniques..." (Fishback 2005). Ultimately, this entire debate, with its massive and profound repercussions in both practical and symbolic domains, seems to hinge on a certain image or constellation of metaphors that expresses the dynamics of power.

At this juncture, I would like to come back to my point of departure. In the end, what is at issue in

this so-called new paradigm, which lays the groundwork for a "state of exception," bears only indirectly on the modalities of torture, American policy, or even what is humane, inhumane, or human dignity. As I have tried to indicate, the law - as text, as tradition, as the material basis for collective consciousness in history - imposes a limit, a "corner," a line not to cross; whether one conceives of it as a cardboard box, a metal container or simply a line in the sand, it binds potential action to a standard. That is, this metaphorizing betrays the nature of the thinking for which it is the vehicle; arguments about the need for a limit, about where to draw the line, signals a clash, a confrontation between modes of thinking. These modes of thinking concern power, of course, but they pertain no less to human understanding generally. They reflect the role of language in fashioning and expressing thought and interpretation, serving at the same time to weave consequent worldviews. The now classical paradigm of literary understanding addressed this issue head-on:

> [T]he will of a monarch who is not bound by the law can effect whatever seems to him without regard for the law - that is, without the effort of interpretation. The need to understand and interpret arises only when something is enacted in such a way that it is, as enacted, irrevocable and binding. (Gadamer 1994: 329)

The groping toward a presumed new paradigm proceeded by interpretation - however negligent and duplicitous; that is, it formally stayed within the limits of law even if its ultimate goal was to divest itself of limits and liberate action from interpretation and being judged. These aberrant interpretations did not escape being judged even while endorsing uncontrolled brutal power. Moreover, despite occasional suggestions to the contrary, the U.S. does not have a king or monarch, nor even a dictator; nor does the presidency represent a world in which the executive branch of power dominates. The Supreme Court continues to overturn the torture issue, and, it would seem, the rule of law has tried to reassert itself. But this economy of thinking has, for the first time, come out into the open and begun to elaborate its own institutional legitimacy. To my mind, what is most troubling derives from this paradigm's uncanny resemblance to contemporary literary understanding that has renounced its hold on the world. Yet whereas the literary regime of thought draws no lines, takes no stands, and judiciously refrains from addressing issues of life and death, the regime of limitless executive power introduces a capriciousness that decides the fate of individuals without the rule of law. In the realm of pure power, the law exists primarily as a result of its application; its raison d'être can never be dissociated from the underlying arbitrariness that occasioned it.

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