

Forever Again: How Discursive Strategies Re-legitimate Torture in the US Senate Select Committee's 'Torture Report' and the CIA's Response

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1. Introduction

This article was first inspired by the uneasy feeling I was left with after reading the summary report by the US Senate Select Committee on Intelligence on the CIA's use of the so-called enhanced interrogation techniques (the Committee report, or simply the report), and the CIA's response. The purpose of the report was to investigate the allegations of the CIA using torture in its secret detention centers after the terrorist attacks in September 11, 2001. While it is fair to say that the Commission report quite straightforwardly condemns the way the enhanced interrogation techniques were used, an unsettling undertone remains. If the prohibition of torture is absolute and exceptionless, why is so much explanation required? What I believe accurately captures and, as I will show in this article, explains the uneasy feeling is what Scott Veitch describes as law's irresponsibility (Veitch 2007).

Law and legal institutions are commonly understood as central organizers of responsibility, being 'seen as society's key modes of asserting and defining the scope and content of responsibilities' (Veitch 2007, 1). Veitch's view is different in that for him, law and legal institutions are in fact central in organizing irresponsibility, particularly with respect to extensive human rights violations and other large-scale

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** I am grateful to Sakari Melander, Samuli Hurri, and the two anonymous reviewers for their extremely helpful comments on earlier drafts. This work was supported by the Finnish Cultural Foundation, the Olga and Kaarle Oskari Laitinen Foundation, and the Kone Foundation, and was conducted as part of the Legal Language of Moral Struggles project.

harms caused to the human race, such as genocide and nuclear threat.¹ Veitch argues that law as the ultimate measuring stick trumps moral and ethical claims about personal responsibility even when the legal action itself results in extensive suffering. Moreover, law's irresponsibility is not a question of the substance of law, but an intrinsic feature of the law itself (Veitch 2007; see also Cover 1983 and 1985; Kerruish 1998). Veitch argues that '[l]egal norms and actions operating within the legal realm are to be understood as not only contributing to establishing the boundary between the legal and non-legal realms themselves, but also influencing what lies *beyond* the boundary' (Veitch 2007, 81). In other words, the practices, concepts and categories of law and legal institutions guide our perception of harm and responsibility beyond the legal sphere: they 'structure social relations at such deep levels that questions of responsibility and irresponsibility tend already be underpinned or influenced by forms of law and legal role responsibilities that necessarily serve to limit the potential as to what, and how, alternative normative understandings may appear' (Veitch 2007, 84). In this article I demonstrate how legal argumentation is used for deflecting responsibility for torture in the Committee report and CIA's response, despite neither of them was not intended as an assessment of the lawfulness of the so called enhanced interrogation techniques (Miller 2009).

In order to explore Veitch's claims about law's workings in the world I use a reduced and further refined version of Sten Hansson's heuristic model for analyzing discursive techniques of blame avoidance in the Committee report, and in the CIA's response to it (Hansson 2015). Hansson's model categorizes ways of arguing, framing, denying, representing actors and actions, legitimizing, and manipulating the perception of blame through different forms of problem denial, excuses, justifications, counter-attacks, drawing a line under the discussion, changing the subject, restricting information, and working behind the scenes. I have re-organized the central elements of Hansson's model in three sections, namely the representations of *the self*, *the harm*, and *the other* as illustrated in table 1, which is described in more detail below.

Hansson's model for interpreting discursive blame avoidance strategies is a synthesis of the work of many discourse theorists, in which he identifies several strategies of argument for manipulating the perception of loss and the perception of agency. Along with Hansson and other discourse theorists, Stanley Cohen has analyzed the 'repertoire of official responses', and especially the different forms of denial regarding allegations of human rights violations (Cohen 1996; 2001).

The aims of this article are, firstly, to provide a convenient analytical framework for making discursive strategies for responsibility avoidance apparent; secondly, to demonstrate the discursive process which contributes to atrocities re-occurring

1 For the record, Veitch states that he does not claim a straightforward causal relationship between law and devastation, nor is he arguing that the law is completely incapable of holding people and institutions responsible for the harm they cause. Rather, he is 'exploring the ways in which legality can and does allow the production of suffering' (Veitch 2007, 10). What he is claiming is that this is not simply aversion of law or an unwanted by-product, but an integral part of the law's workings in the world.

despite declaring ‘never again’ time after time, and thirdly to examine how legal language is involved in the process.

The analytical framework is presented in table 1 below. I have identified two dominant topoi in the Committee report and CIA’s response to it: *the topos of law* and the *topos of threat*. In discourse analysis, topos has been ‘described as parts of argumentation which belong to the obligatory, either explicit or inferable premises’ (Zagar 2010). In other words, the conclusion rules of a topos justify the relevance of the arguments and the transition from the argument to the conclusion (Kienpointner 1992, as cited in Zagar 2010). In a looser sense, topos refers to a ‘reservoir of generalized key ideas,’ from which arguments can be generated (Richardson 2004, as cited in Zagar 2010). In this article, topos refers to the basis of evaluation and justification, and to the central discursive strategies; in the topos of law the basis of evaluation is authority; the basis of justification is legality; and the main discursive strategy is legitimation. In the topos of threat the basis of evaluation is security; the basis of justification is necessity; and the main discursive strategy is rationalization.

In the topos of law, the construed facts are evaluated according to their legality, which is ultimately based upon the authority of the law: according to the legality or illegality of a specific action, it either has to be performed or omitted (Reisigl & Wodak 2001, 79). Only certain types of justification having to do with agency, causality, intention and legitimacy are relevant in the topos of law. Therefore, also the denial strategies target these elements of responsibility. For example, causing legally relevant harm can be denied altogether, or responsibility for the harm assigned to someone else (the ‘bad apples’); knowledge of the harm and/or the action can be denied; the intent to cause harm can be denied; and the necessity of action can be emphasized (see Cohen 1996, 522-531; 2001, 60-96; Hansson 2015). In the topos of threat, the ultimate and unquestionable justification is security—all things necessary for security are, by default, justifiable, and indeed necessary (Hansson 2015, 309). Furthermore, making a claim of necessity is an effective way to disconnect the use of ‘enhanced interrogation techniques’ from the ‘barbaric’ practice of torture. Introducing instrumentality, rationality and proportionality—all of which are defining features of the liberal democracies—‘democrats have produced an image of torture that may be fitted to its conception of legitimate violence’ (Del Rosso 2014a, 387; see also Luban 2005). In my analysis, I identify specific discursive strategies typical of the topoi of law and threat for producing certain kinds of perceptions of the self, harm, and the victim. The discursive strategies listed in table 1 are not intended to be exhaustive, but examples of prevalent discursive strategies in the material discussed in this article.

I analyze the discursive strategies as a central part of topoi for the purpose of developing an analytical tool that can be used to identify the ways in which irresponsibility is (re)produced in legal language. The identified discursive strategies for responsibility avoidance are, for the most part, adopted from Hansson’s heuristic model, which in turn is based on synthesizing the work of many other discourse theorists. The discursive strategies identified in my analysis are 1) *Individualizing*

(the bad-apple narrative), which means shifting the blame within an organization onto the shoulders of an individual actor;² 2) *The rescue narrative*, in which the Hero sets out to protect the Victim from the Villain;³ 3) *Denial* of intention, act, harm, causality or control;⁴ 4) *Obscuring agency* with vague and impersonal use of language;⁵ 5) *Silencing* a disconcerting topic;⁶ 6) *Relativizing*, e.g., through the use of (possibly misleading) comparisons or equating strategies;⁷ 7) *Legitimizing* by referring to the law, morals, authority;⁸ 8) *Rationalizing* by referring to goals and effects;⁹ 8) *Impersonalizing* the victim;¹⁰ 9) *Assigning partial responsibility* for the harm to the victim because of their own conduct, or presenting the victim as blameworthy because of their characteristics.¹¹

As illustrated in table 1, ‘we’ (the self) in the topos of law is presented as law-abiding, and the harm, if it is admitted at all, is presented as legitimate, while the ‘they’ (the other), is seen as partially responsible for causing the harm. In the topos of threat, ‘we’ (the self) is presented as sincere, the harm caused as relative to the cause, and the ‘they’ (the other) as dangerous (Hansson 2015).

My analysis shows that in the topos of law, the perception of a law-abiding, blameless self is produced by individualizing, intention and act denial, compartmentalizing, and obscuring agency. The perception of a non-existent or legitimate and/or unavoidable harm is produced by silencing or denying harm altogether, denying causality between action and harm, denying control over causing harm, and by legitimating harm. The perception of the other, i.e. the victim, as corrupt is produced by assigning responsibility for causing harm to them. In the topos of threat the perception of a sincere self is produced by using the rescue narrative and various forms of denial. The perception of non-existent or relative harm is produced by problem and/or goal denial, limiting, relativizing, and rationalizing. The perception of the other as dangerous and blameworthy is produced by impersonalizing the victims and blaming them for their own suffering.

2 See Hansson 2015, 301; Lakoff 2008, 163-167; see also Cohen 1996, 522-531; Del Rosso 2014b, 53; and Veitch 2007, 41-43, 78, 87.

3 See Del Rosso 2014a, 384; Hansson 2015, 308.

4 Cohen 1996; 2001, 60-96; Hansson 2015, 301-302; Van Dijk 1992, 92.

5 Hansson 2015, 302; Scollon 2008, 109.

6 Hansson 2015, 315; Schröter 2013.

7 Hansson 2015, 309-310; see also Hooks & Mosher 2005, 1631.

8 Hansson 2015, 299; Van Leeuwen 2007, 92, 94; Van Leeuwen and Wodak 1999.

9 Hansson 2015, 303, 7; Van Leeuwen 2007, 92, 94; Van Leeuwen & Wodak 1999.

10 Hansson 2015, 308; Van Leeuwen 1996; 2008.

11 Fairclough & Fairclough 2012, 172; Hansson 2015, 299; Hooks & Mosher 2005, 1630; Wodak 2006.

Table 1: Discursive strategies for altering the perception of the self, harm, and the other in the topoi of law and threat.

	TOPOS OF LAW	TOPOS OF THREAT
Basis of evaluation	Authority	Security
Basis of justification	Legality	Necessity
Main discursive strategy	Legitimation	Rationalization

THE SELF		
Description	Law-abiding	Sincere
Discursive strategies	Individualizing (bad-apple -narrative) Intention / act denial Obscuring agency Compartmentalizing	Rescue narrative Denial
Perception	No-one to blame, no reason to blame, someone else to blame	

HARM		
Description	No harm Legitimate harm	No harm Relative harm
Discursive strategies	Denying harm / causality / control Silencing Legitimizing	Denying problem / goal Limiting Relativizing (yes, but) Rationalizing
Perception	No harm, limited harm, relative harm, unintentional harm, unavoidable harm, justifiable harm	

THE OTHER		
Description	Responsible	Dangerous
Discursive strategies	Assigning responsibility	Impersonalizing Blaming the victim
Perception	Non-existent / non-human, blameworthy, responsible	

Before analyzing the Committee report and CIA's response and discussing how the topoi of law and threat produce the perception of the self, harm and the other, I will briefly outline the context of both texts, going back to the infamous terrorist attacks in September 11, 2001. The saga of the US war on terror and the use of the so-called enhanced interrogation techniques is long and complicated. The following provides a brief oversight of the authorization of the CIA detention and interrogation

program and the interrogation techniques, but it is not possible to do justice to all the points of interest in the process. Admittedly the picture offered here is rather one-sided and, for example, the internal conflicts of different authorities are not addressed. A brief outline is however needed in order to understand the analysis of the Commission report and the CIA's response. The analysis presented later in this article follows the structure of table 1 above; I will discuss the way in which *the self*, *harm*, and *the other* are constructed in the reports with the *topos of law* on one hand, and the *topos of threat* on the other.

2. The 'torture report' and CIA's response in context

Only days after the attack on September 11, 2001, President Bush authorized the CIA to capture, detain and kill al-Qaida operatives around the world by issuing a Memorandum of Notification (MoN) on 17 September 2001. Even at this stage, the possibility of the use of torture during the counter-terrorist operations occurred to the International Commission of the Red Cross, who expressed their concern to the United Nations. The UN High Commissioner then issued a letter reminding the states taking part in the war on terror of the absolute nature of the prohibition on torture (Cohen 2012).

During the Rendition, Detention and Interrogation program (RDI), the CIA used what became known as enhanced interrogation techniques (EIT) while interrogating the detainees captured and held in secret detention sites all around the world. The Department of Justice's Office of Legal Counsel (OLC)¹² was involved in assessing the legality of the enhanced interrogation techniques from the outset. The first series of the so-called torture memos by the OLC were issued in January 2002, in which the OLC provided legal arguments for assertions by administration officials that the Geneva Conventions did not apply to detainees from the war in Afghanistan (The New York Times 2005; Yoo 2002a; see also Gonzales 2002; Powell 2002). In February 2002, President Bush issued a directive stating that the Common Article 3 of the Geneva Conventions, which prohibits torture and the cruel treatment of prisoners of war does not apply to al-Qaida and Taliban detainees (The New York Times 2005; see also Taft 2002). In August 2002, the OLC issued another set of memoranda defining torture infamously narrowly only to conduct which causes pain akin to that of organ failure, impairment of bodily function or death (Bybee 2002; Yoo 2002b). Using the so-called enhanced interrogation techniques on the detainee Aby Zubaydah was authorized for the first time.

The interrogation techniques used by the CIA were classified either as 'standard' or 'enhanced'. At one time during the program, some techniques were classified as standard and enhanced at another. The 2003 Interrogation Guidelines, for instance,

12 The OLC 'provides authoritative legal advice to the President and all the Executive Branch agencies. The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department' (Office of Legal Counsel).

defined standard techniques as those that did not ‘incorporate significant physical or psychological pressure’, and included techniques such as isolation, sleep deprivation up to 72 hours, reduced caloric intake, use of loud music or white noise, and use of diapers ‘generally not to exceed 72 hours’. The enhanced techniques included those used on Abu Zubaydah, such as attention grasp, facial and abdominal slap, cramped confinement in a dark box up to 18 hours, combining cramped confinement with the use of insects, various stress positions, sleep deprivation up to 11 days, and the waterboard technique (Daugherty Miles 2015; see also Tenet 2003). In 2004, the OLC revised its definition of torture, but the enhanced interrogation techniques were, once again, approved by the OLC in the 2005 memoranda (see Bradbury 2005a and 2005b; Levin 2004).

In December 2005, the Detainee Treatment Act prohibited the use of cruel, inhuman, or degrading treatment or punishment against anyone in US custody, and in 2006 the Supreme Court case *Hamdan v. Rumsfeld* held that Common Article 3 of the Geneva Conventions also applied to the detainees at the Guantanamo Bay detention center. The OLC again issued a memorandum assessing the conditions of confinement for CIA detainees in the light of the Detainee Treatment Act. The memorandum concerned blocking detainees’ vision, forced grooming, solitary confinement, use of white noise, constant illumination of cells, and shackling. The OLC concluded that, as described by the CIA, these techniques did not amount to cruel, inhuman or degrading treatment or punishment (Bradbury 2006).

In September 2006, the Congress passed the Military Commissions Act, which provided that particular violations of Common Article 3 of the Geneva Conventions were subject to criminal prosecution under the War Crimes Act and that the President had the authority to interpret the meaning and application of the Geneva Conventions. The OLC ultimately concluded again that the enhanced interrogation techniques were consistent with the Act (The Committee Report 2012, 447; Human Rights Watch 2006). In July 2007, the OLC issued a memorandum concluding that six interrogation techniques, namely, dietary manipulation, extended sleep deprivation, facial hold, attention grasp, the abdominal slap and facial slap, were consistent with Common Article 3 of the Geneva Conventions, the Detainee Treatment Act and the War Crimes Act (see Bradbury 2007). In conjunction with the memorandum, President Bush signed an Executive Order stating that the detention and interrogation program was fully in compliance with the Geneva Conventions, and authorized continued use of the CIA interrogation practices (Berenson 2014). President Bush also vetoed the Intelligence Authorization Act for 2008, which would have limited the interrogation techniques to those authorized by the Army Field Manual (The Committee Report 2012, 452-453). Finally, President Obama issued Executive Order banning the CIA’s detention authority and restricting the interrogation techniques to those authorized in the Army Field Manual in 2009. The authoritative status of the so-called torture memos was finally withdrawn in 2009 (Bradbury 2009).

During 2009-2013 the Democratic members of the US Senate Select Committee on Intelligence (SSCI) investigated the torture allegations concerning the CIA

secret detention sites, while the Republican members of the committee chose not to participate in the investigation. The SSCI's mandate was limited to examining the factual aspects of the CIA program, and did not include a legal assessment of the program or any of the findings. Rather, the aim of the investigation was to determine how and why the program was created, its intelligence value, and whether or not the information provided to the SSCI by the CIA had been accurate, and whether the program had been implemented in compliance with operative executive branch guidance and policy (Human Rights First).

Only the roughly 600 page long executive summary is public, apart from the names of the CIA personnel, countries that hosted the secret prisons, and some other details, while the rest of the report, extending to over 6,000 pages, remains classified (Berenson 2014). The purpose of releasing the summary of the Committee report was, according to Committee chair Senator Dianne Feinstein, to ensure that 'U.S. policy will never again allow for secret indefinite detention and the use of coercive interrogations' (The Committee report 2012, Foreword, 3).

The Committee reviewed 20 of the most frequent examples of purported counterterrorism successes that the CIA had attributed to the use of the enhanced interrogation techniques, and found them to be wrong in fundamental respects. In some cases, no relationship was found between the cited counterterrorism success and any information provided by detainees during or after the use of the enhanced techniques. In the remaining cases, the Committee found that the CIA inaccurately claimed that specific, otherwise unavailable information was acquired from CIA detainees as a result of the interrogations, when in fact the information either corroborated information already available to the CIA or acquired from the detainees prior to the use of the enhanced techniques. The Committee also found that the interrogations of detainees were brutal and far worse than the CIA represented to policy-makers and others.

The Committee's conclusions were that 1) the enhanced interrogation techniques were not effective, and their use rested on inaccurate claims of effectiveness, 2) the CIA misled other officials and actively avoided or impeded oversight of the program, 3) the use of enhanced techniques and the detention conditions were misrepresented by the CIA to other officials, policy-makers and the public, 4) the CIA program was not properly managed and the CIA overstepped its authority, and 5) the CIA's program was counter-productive to national interests. Throughout the Commission report, one of the main claims is that the other authorities, such as the OLC, relied completely on the information provided by the CIA on the efficiency of the enhanced interrogation techniques and suggests that, had the information provided by the CIA been different, the legal assessment of the techniques would have been different as well (The Committee report 2012, 2-17).

In its response to the findings of the report, the CIA insisted that the representation it had provided to other state officials on the use and effectiveness of the enhanced interrogation techniques had been accurate overall. The CIA also maintained that the information acquired from the interrogations was significant

and helped save human lives. The CIA claimed that it had sincerely believed at the time that there were no other viable options for gathering actionable intelligence to prevent terrorist attacks, and that it remains unknowable whether such information could have been acquired through other means. The CIA agreed that it was unprepared and lacked core competencies to respond effectively to the decision to introduce the detention and interrogation program, and that there was, particularly at the beginning, lapses in its 'ability to develop and monitor its initial detention and interrogation activities' (CIA 2013, Comments, 2). The CIA also agreed that it 'failed to perform a comprehensive and independent analysis of the effectiveness of enhanced interrogation techniques,' 'detained some individuals under a flawed interpretation of the authorities granted to CIA' and 'fell short when it came to holding individuals accountable for poor performance and management failures' (Ibid., 3). On the other hand, the CIA disagreed with several of the Committee findings; particularly 'with the Study's unqualified assertions that the overall detention and interrogation program did not produce unique intelligence that led terrorist plots to be disrupted, terrorists to be captured, or lives to be saved'. The CIA also maintains that it did not resist internal or external oversight or deliberately misrepresent the program to other officials or the public (Ibid., 4).

In the following analysis, the Committee report and CIA's response are discussed together in order to examine the whole they create. Rather than a comprehensive discursive analysis on either of them, the analysis is intended to illustrate the discursive strategies in action. The analysis is divided into three parts, following the structure of table 1 above. I will analyze how the perception of *the self*, *harm*, and *the other* are produced in both the topos of law and the topos of threat. The analysis shows how the two topoi are intertwined and together deflect the question of torture. Furthermore, the analysis illustrates how the legal language reproduces law's irresponsibility by deflecting both individual and systemic responsibility for torture (Veitch 2007).

3. Perception of agency

3.1. Topos of threat—sincere self

In the topos of threat, the ultimate touchstone is security; all things necessary for ensuring security are basically acceptable. The enhanced interrogation techniques, the CIA's response asserts, were always used solely for the purpose of obtaining actionable intelligence in order to prevent terrorist attacks and save lives. The perception of sincere agency is discursively produced by intention denial: causing pain was not, according to the CIA's response, a purpose in itself, but a mere by-product, which should be weighed against the legitimate aims of preventing terrorist attacks and saving innocent lives. As already mentioned, necessity arguments alleviate the apparent incompatibility of torture and liberal political culture by introducing

utilitarian logic to torture debate.¹³ Even when the agency finds fault with its own conduct, it insists that the intention always remained sincere:

[I]n hindsight, we believe that assertions the [CIA] made to the effect that the information it acquired could not have been obtained some other way *were sincerely believed* [emphasis added] but were also inherently speculative. (CIA 2013, Comments 15; Conclusions 23.)

[...] [the] CIA did not, as the Study alleges, *intentionally* [emphasis added] misrepresent to anyone the overall value of the intelligence acquired, the number of detainees, the propensity of detainees to withhold and fabricate, or other aspects of the program. (CIA 2013, Comments 16.)

The CIA's representation of its own role in the war on terror follows the rescue narrative, in which the CIA is assigned the role of a Hero, identifying the detainees as the Enemy and the US people as the potential Victim whom the Hero is ordained to protect from the enemy:

We concluded that all of the examples fit within and support CIA's overall representation that information obtained from its interrogations produced unique intelligence that helped the US disrupt plots, capture terrorists, better understand the enemy, prevent another mass casualty attack, and save lives. (CIA 2013, Comments 13; Conclusions 21.)

3.2. Topos of law—law-abiding self

In the topos of law, the emphasis is on *who* is responsible for possible harm where harm is considered legally relevant to begin with (see Veitch 2007, 86, 90). For the purposes of this article, the most interesting feature of the Committee report is how responsibility is assigned between the state agencies. Throughout the report there is a tendency to balance between verifying the atrocities committed against the detainees and providing disturbingly descriptive accounts of their treatment, while assuring that the blame lies almost entirely on the CIA. The fact that other state agencies were heavily involved in the fight against terrorism and all the policies relating to it, as well as the legal assessment of the detention and interrogation program and the enhanced interrogation techniques, is not discussed in depth. The responsibility for the treatment of the detainees is compartmentalized to the CIA in the Committee report by emphasizing the way in which the other officials and policy-makers relied on the information provided by the CIA regarding the importance, effectiveness, and application of the enhanced interrogation techniques. The references to the OLC torture memos are factual and consistently combined with mentioning that the memos were based on the information provided by the CIA, which later proved to be incorrect:

13 Luban 2005; see also Del Rosso 2014, 389; Hooks & Mosher 2005, 1633.

The office of Legal Counsel (OLC) in the Department of Justice wrote several legal memoranda and letters on the legality of the CIA's Detention and Interrogation Program between 2002 and 2007. The OLC requested, and relied on, information provided by the CIA to conduct the legal analysis included in these memoranda and letters. Much of the information the CIA provided to the OLC was inaccurate in material respects. (The Committee report 2012, 40.)

On August 1, 2002, the OLC issued a memorandum advising that the use of the CIA's enhanced interrogation techniques against Abu Zubaydah would not violate prohibitions against torture [...] The memorandum relied on CIA representations about Abu Zubaydah's status in al-Qa'ida, his role in al-Qa'ida plots, his expertise in interrogation resistance training, and his withholding of information on pending terrorist attacks. (The Committee report 2012, 409.)

By highlighting the CIA's role in providing the information on which the OLC torture memos were based, the perception of agency is altered so that all responsibility for interrogation techniques possibly amounting to torture is assigned to the CIA; not to the OLC or other authorities, who remained law-abiding at all times. Also, as if the likelihood of torture leading to false confessions and statements was not known to other officials prior to the 21st century, the Committee report represents other state authorities as completely reliant on the information provided by the CIA about the effectiveness of coercive interrogation techniques, possibly amounting to torture. The CIA, according to the report, was aware that the 'inhumane physical or psychological techniques' were counterproductive, yet the report makes no reference in this context to other authorities such as the OLC, who surely were equally aware of the inefficiency of torture.¹⁴

Despite the CIA's previous statements that coercive [...] techniques 'result in false answers' [...] and have 'proven to be ineffective,' [...] by the end of November 2001, CIA officers had begun researching potential legal defenses for using interrogation techniques that were considered torture by foreign governments... (The Committee report 2012, 19.)

The CIA disagrees with the Commission report in that its reflections on the applicability of the necessity defense to possible criminal torture charges was ever meant to be the legal basis on which the detention and interrogation program activities were based. While the Commission report places the responsibility for the use of the enhanced techniques almost entirely on the CIA, the CIA makes an authority claim and maintains that it executed the policy outlined by a higher organ,

¹⁴ According to the Committee report 'In January 1989, the CIA informed the Committee that "inhumane physical or psychological techniques are counterproductive because they do not produce intelligence and will probably result in false answers". The testimony of the CIA deputy director of operations in 1988 denounced coercive interrogation techniques, stating that "[p]hysical abuse or other degrading treatment was rejected not only because it is wrong, but because it has historically proven to be ineffective" (The Committee report 2012, 18).

and that the CIA itself remained law-abiding:

The legal basis for the program was not a speculative ‘necessity defense’, but rather paragraph 4 of the 17 September 2001 MoN [Memorandum of Notification]. Enhanced techniques [...] were reviewed by Office of Legal Counsel [...] explicitly for the purpose of determining that they did not constitute torture or otherwise violate the law [...]. (CIA 2013, Conclusions 5.)

The CIA response explicitly states that it does not ‘engage in a debate about the appropriateness of the decisions that were made in a previous Administration to conduct a detention and enhanced interrogation program’, but instead merely assesses whether the CIA has acted according to its role as a government organ, ‘to review the performance of the CIA with regard to the program and to take whatever steps necessary to strengthen the conduct as well as the institutional oversight of CIA covert action programs’ (CIA 2013, Foreword by DCI Brennan, 2). Here the CIA transfers the responsibility to the norms guiding CIA instead of the CIA as a legal actor itself. The CIA is thus deemed responsible only so far as it fulfilled its legal obligations. This is an example of how the legal action and language conveniently allow the discussion to be defined solely to the question of legality, and legality to be equated with acceptability (see Veitch 2007, 87).

The CIA admits having ‘detained some people under a flawed legal rationale’ but at the same time finds it ‘hard to imagine how [CIA] lawyers could have developed and applied differing interpretation of the MoN’s capture and detain authorities’ (CIA 2013, Comments 5). The CIA as an institution does not accept responsibility for the legal interpretation and, as we have seen in the quotations above from the Committee report, neither does the OLC.

Despite admitting some misconduct, the CIA as a whole is presented in its response as a law-abiding institution. The CIA’s response places the responsibility for misconducts to individual officers, who did not follow the CIA guidelines sufficiently; the CIA as an organization accepts responsibility only for not holding the ‘bad apples’ responsible for their errors. By taking this stance the CIA does not, however, for practical reasons, recommend holding the officers responsible: ‘[W]e do not believe it would be practical or productive to revisit any RDI-related case so long after the events unfolded’ (CIA 2013, Comments 9). Still, the response generously accepts the report’s conclusion that the CIA did not hold officers sufficiently accountable for misconduct, and goes even further in stating that

[W]e would take the Study’s argument one step further. [...] the [CIA] did not sufficiently broaden and elevate the focus of its accountability efforts to include the more senior officers who were responsible for organizing, guiding, staffing, and supervising RDI activities, especially at the beginning. (CIA 2013, Comments 8; Conclusions 44.)

The relationship between the systemic and individual factors contributing to misconduct is interesting: the CIA seems to accept that there might be systemic

reasons underlying the individual misjudgments, but at the same time ‘the system’ is reduced to those individuals, in which case there is no need for more profound evaluation of the systemic problems and identifying systemic solutions for them. The CIA recommends that the scope of accountability reviews is broadened in order to:

[...] assess and make recommendations to address any systemic issues revealed by the case, and to expand the scope of the review as warranted to include *officers responsible for systemic problems* [emphasis added]. (CIA 2013, Comments 18.)

As the above quotation shows, the responsibility for systemic problems remains on the individual level. This is an interesting point when analyzed in the context provided by David Luban and what he calls torture culture and liberal ideology of torture (Luban 2005). Again, avoiding to discuss torture, or the misuse of the so called enhanced interrogation techniques, as a systemic question serves the same purpose as introducing the utilitarian logic to torture debate. Change in the foundations of torture culture remains impossible, if we are unable or unwilling to identify and challenge the structural factors underlying the individual choices, such as purposefully giving mixed messages to the interrogators whether or not the Geneva Conventions apply to the detainees.¹⁵

In the CIA’s response, agency is also obscured by representing the detention conditions almost as an actor in their own right, and merely ‘allowed to exist’ by someone. The ‘grim conditions’ seem, in fact, directly responsible for the death of the detainee Gul Rahman: ‘It was during those [first couple of] months that grim conditions and inadequate monitoring of detainees were allowed to exist’ culminating in the death of Gul Rahman in November 2002 (CIA 2013, Comments 2).

The ultimate legitimation of the use of the enhanced interrogation techniques in the CIA’s response is their legality. The techniques, even when used without prior approval, were legal, and therefore, although possibly in hindsight vulnerable to criticism, ultimately acceptable. The crucial point is that while the factual description of the application of the so called enhanced interrogation techniques is accepted as overall accurate, the interpretation that it amounted to torture, cruel or inhuman treatment, is denied (see Cohen 1996, 528). The CIA also claims the authority for conducting legal interpretation without the OLC approval.

[W]hile it would have been prudent to seek guidance from OLC on the complete range of techniques prior to their use, we disagree with any implication that, absent prior OLC review, the use of the ‘unapproved’ techniques was unlawful or otherwise violated policy. (CIA 2013, Conclusions 57.)

[T]he *Study* seems to misunderstand the role of OLC and its interaction with CIA. OLC is not an oversight body, and it does not act as a day-to-day legal

¹⁵ Luban 2005, 1439, 1449; see also Del Rosso 2014a, 389; Hooks & Mosher 2005, 1633.

advisor for any executive agency. Further, OLC does not ‘approve’ executive agency activities. [...] [The CIA] will often apply the legal guidance provided in a particular OLC memorandum to other similar factual scenarios. (CIA 2013, Conclusions 33.)

4. Perception of harm

4.1. Topos of threat—relative harm

In the Committee report, the focus is shifted away from the human suffering and onto the disloyalty of the CIA towards other state authorities. Despite heavily criticizing the CIA’s interrogation guidelines (2003) which listed enhanced and standard interrogation techniques,¹⁶ an explicit condemnation of the techniques as approved by the OLC is lacking in the Committee report. Instead, the explicit criticisms are that the CIA applied the enhanced techniques differently than what it represented to other authorities, left CIA officers with broad discretion to apply the techniques without prior approval, and neglected to assess whether or not certain techniques were prohibited. In other words, the critique addresses those techniques that exceeded, either qualitatively or quantitatively, the way their use was approved by the OLC. Thus the problem is not the use of these techniques per se, but the lack of their legal assessment and prior approval from the CIA headquarters; the problem is not the suffering caused by the use of enhanced techniques, but the shortcomings in the appropriate procedure and the CIA’s lack of loyalty to other authorities.

The [director of central intelligence’s] Jan 2003 interrogation guidelines listed 12 ‘enhanced techniques’ [...] that had not been evaluated by the OLC. [...] The guidelines, for example, did not address whether interrogation techniques such as the ‘rough take down,’ the use of cold water showers, and prolonged light deprivation were prohibited. [...] Thus, consistent with the interrogation guidelines, throughout much of 2003, CIA officers [...] could, at their discretion, strip a detainee naked, shackle him in the standing position for up to 72 hours, and douse the detainee repeatedly with cold water—without approval from the CIA [headquarters] if those officers judged CIA [headquarters] approval was not ‘feasible’. In practice, CIA personnel routinely applied these types of [interrogation techniques] without obtaining prior approval. (The Committee report 2012, 63.)

The CIA in turn uses the *yes, but* structure (*we agree* followed by *however*) in acknowledging the problems identified by the Commission report: first it admits that the critique is correct, but immediately insists that the problem was not as serious as the report suggests—thereby relativizing the significance of the problem:

¹⁶ The difference between the standard and enhanced interrogation techniques was that EITs were only to be employed with the prior approval of the director of CTC, while STs required advance approval ‘whenever feasible’ and documentation of their use (The Commission report 2012, 63).

We [...] agree [emphasis added] with the Study that 'CIA did not adequately develop and monitor its initial detention and interrogation activities.' In agreeing with this statement, however [emphasis added] we draw particular attention to the word 'initial'. (CIA 2013, Comments 3.)

We believe [emphasis added] this period represents a failure at all levels of management. [...] However [emphasis added], in contrast to the impression left by the Study, the confusion over responsibility, lack of guidance, and excessively harsh conditions that detainees experienced in the early days [...] did not characterize more than a few months of our [rendition, detention, and interrogation] effort. (CIA 2013, Comments 4.)

We agree [emphasis added] that there were instances in which CIA used inappropriate and unapproved interrogation techniques, particularly at the program's outset. Overall, however, [emphasis added] we believe that the Study overstates the number of instances of unauthorized use of enhanced techniques as well as the number of non-certified individuals whom it alleges wrongfully participated in interrogations. (CIA 2013, Conclusions 57.)

As the above quotes indicate, the CIA emphasizes that the cases of misconduct were few in number and took place mainly in the early days of the detention and interrogation program, discursively denying and limiting the perception of harm both qualitatively and quantitatively. Spatial and temporal isolation, i.e. claiming that a certain unfortunate event was 'only an isolated incident' belonging in the past and could not happen again, are typical denial strategies (Cohen 1996, 537). To emphasize the small number of detainees subjected to the so called enhanced techniques minimizes the harm caused by their use:

*One of the main flaws of the Study is that [...] it tars CIA's entire [rendition, detention, and interrogation] effort with the mistakes of *the first few months* [emphasis added], before that effort was consolidated and regulated under a single program management office. (CIA 2013, Comments 3.)*

*No more than *seven detainees* [emphasis added] received enhanced techniques prior to written Headquarters approval [...] (CIA 2013, Conclusions 47.)*

*Without commenting on the wisdom or propriety of the waterboard or any other technique [...] we believe it important the record be clear: CIA utilized the waterboard on *only three detainees* [emphasis added]. *The last* [emphasis added] waterboarding session occurred in March 2003 [...] [T]echniques (walling and cramped confinement) that had not been previously approved by Headquarters were applied to *two Libyan detainees* [...] [emphasis added]. (CIA 2013, Conclusions 55, 56.)*

While acknowledging certain problematic features in its interrogation methods, the CIA maintains that the information obtained from the detainees by using the enhanced techniques was crucial. The perception of harm is relativized by suggesting

that abandoning the enhanced interrogation techniques might have resulted in more terrorist attacks—the implicit argument being that the possible harm caused by the interrogations must be evaluated in relation to their positive outcomes. The CIA casts doubt on whether or not the information crucial for preventing terrorist attacks could have been obtained without using the enhanced interrogation techniques, without actually saying so, and thus implicitly foisting the burden of proof onto those who oppose the use of the enhanced techniques:

Although it is indeed impossible for us to imagine how the same counterterrorism results could have been achieved without any information from detainees, we also believe [...] that it is unknowable whether, without enhanced techniques, CIA or non-CIA interrogators could have acquired the same information from the detainees. (CIA 2013, Comments, 14.)

Similar balancing between the use of the enhanced techniques and their alleged positive outcomes can be found in the Commission report. Regarding the legality of the enhanced interrogation techniques, the report asserts that the legal evaluation of the enhanced interrogation techniques might have been different had the information provided by the CIA been correct, i.e., had the information provided by the CIA been correct, the legal assessment by the OLC might have been correct as well. Thus, the use of the so-called enhanced interrogation techniques is rationalized by referring to their alleged positive outcome:

Prior to the initiation of the CIA's Detention and Interrogation Program and throughout the life of the program, the legal justifications for the CIA's enhanced interrogation techniques relied on the CIA's claim that the techniques were *necessary to save lives* [emphasis added]. (The Committee report 2012, 5.)

In March 2002, the CIA submitted to the Department of Justice various examples of the 'effectiveness' of the CIA's EIT that were inaccurate. OLC memoranda signed in May 30, 2005, and July 20, 2007, relied on these representations, determining that the techniques were legal in part because they produced 'specific, actionable intelligence' and 'substantial quantities of otherwise unavailable intelligence' that saved lives. (The Committee report 2012, 5)

4.2. The topos of law—legitimate harm

In theory, the prohibition on torture is meant to be absolute and to know no exceptions. In practice, however, law is fundamentally contingent and allows torture simultaneously to be absolutely prohibited and yet lawfully practiced. In theory, the question of whether or not torture might be useful should be irrelevant to the law. In practice, the utilitarian and pragmatic arguments justify the torture practices (Cohen 1996, 531; 2001, 91-92, 110). In stressing the importance of the effectiveness of the enhanced interrogation techniques in determining their lawfulness, the Commission report relativizes the absolute ban on torture by weighing it against its possible

positive outcomes or, does not consider enhanced interrogation techniques torture to begin with. This results in silencing the question of torture from the outset.

Relativizing the question of torture shows that the topoi of law and threat seem to merge together both in the Commission report and CIA's response, since the security arguments belonging to the topos of threat permeate the legitimacy arguments of the topos of law as the harm is considered relative to the allegedly positive outcome of causing it. In other words, relative harm is equated with legitimate harm. One would expect that the question of whether the enhanced interrogation techniques amounted to torture would be at the center of the whole discussion about the enhanced techniques and the focus of the Committee report. However, there are only a few direct references to torture in the report, and the explicit discussion of whether or not the detainees were tortured is in fact completely silenced. The only time the treatment of the CIA detainees is explicitly described as torture is in the Foreword by the committee chair, Feinstein:

[I]t is *my personal conclusion* [emphasis added] that, under any common meaning of the term, CIA detainees were tortured. (The Committee report 2012, Foreword by Chairman Feinstein, 4.)

Other explicit statements on whether or not the detainees were tortured are made by the International Red Cross, the torture victim Majid Khan, the Office of Medical Services and Senator McCain, who are quoted or referred to in the report (the Commission report, 89 [footnote 497], 160, 213, 447). In the report itself the word torture appears mainly in the contexts of legal evaluation and policy outlines without any conclusion on whether or not the enhanced interrogation techniques amounted to torture. As to the legality of the enhanced interrogation techniques, Committee chair Feinstein states in her foreword that in her opinion, the use of 'brutal interrogation techniques' was 'in violation of U.S. law, treaty obligations, and our values' (the Committee report 2012, Foreword, 2). However, in the report itself, there are no conclusions concerning the legality of these techniques other than stating that the CIA used techniques that had not been approved by the Department of Justice or by the CIA headquarters (The Committee report 2012, Conclusion no 14, 12).

In the CIA's response, the word torture is only mentioned a handful of times on pages 4-5. The response does include an explicit condemnation of the enhanced interrogation techniques, but without describing them as torture, and made only in a personal comment by the director of the CIA, John O. Brennan:

I personally [emphasis added] remain firm in my belief that enhanced interrogation techniques are not an appropriate method to obtain intelligence and that their use impairs our ability to continue to play a leadership role in the world. (CIA 2013, Foreword by DCI Brennan, 1.)

Silencing explicit discussion on torture in this way alters the perception of possible harm caused by the use of enhanced interrogation technique to the detainees since,

as long as it was not torture, it was not that bad, and more importantly, it was legal. When the question of legality seems too difficult, it can be silenced altogether. In the CIA's response, the question of 'rectal feeding' is completely silenced. The Committee report questions the appropriateness of 'rectally hydrating' and 'feeding' detainees on hunger strikes. According to the Committee study, the detainee Majid Khan (MK) was

subjected to involuntary rectal feeding and rectal hydration [...] MK's 'lunch tray', consisting of hummus, pasta with sauce, nuts, and raisins was 'pureed' and rectally infused. Additional sessions of rectal feeding and rectal hydration followed. (The Committee report 2012, 115.)

The CIA's response lacks a single mention of 'rectal feeding' and comments only on 'rectal hydration'. The response legitimizes its use by alleging that it is a medically acknowledged technique:

The Study alleges that the CIA used rectal rehydration techniques for reasons other than medical necessity. [...] Medical personnel who administered rectal rehydration did not do so as an interrogation technique or as a means to degrade detainees but, instead, utilized the well-acknowledged medical technique to address pressing health issues. (CIA 2013, Comments 55.)

5. The perception of the other

5.1. Merging the topoi of law and threat—the dangerous and blameworthy other

The Committee report does not identify the detainees subjected to the so-called enhanced interrogation techniques as victims. Instead, the role of the victim is reserved solely for the victims of the terrorist attacks on September 11, 2001. The Committee report begins with the foreword by senator Feinstein, who creates the context for the whole report by commemorating the victims whose suffering resulted in the war on terror:

I recall vividly watching the horror of that day, to include the television footage of innocent men and women jumping out of the World Trade Center towers to escape the fire. The images, and the sounds as their bodies hit the pavement far below, will remain with me for the rest of my life. It is against that backdrop [...] that the events described in this report were undertaken. Nearly 13 years later, the Executive Summary and Findings and Conclusions of this report are being released. They are highly critical of the CIA's actions, and rightfully so. Reading them, it is easy to forget the context in which the program began—not that the context should serve as an excuse, but rather as a warning for the future. (The Committee report 2012, Foreword by Chairman Feinstein, 1-2.)

Innocence is almost entirely reserved for the real and potential, predominantly

American, victims of terrorist attacks. The CIA documents and OLC memoranda quoted in the Committee report show how the justification of the detention and interrogation program was built upon the rescue narrative, in which the emphasis was on the innocent lives that were saved:

As the President explained (on September 6, 2006), ‘by giving us information about terrorist plans we could not get anywhere else, the program has saved innocent lives.’ (The Committee report 2012, 177, footnote 1057.)

In addition to the distinction between the innocent victims of terrorist attacks and the terrorists, the Committee report constructs an implicit distinction between the detainees who were actually dangerous and wrongfully captured. The report in itself contains few qualitative descriptions of the detainees. The dangerous terrorist appears in the report indirectly, in the quotations from the material used in the Committee investigations, such as in this quote from President Bush:

On March 8, 2008, President Bush vetoed the Intelligence Authorization Act for Fiscal Year 2008 that banned coercive interrogations. [...] Addressing the use of the CIA’s enhanced interrogation techniques, President Bush stated that the ‘main reason’ the CIA program ‘has been effective is that it allows the CIA to use specialized interrogation procedures to question a small number of the most dangerous terrorists under careful supervision.’ (The Committee report 2012, 170.)

The wrongfully captured detainees are discussed directly. The Committee report concludes that of the 119 known detainees at least 39 were subjected to the enhanced interrogation techniques, and at least 26 were ‘wrongfully held and did not meet the detention standard in the September 2001 Memorandum of Notification’ (the Committee report 2012, Conclusions 12). From the legal perspective, the distinction between the actually dangerous detainees and those wrongfully captured is very important. The Committee makes an implicit remark on the way in which the dangerousness of the detainees and the legal assessment of the enhanced interrogation techniques are linked, and effectively states that had the detainees in fact been as dangerous as the CIA claimed, the legal assessment of the interrogation techniques by the OLC would have been correct:

OLC memoranda signed on May 30, 2005, and July 20, 2007, relied on [the] representations [provided by the CIA], determining that the techniques were legal in part because they produced ‘specific, actionable intelligence’ and ‘substantial quantities of otherwise unavailable intelligence’ that saved lives. (The Committee report 2012, 5.)

The CIA’s response discusses many of the detainees by name and abbreviations of their names. They are described as highly organized and trained to conduct terrorist attacks and resist various interrogation techniques, and some of them as high-ranking in their terrorist networks. This makes them the perfect enemy to fit to the

topos of threat. The possibility that individuals guilty of terrorism could also be a victim themselves at the same time is implicitly denied.

We assess to this day that Padilla was a legitimate threat who had been directed to use his training in Afghanistan, funding from al-Qa'ida, and US passport to put together a plan to attack tall residential buildings. (CIA 2013, Examples 5.)

Hassan Gul told CIA interrogators in January 2004 about al-Qa'ida's compartmented external operations training program in Pakistan's tribal areas. At the time of his arrest, CIA believed based on a body of intelligence that Gul facilitated for al-Qa'ida's senior-most leaders, placing him in a position to know details of the group's operational plans. (CIA 2013, Examples 29.)

CIA had multiple threads of reporting indicating that Zubaydah was a dangerous terrorist, close associate of senior al-Qa'ida leaders, and was aware of critical logistical and operational details of the organization, whether or not he held formal rank in al-Qa'ida. (CIA 2013, Conclusions 32.)

In general, the people subjected to enhanced interrogation techniques are referred to by the CIA as 'detainees', 'captives', 'terrorists' and 'the enemy'. These expressions impersonalize the victims of torture and attach a negative connotation to them. But more importantly, they have legal weight as well. Detainee is a term used in a legal sense for describing someone being held captive without being convicted or, possibly even suspected of or charged with a crime. Interestingly, the topoi of law and threat intertwine in the CIA's comments at this point, since the legal term detainee is not only descriptive but prescriptive, as it is inextricably combined with the connotation of danger.

The CIA acknowledges that it did indeed detain individuals who 'failed to meet the proper standard for detention', but insists that the number of such individuals was smaller than is estimated in the Committee report. According to the CIA, the report 'applies too much hindsight in reaching its conclusion that 26 individuals were wrongfully detained, ignoring key facts that, at the time, drove rational CIA decision-making' (CIA 2013, Conclusions, 51). At this point, the CIA response does not reflect further the 'rational CIA decision-making' or the facts upon which it was based. However, the connotation is that the CIA operated *rationally* and relied upon *facts* at all times. Detaining some individuals who 'failed to meet' the detention criteria was unfortunate but necessary collateral damage.

Together with the alleged effectiveness of the enhanced interrogation techniques, the perception of the other as a danger to national security is apt for relativizing the perception of harm in the CIA's response. As the detainee subjected to the enhanced techniques is dangerous (i.e., blameworthy, partially responsible for his own suffering), and the enhanced techniques are effective, the use of enhanced techniques is necessary and rational for the protection of national security, and *therefore* legally justifiable. Relativizing the perception of harm through identifying the detainees as dangerous and as such useful for intelligence purposes becomes

legally relevant when the prohibition of torture and cruel and inhumane treatment is not considered absolute in practice, despite seemingly holding on to the idea.

6. Concluding remarks

In this article I have applied a modified version of an analytical framework developed by Hansson, and discussed the way in which the perception of the self, harm, and the other are produced in the topoi of law and threat. My analysis leans on Veitch's perspectives on the law's irresponsibility. According to him, law has become the ultimate measuring stick. Law, in other words, is a moral trump card despite being strictly separated from ethics and moral, as the law extends its influence beyond the legal realm (Veitch 2007, 81).

The analytical tool presented in table 1 is intended to serve as a ready-to-hand device for analyzing responsibility and blame avoidance in texts and especially in legal language. My analytical aim was to illustrate how discursive strategies contribute to atrocities, in this case torture, possibly re-occurring by showing how the topic is ultimately silenced and deflected in the 'torture report' by the Senate Select Committee of Intelligence, and CIA's response. I have also introduced the possibilities of discourse analysis for creating a deeper understanding of how law produces irresponsibility.

As a concluding remark, it can be argued that the CIA operates with both the topos of law and topos of threat in that their own agency is portrayed as sincere and law-abiding, the harm caused as relative and legal, and the other, i.e. the victim, as dangerous and blameworthy. The Committee report in turn undermines the *security arguments* of the topos of threat used by the CIA. It questions the necessity of the use of the enhanced interrogation techniques and the sincerity of the CIA officials in applying those techniques and communicating with other officials and the public, and it questions the level of danger some of the detainees posed to the US.

However, the *legitimacy arguments* of the topos of law remain almost intact in the Commission report since, although the CIA is depicted as responsible for the flaws in the OLC's legal assessment of the enhanced techniques, the legality or illegality of the techniques is not explicitly considered, apart from senator Feinstein's personal comment that the detainees were tortured. In fact, the question of the legality of the interrogation techniques is left at the rather brief mention that had the information on the effectiveness of the techniques provided by the CIA been correct, the legal assessment of the program might have been different. This is a rather disquieting conclusion, as the prohibition of torture, cruel and inhuman treatment is not intended to be relative, i.e., should not take into account the possible effectiveness of such treatment. This brings us back to Luban's argument that despite torture being seemingly completely incompatible with liberal political culture, instrumentalization of torture transforms the 'barbaric' torture into potentially useful practices. For the same reason it is essential to emphasize the lack of intent to cause

pain to the detainees.¹⁷ Moreover, despite the necessity of the enhanced techniques being disputed, their lawfulness is not, save a personal remark by Feinstein.

Rather than showing flaws in the legal assessment of the enhanced interrogation techniques, the above is a telling example of the way in which the legal language works, and is meant to work. The question of legality is always relative and contestable, and can be deflected by the use of words; for example, discussing the *enhanced interrogation techniques* rather than *torture* allows a much wider discursive leeway to begin with, and also allows the question of torture to be left untouched.

The observed merging of the topos of law and the topos of threat gives ground for another hypothesis, which, for law, is even more profound. It is quite possible that the merging of the topoi thus detected contribute to the way in which responsibility and blame are discursively deflected, and indicate that the law has an apologetic function, providing a framework onto which discursive strategies from other topoi, such as the topos of threat, can be inserted and made relevant in the logic of law. The legal language seems porous, as it absorbs arguments from foreign topoi. This finding can be used for analyzing *how* the legal language can be used to deflect responsibility.

Admittedly the Committee report was not intended as an assessment of the lawfulness of the use of the enhanced interrogation techniques or other conduct by the CIA, but was meant to serve as a fact-finding mission into the detention and interrogation program and torture allegations made against the CIA (Miller 2009). However, contrary to the explicit aim of the Senate Select Committee on Intelligence, the discursive strategies they use re-legitimize the use the enhanced techniques.¹⁸ Fact-finding, when not combined with admitting responsibility for the facts found, is not enough to ensure that the same will happen ‘never again’.

17 Luban 2005; see also Del Rosso 2014, 389; Hooks & Mosher 2005, 1633.

18 President Obama has announced that the Department of Justice would not pursue criminal proceedings against those CIA officers who participated in interrogations which were carried out consistently with the legal memoranda issued by the Office of Legal Counsel. The Department of Justice initially announced that it would review the legality of destruction of interrogation recordings by the CIA, and the potentially unauthorized interrogation techniques by the CIA officers. In 2011, the investigation was narrowed down to the death of two detainees, and in 2012 the Department of Justice announced that it would not seek to prosecute any CIA officers in connection to the deaths (Los Angeles Times 2014).

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