

Does Torture Work?
A Socio-Legal Assessment of the Practice
in Historical and Global Perspective

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Torture is the calculated infliction of pain, but it is also an emblem of state power. To talk about torture is not just to talk about pain but to enter into a complex discourse of morality, legality and politics.

Stanley Cohen (1991)

The abuse of detainees in U.S. custody ...damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority.

United States Senate Armed Services Committee
(2008)

INTRODUCTION

If an essay addressing the question “does torture work?” had been solicited for the *Annual Review of Law and Social Science* a decade ago, it would have seemed as anomalous as an essay titled “does genocide work?” A reader perusing the table of contents might have pondered the editorial committee’s rationale for allocating space to consider the efficacy of such an indisputably abhorrent practice as torture which, in some ways, is normatively and legally analogous to genocide. A decade ago, the torture-related subject that was attracting the most socio-legal interest was the “Pinochet precedent” (holding that even a former head of state is prosecutable) and, more broadly, post-Cold War developments in international criminal law enforcement (see Aceves 2000; Brody 2001; Hitchens 2001; Roht-Arriaza 2001; Sugarman 2002; Wilson 1999). A decade ago,

Israel's decade-long experiment with "legalized" torture (euphemized as "moderate physical pressure") appeared to end ignominiously when the Israeli High Court of Justice rendered a ruling prohibiting the routine use of interrogation tactics that cause pain and suffering (PCATI v. Israel 1999; see also Biletzki 2001; Conroy 2000; Hajjar 2005; Kremnitzer & Segev 2000; Pacheco 1999). Although Israeli torture did not actually stop (PCATI 2003), the decision deprived practitioners of the cover of law.

A decade ago, although the practice of torture was a pervasive global phenomenon (see Forrest 1996; Hathaway 2002), the legal prohibition as a peremptory norm (*jus cogens*) of customary international law was sufficiently strong to compel torturing regimes to officially deny their wrongdoing, which they did in common patterns: literal denial (we don't torture); interpretative denial (what we do isn't torture); and implicatory denial (torture was the work of rogues and/or our enemies deserve what is done to them) (Cohen 1995a, 1995b, 2001). In 2000, summing up the paradox of torture as pervasive and absolutely prohibited, I wrote: "No society on earth advances the claim that torture, as legally defined, is a valued or integral part of its cultural heritage or political culture. If such an argument could be made, it would be: the practice of torture would be acknowledged rather than denied" (Hajjar 2000: 108).

Over the last decade, no new international laws have been promulgated to relax or limit the universal prohibition. But following the terrorist attacks of September 11, 2001, torture got a 21st century superpower upgrade when US officials in the Bush administration secretly authorized various forms of torture for use on terror suspects captured in the "global war on terror." In the wake of 9/11, the American public demonstrated a parallel willingness to reconsider the "torture taboo," which some

scholars condemned for opening a “Pandora’s box.” But, as Shue wrote, “the box is open” (2004, p. 47; see also Kreimer 2003; Scheppele 2005, p. 303; Žižek 2002, pp. 103-04). A public debate on the moral philosophy of national security became a preoccupation of pundits and academics who opined and disagreed about whether torture should be used to extract innocent-life-saving information from a recalcitrant terrorist in order to avert a catastrophic attack.¹

Initially, this public debate was “academic” in the sense that the torture and the terrorist were as hypothetical as the ticking bomb (Dershowitz 2003-4; Gross 2004; Levinson 2003a, 2003b; Luban 2002; Parry & White 2002; Shue & Weisberg 2003; Strauss 2003-4). Those staking out positions that torture (of the non-maiming variety, euphemized as “torture lite”) might be necessary and, thus, legitimate under exceptional circumstances (the pro-torture “consequentialists”) referenced the past unaverted death and destruction of 9/11 to rationalize the necessity of future torture, and tried to shame those who oppose torture under all circumstances (the “absolutists” or “deontologists”) by arguing that the latter were less concerned about the safety of hypothetical innocent victims than the sanctity of legal principles and/or the rights of terrorists. Most pro-torture consequentialists (Elshtain 2004; Posner 2004; Seidman 2005), and some conflicted absolutists (Ignatieff 2004, 2006; Levinson 2007) affirmed the consensus view that torture is unequivocally bad, but might be justifiable as a lesser evil in the service of public safety and national security. These arguments hinge on the presumption that

¹ In popular culture, torture-can-save-us perceptions and attitudes got a big boost in the post-9/11 era, in no small part because of their positive depictions on fictional primetime television shows like *24* (see Human Rights First [HRF] 2007; Mayer 2007). Between 1995 and 1999, there were 12 scenes of torture on primetime network television (HRF 2007). Between 2002 and 2007, there were 897 (Harper’s Magazine 2008). According to a 2008 opinion poll, the use of torture under certain circumstances is acceptable to 44 percent of Americans, up from 36 percent in 2006 (WorldPublicOpinion.org Staff 2008).

torture works. Dershowitz, the most prolific advocate for legal exceptions to the prohibition (2002, 2003, 2004; for criticisms, see Brecher 2007; Scarry 2004; Scheppele 2005), supported his arguments with examples, like those members of the French Resistance who were successfully broken by their Nazi interrogators. (In such a narrowly construed perspective on torture's efficacy, the fate of the Nazis is beyond the horizon.)

The discourse on torture began to change in early 2002 as information about the treatment of actual prisoners in US custody started to emerge. For example, when the Pentagon published pictures on January 11, 2002, of the first prisoners transported to Guantánamo Bay kneeling on the ground in stress positions and wearing sensory deprivation gear, the administration was surprised that they weren't received with unanimous applause. A groundbreaking investigative article in the *Washington Post* (Priest & Gellman 2002) revealed that, in the drive for "actionable intelligence," US security agents were utilizing "stress and duress" tactics in the interrogation of people captured in Afghanistan and elsewhere, and that detainees who could not be broken by such methods might be given mind-altering drugs or "extraordinarily rendered" (i.e., kidnapped and extra-legally transported) to foreign governments with well-established records of torture, like Egypt and Morocco. Journalistic exposés (Bonner et al 2003; Borger 2003; Bowden 2003; Harnden 2003; Rose 2004a) and allegations by human rights monitors (Amnesty International 2002; Human Rights Watch 2003) that prisoners in US custody were being tortured and abused raised less hypothetical concerns, which could be summarized by the pithy title of Parry's (2003) article: What is torture, are we doing it, and what if we are?

Concerns also were beginning to congeal around the risks to those who might be perpetrating torture, and adverse consequences for perpetrating institutions. In mid-2003, several members of the Judge Advocate General (JAG) corps, who had lost their (then-clandestine) battle with the Pentagon leadership to adhere to the interrogation guidelines in the Uniform Code of Military Justice (UCMJ) (see Mayer 2008; Sands 2008), met with Scott Horton, then head of the Committee on International Human Rights of the Association of the Bar of the City of New York. Because the interrogation policies for Guantánamo (GITMO) prisoners were classified, the JAGs presented their concerns using hypothetical scenarios. Horton preserved their confidentiality, but he and other lawyers produced a sharp analysis of legal rules that govern wartime interrogations, which was released in mid-April 2004 (ABCNY 2004).

The “it’s not hypothetical!” phase began abruptly on April 28, 2004, with the publication of shocking photos from the Abu Ghraib prison in Iraq on CBS’s 60 Minutes II, and Hersh’s (2004) *New Yorker* article on the leaked (“not meant for public release”) Taguba Report (2004), which concluded that prisoner abuse at Abu Ghraib was “systematic” and “wanton,” and that unlawful interrogation tactics linked Iraq to Afghanistan and Guantánamo. The Abu Ghraib scandal put pressure on the Bush administration to provide information about its interrogation and detention policies. In June 2004, the first batch of official documents pertaining to military and CIA interrogations was declassified or leaked to the public (Danner 2004; Greenberg & Dratel 2005). The memos exposed a policy of torture built on an elaborate set of legal interpretations and security rationales circumventing the black letter prohibition to

authorize violent and painful interrogation tactics, and to negate the risk of criminal liability for doing so (ACLU N.D.; Jaffer & Singh 2007; Sands 2005).

The Schmittian illiberalism exposed in the “torture memos” was stunning (Schmitt 1996; see also Agamben 2005; Horton 2005a, 2005b, 2007). Secretly, the administration had reinterpreted the Constitution (Article 2) to assert that the president, as commander-in-chief, is free to ignore federal law and treaty obligations if he deems them to hinder national security interests. The aim of this “unitary executive” reasoning was to exclude any power-checking role for US Congress and the courts. In terms of interrogation and detention specifically, the President’s February 7, 2002 decision to declare the Geneva Conventions inapplicable to the “war on terror,” coupled with the interpretation that no US laws applied to prisoners in off-shore detention facilities, effectively rendered people classified as “unlawful combatants” rightless (Ahmad 2008; Margulies 2006; Waldron 2005). And the policy decision allowing that classification to be assigned without the benefit of a status review hearing meant that anyone in custody was presumed guilty and subject to government-authorized torture.² However, the secrecy that had shrouded the crafting of the US torture policy, including the copious work by lawyers in the Office of Legal Counsel, was a backhanded homage to the torture taboo. Indeed, anxieties about prosecutability loomed so large that the imagined subject in the key torture memos is repeatedly referred to as “the defendant.”

The Bush administration’s refusal to end the torture policy after it was exposed intensified public debates (Bagaric & Clarke 2007; Greenberg 2005; Posner & Vermeule

² Declassified memos also revealed the principled but ultimately unsuccessful efforts by top officers in the JAG corps, Secretary of State Colin and his counsel, William Taft, to dissuade the White House from disregarding the Geneva Conventions and authorizing interrogation tactics that deviated from the UCMJ.

2007; Roth & Worden 2005). Top officials asserted the prerogative to continue using coercive interrogation tactics, extraordinarily rendering prisoners to states that torture, and disappearing people into CIA “black sites,” and defended these practices as necessary and effective elements of “the program,” as the torture policy was euphemistically termed. The administration fought every legal challenge and inveighed against Supreme Court decisions that curbed and criticized elements of the policy (i.e., *Rasul v. Bush*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*). President Bush objected to anti-torture legislation in 2005 (Mayerfeld 2007, pp. 103-105), and between September 2006 and the end of his term in January 2009 issued many pronouncements that specific attacks had been averted by our “tough but legal” methods of interrogation. Vice President Dick Cheney, the chief architect of the torture policy (Mayer 2008), insisted repeatedly that waterboarding and other forms of torture worked exceedingly well to extract invaluable information, as “proven” by the fact that there were no “massive-casualty” attacks in the US since 9/11.

Even if Bush administration officials’ proclamations of torture’s efficacy were accurate on their own terms (i.e., take terrorists, add torture, get truthful information, enjoy security), at the time the US torture policy was being devised, its authors couldn’t know but rather had to presume that torture would enable interrogators to extract truthful and useful information from prisoners.³ Clearly, the will to make policy on the basis of

³ The foundations of the torture policy were laid in the immediate aftermath of 9/11, before any suspects had been taken into custody. On September 17, 2001, President Bush signed a memorandum of understanding giving the CIA authority to establish a secret detention and interrogation operation overseas. By December 2001, the Pentagon’s general counsel “had already solicited information on detainee ‘exploitation’ from the Joint Personnel Recovery Agency,...whose expertise was in training American personnel to withstand interrogation techniques considered illegal under the Geneva Conventions” (US SASC 2008). This paved the way for the “reverse engineering” of SERE (survival, evasion, resistance, extraction) techniques in the interrogation of prisoners, which was “legalized” by the president’s secret decision declaring the Geneva Conventions inapplicable to prisoners captured in the “war on terror.”

this presumption reflects a blithe disregard for the opinions of experts in interrogation (see Department of Army 1992; Johnson 1986; Moyar 1997; Richardson 1987; see also Gudjonsson 2003; Shane & Mazzetti 2009; Swenson 2006). The fact that this presumption prevailed attests to the sway of Cheney's "one percent doctrine" (Suskind 2006): If there is even a one percent chance that torture will produce actionable intelligence, assume it works and act accordingly. The other fundament of the Bush administration torture policy was the claim that our enemies don't deserve not to be tortured and therefore torturing our enemies is not wrong (Yoo 2006).

Such ideas about the efficacious relationship between torture and truth, and the torturability of certain kinds of people bear some striking resemblances to the rationales and legitimizing presumptions for torture in ancient and pre-modern regimes. After the release of the first batch of torture memos, Langbein's 1977 history of medieval European torture had such renewed interest that it was reissued in 2006. In the new preface, he draws the conclusion that US interrogation policy makers must have been ignorant of history or they would not have replicated one of Western history's "worst blunders" (Langbein 2006, p. xii).

Although many states defy the taboo to engage in torture, the American case is exceptional in two regards. First, by "legalizing" practices that constitute torture (e.g., waterboarding; protracted sleep deprivation, stress positions, and isolation; sensory and temperature manipulations) as well as cruel and degrading treatment (e.g., sexual and religious humiliations), Bush administration officials defied the "normal" pattern of torturing regimes, including pre-9/11 patterns of American torture (Parry 2009), to publicly deny what is done secretly and extra-legally. Second, the global power and

influence of the US makes American torture more deleterious than torture by less powerful regimes because of its capacity to influence international legal norms and standards of treatment for prisoners (see Anderson 2003; Byers & Nolte 2003; Dörmann 2003a; Hajjar 2006; Sands 2005). US officials' oft-repeated claim that "we don't torture" had its counterpart in the assertion that any officially authorized practice isn't "torture" (see ACLU 2006; UN Commission on Human Rights 2006). In other regards—the whys and hows of torturing enemies in the interest of national security—American torture is "entirely unexceptional" (Ristoph 2008, p. 254).

SOCIO-LEGAL STUDIES AND TORTURE

The subject of torture intersects with many issues that command the attention of scholars in the interdisciplinary field of socio-legal studies. Prior to 9/11, however, the study of torture per se was not a major subject of interest. In the intervening decade, many scholars who had no prior professional interest in torture were incited into a productive rage by revelations of the US torture policy. This is not surprising because the field is dominated by people whose commitments tend toward the liberal end of the ideologico-political spectrum, and torture is illiberal and illegal. Because so much of this new socio-legal literature focuses on American torture, there is a high degree of redundancy. My point is not to condemn but rather to observe that when dozens of scholars simultaneously start writing critically about hypothetical ticking bombs, or the contents of the torture memos, or abusive treatment of prisoners at GITMO, or the Abu Ghraib photos, the redundancy reflects the intellectual cohesion of the field and scholars' shared liberal ethics when addressing related issues.

The subject of torture inevitably will remain interesting to many socio-legal scholars for years to come. Although the new Obama administration has pronounced the intention to recommit to an official anti-torture position, the legacy of torture-permissive policies is proving enormously difficult to resolve. Some politicians' and pundits' admonitions that investigations into past practices would unleash a "partisan witch hunt" and "criminalize policy differences" appear to be informing the Obama administration's political disinclination to pursue prosecutions of officials who authorized torture. In light of these unfolding developments, we can anticipate (and produce) new studies that analyze the politics of legal accountability, which can tap the rich veins of scholarship on the force of law (see Cover 1995; Derrida 1990; Sarat 2001; Sarat & Kearns 1995), and build on the post-Cold War socio-legal literature about crimes of state (Hagan 2003; Hajjar 2004; Horton 2008; Minow 1998; Neier 1998; Teitel 2000). Likewise, there is a compelling need to analyze torture's effects on the rule of law, and the impact of American torture on the future of legal liberalism (Halliday et al. 2007; Luban 2005a; Michaelsen & Shershow 2006; Streichler 2008).

My objective in this essay is to present a socio-legal analysis of torture that accommodates but is not constrained by post-9/11 scholarship on American torture. I strive to illuminate the historic and global dimensions of the practice of torture in order to address the titular question more critically and comprehensively than a narrowly construed perspective on the value and veracity of utterances produced as a result of pain and suffering. I draw on scholarship from a variety of fields that address how torture works (i.e., why it has been used and its effects) in order to highlight the role of torture in the mutually constitutive histories of law-state-society relations.

TORTURE'S PAST

Not all ancient societies did as the Greeks and Romans by incorporating instrumentalized torment into their legal procedures. The most authoritative histories of ancient and pre-modern torture (Langbein 2006; Peters 1996) concur that it “began as a legal practice and has always had as its essence its public character” (Peters 1996, p. 4). The Greeks were the first to devise and develop judicial torture (i.e., painful questioning to extract information for a legal process). Penal torture (i.e., painful forms of punishment) has a much longer history.⁴ As Garland (1990, p. 18) explains: “Punishment in some form or another is probably an intrinsic property of all settled forms of association...[T]he sovereign claims of the law give legal punishments an obligatory, imperative and ultimate nature...”

There are differences of opinion among historians about where to draw the line between “torture” and “not torture” in the ancient and pre-modern eras. This distinction is not determined by the intensity or amount of torment (i.e., it does not compare to contemporary debates about how to distinguish between torture and cruel, inhumane and degrading treatment). Rather, it turns on whether to include sanguinary punishments. Peters and Langbein insist that while many forms of torment may have been sanctioned and used by public authorities, only those practices relating to judicial proceedings qualify as “torture” in the ancient and pre-modern eras. Langbein is emphatic: “No punishment, no matter how gruesome, should be called torture” (Langbein 2006, p. 3).

⁴ The most ancient recorded forms of capital punishment were ritualistic ordeals in which the condemned man’s head was covered in a wolf skin and he was put in a sack with serpents, a dog and a rooster, and then thrown into water; or thrown from the Tarpean rock (Agamben 1998, p. 81).

Although Peters concurs that “judicial torture is the *only* kind of torture” (1996, p. 7), his book includes extensive discussion of penal torture.

Foucault’s *Discipline and Punish* (1977) is not a history of torture per se, but it is one of the most influential books in sociology (Simon 1998), among other fields, and thus, one of the most widely read accounts of torture’s past. Foucault has no qualms about combining pre-modern judicial and penal torture, which he characterizes as the “gloomy festival of punishment” (1977, p. 8), because his interest is the various ways and purposes the pre-modern sovereign exercised legal power to physically harm subjects.

The historic role of judicial and penal torture and the difference between them cannot be explained through a victim-centered perspective because those on the receiving end do not determine the purposes or assess the benefits derived from their pain and suffering. Rather, a perpetrator-centered perspective is required to understand the purposes that these forms of torture served in law-state-society complexes where either or both forms were deemed necessary and legal.⁵ Judicial and penal tortures were, respectively, the painful means and ends of law enforcement processes.

A. Antiquity

Judicial torture among the early Greeks began with the transition from a communal to a complex legal system. Socio-political changes transformed law from the private justice of individuals and households pursued through feuds into public codes and the resolution of conflicts through trials. Torture was instituted in response to the need for new kinds of legal evidence in the emergent sovereignty of the *polis* (city-state). The

⁵ I acknowledge that the terms “victim” and “perpetrator” are inapt in reference to systems where torture was legal and legitimate.

etymology of torture in ancient Greek traces back to “*basanos*,” a “touchstone” used to test gold for purity (DuBois 1991, pp. 7, 35; Peters 1996, p. 14). “The ‘test,’ over time, changes to ‘torture,’ as the analogy is extended to the testing of human bodies in juridical procedures for the Athenian courts” (DuBois 1991, p. 21).

It was the Greek slave and under certain circumstances the foreigner, but never the citizen, who could be tested through torture. The prerogative to kill or harm the slave (*homo sacer*) without consequence constitutes “the original activity of sovereign power” (Agamben 1998, p. 6). The rationales for slave torture in the Greek legal system were premised on assumptions that (1) a slave’s servile status militated against the possibility of making spontaneous truthful statements, (2) a slave’s fearful self-interest to avoid a litigant-owner’s punishment would incline him/her to lie, and (3) only through pain would a slave speak truth—or only through pain could the word of a slave be deemed trustworthy, since they lacked honor and could not be “taken at their word.” Torture was a means of eliciting presumptively true statements from slaves, which could be presented to evaluate the veracity of testimony of freemen (litigants and witnesses) in court cases. Tortured statements from slaves were not confessions because they were not the accused; their lack of rights included the lack of right to be punished by law. Rather, tortured statements from slaves were evidentiary information (Gagarin 1996).

But if torture was perceived as an effective means to produce truth, why limit torture to slaves (Arendt 1998, p. 129, n. 78)? In the larger context, torture helped demarcate an absolute difference in status between slaves and even the lowliest freemen (Finley 1998, p. 162; Luban 2005b, p. 1432 n. 24). According to Greek social ideology, truth was assumed to be embodied in slaves and extractable only through torturing their

bodies, whereas free people produced truth through reasoned speech. Because freemen were equally capable of lying as speaking the truth, the value of tortured slave speech was, paradoxically, elevated by the valuation of reason as a mark of distinction and the untorturability of non-slaves.

In earliest Roman law, as in Greek law, only slaves could be tortured. The influence of Greek thought on Roman law⁶ included valuation of oaths and testimony of witnesses, the formal character of complaints, and public methods of arbitration. During the classical period, divisions in Roman society were reconfigured into status categories of *honestiores* (the privileged governing class) and *humiliores* (everyone else). *Humiliores* could be interrogated through torture and those found guilty could be subjected to corporal punishments and humiliating executions that earlier had been reserved for slaves.

The Roman jurisprudence of torture evolved as a result of the expanding spectrum of crimes and changes in criminal procedure. Judicial interrogation (*quaestio*) and tormenting punishments (*tormentum*) were conjoined into questioning by torment (*quaestio per tormenta*). The use of torture in the service of the Roman state had the slippery slope effect of eroding the privilege of not being subject to torture. Eventually *honestiores* could be tortured as defendants or witnesses in cases of treason and, over time, for “a broader and broader spectrum of cases determined by imperial order” (Peters 1996, p. 18). By the Empire’s late period, use of torture increased as “Roman governors found their populations growing unruly and the material benefits of torture growing larger” (Turner 2005, p. 4).

⁶ Roman legal history is divided into three periods: ancient (to the 3rd century BC), classical (from the 2nd century BC to the beginning of the 3rd century AD/CE), and late Empire (3rd to the 4th century AD/CE).

The blurred boundaries of judicial and penal torture in the Roman legal system can be seen, for example, in the term “excruciating,” which traces back to the Latin *cruciāre*, meaning “crucify” or “torture.” The crucifixion of Jesus of Nazareth in the Roman province of Judea was an unremarkable punishment in the sense that it was part of the Empire’s punitive repertoire. However, crucifixion was reserved for slaves, rebels and especially despised categories of criminals because the method was shaming and shameful: the crucified were displayed naked in public; were vulnerable to attacks by crowds, wild beasts and birds of prey; were subject to extended suffering; and when dead were denied a proper burial.

By the last quarter of the 1st century AD/CE, Christians were regarded by Roman rulers as impious and subversive, and Christianity was construed as a form of treason. Christians’ torturability was both a means of confirming their lowly and despised status, and a deterrent against the evangelical spread of their beliefs. However, when the Roman imperial state was Christianized in the 4th century, acts committed against churches or clergy, and heresy, were made into public offenses and subject to criminal procedures. Thus, the use of torture to defend Christianity was “law in the books” by the end of the Empire.

Between the 5th and 6th centuries (late antiquity), Germanic invaders established small kingdoms in the regions of the late Empire. In contrast to the centralized legal authority of Roman sovereignty, social order manifested through archaic custom-based laws with personal rather than public forms of justice. Until the 12th century, the modes of legal proof involved oaths, judicial combat, and ordeals which resembled torture, but the “truths” they rendered were god’s inerrable and immanent justice. In this era, the

legal order was too “primitive, irrational and barbaric” to have any use for judicial torture (Peters 1996, p. 42). The Roman church effectively destroyed ordeals as a system of proof in 1215 (Langbein 2006, pp. 5-7; McAuley 2006).

B. Medieval Europe

Judicial torture experienced a revival in western Europe starting in the 12th century due to a combination of factors: the rediscovery of Roman law, whose rules for order and justice in a complex society were appealing to the forms of centralizing legal authority underway; a culturally declining confidence in god’s arbitrating abilities in favor of human juridical competence; and the displacement of the accusatorial procedure by the inquisitorial procedure into legal processes, both ecclesiastical and secular. According to Peters (1996, p. 41), “Instead of the confirmed and verified freeman’s oath, confession was elevated to the top of the hierarchy of proofs...[T]he place of confession in legal procedure...explains the reappearance of torture in medieval and early modern law.”

The purpose of torture in the medieval European law of proof served to ameliorate uncertainties about how to gather and evaluate evidence, and to compensate for the inability to pass judgment for serious crimes on circumstantial evidence. Without either two unimpeachable eyewitnesses or a confession, conviction was impossible. Judicial torture became part of Roman-Canonical legal procedure of the Latin Church and most states of Europe. No status categories were exempted; an accusation and some degree of proof would make a person subject to judicial torture. A tortured confession had to be repeated at a different time and place, but if retracted, torture could resume.

Torturing people for legal proofs was a routine, judicially supervised procedure, surrounded by protocols and the subject of a large body of law. It was “cruel but not savage,” the “art of maintaining life in pain” (Foucault 1977, p. 40, 33-34). Foucault elaborates on the four characteristics of pre-modern torture: 1) it must produce legally prescribed degrees of pain; 2) the pain must correspond to the crime (e.g., piercing the tongues of blasphemers, cutting the hands of thieves, “waging war” on the bodies of regicides); 3) the body of the tortured is ritually marked and publicly displayed so that it can function as a symbol of the crime and the power of the king to punish; and 4) penal torture must be spectacular and public to deter crime and to foster a public consciousness about the sovereign’s power, social order and justice.

Historians of European torture concur that its “basic flaw” was recognized since the Roman era: What it proves is the individual’s capacity to endure pain rather than the veracity of the statements elicited. This flaw was the subject of emphatic complaint in Renaissance and early modern times. As Langbein (1978, p. 8) states, “Judicial torture survived the centuries not because its defects had been concealed, but in spite of their having been long revealed.” The paradox of pre-modern torture was that it was both necessary to enforce the law and suspect as a means of eliciting truth.

England did not adopt the model of Roman law; rather it developed from a more archaic decentralized model, with “legal institutions so crude that torture was unnecessary” (Langbein 2006, p. 77). By the 13th century, the English common law had acquired most of its fundamental characteristics, including the admissibility of circumstantial evidence, and the jury trial (“the rough justice of the countryside”) for

determining guilt and punishing crimes. Thus, English law enforcement didn't need confessions the way continental law did (Langbein 2006, p. 73; Peters 1996, p. 59).

During the Tudor-Stuart period, torture was used in England. But, as Blackstone famously explained, the rack "was an engine of the state, not of law." The sovereigns, fearing that English Catholics were colluding with Spain, authorized the Privy Council to investigate criminal cases of a political nature. Heresy (including religious dissent from the Church of England) was cast as sedition and treated as a crime of state, and torture to gather information was authorized through warrants. Although historians are unclear about when the experiment with torture ended, it certainly had ceased before passage of the English Bill of Rights in 1689.

C. Early Islam

Islam, which originated in the 7th century among tribal communities in the Arabian Peninsula, provides a comparative historic model. During its formative period, Islamic jurisprudence (*fiqh*)⁷ concerning criminal proof and procedure was based on the notion that the most effective and legitimate evidence is the word. But to contend with the ambiguity of utterances, a judge (*qadi*) had to consider a variety of factors (for example the reputation of the speaker or willingness to swear an oath) in order to evaluate conflicting claims pertaining to criminalized behavior (Johansen 2002, p. 169). There were three views on the legality of torture—specifically, beating suspected criminals to obtain confessions (Reza 2007, pp. 24-25). The first view, which apparently prevailed in the early centuries, prohibited beating because if the suspicion were wrong,

⁷ Scholars periodize this history as follows: formative (8th – 10th centuries); classical (10th – 12th centuries); and post-classical (13th – 16th centuries) (Johansen 2002, pp. 168-169).

the accuser and those who authorized torture would be culpable for causing the harm of an innocent (Rejali 1994, p. 22). The second view, adopted by the Maliki school of *fiqh*, permitted the beating of a suspect with a reputation for relevant wrongdoing (Johansen 2002; Reza 2007). The third view, dominant during the classical period, forbade judicial torture but held that political rulers and the agents of government (*siyasa*) could flog suspects.

Classical Muslim doctrine abjured judicial torture as inimical to social order and justice because it would have signified a corrosion of the legal system and diminishment of judges' status as arbiters of truth; words spoken as a result of pain were legally invalid (Johansen 2002, p. 178). However, with the consolidation and bureaucratization of Islamic states, jurists eventually developed a doctrine (*siyasa shar'iyya*) that bestowed religious legitimacy on a ruler's actions as long as they did not violate commands of the sacred texts and were undertaken to advance the interests of the community and protect public welfare.

During the Mamluk period (starting in the 13th century), influential jurists in the service of the state undermined the clear interdiction of judicial torture that had been dominant in the classical era. This change probably was informed by the exchange of ideas between Europe and the Near East (Johansen 2002, p. 193). The institutionalization of judicial torture into the criminal code of the early Ottoman Empire (late 13th century) suggests even more clearly the influence of medieval European torture in the law of proofs.

TABOO-IFYING TORTURE

In the late 18th century, European legal systems were reformed to eliminate the use of judicial torture to gather evidence and elicit confessions. There was a concurrent move to disallow some of the “crueler” punishments that involved public humiliation, protracted physical suffering, and bodily disfigurement (e.g., pillorying, racking, drawing and quartering, burning at the stake, and mutilation). Beccaria’s (1764/1986) influential monograph, *Essay on Crimes and Punishments*, argued against torture, cruel punishments and execution. However, neither the death penalty nor other forms of sanguinary punishments were deemed inherently cruel or abolished. On the contrary, the guillotine was touted as a painless and equitable form of execution. Because “torture” was affixed to judicial torture, some forms of penal torture could carry over into the modern era as lawful punishments.

The most popular but historically oversimplified explanations for the abolition of judicial torture, which Langbein pointedly terms the “abolition legend” (2006, pp. 64-69), causally credit an emerging humanistic consciousness propelled by Enlightenment-era writers like Voltaire and Montesquieu. This legend was bolstered by the fact that many legal reformers were inclined to interpret their own motives as humanistic, and legal abolition gained ground so quickly that by 1800 provisions for judicial torture were barely visible.

Although Enlightenment thought and a new spirit of humanitarianism were factors in torture’s legal abolition (Hunt 2007), many scholars contend that a variety of changes in law-state-society complexes must be taken into account. Langbein (1978, 2006) emphasizes the importance of changes in criminal procedure, including the ability

to begin convicting people for serious crimes on the basis of circumstantial evidence. Others emphasize the development of new criminal sanctions to provide alternatives to death or sanguinary pain. Foucault (1977, p. 81) credits the “new juridical theory of penalty [which] corresponds in fact to a new ‘political economy’ of the power to punish. This explains why the ‘reform’ did not have a single origin.”

The delegitimization of torture is related to its legal abolition, but derives more squarely from changing models of sovereign statehood, particularly the emergence of national democracies. The French and American revolutions reconfigured relations between states and people, and the legal rights of each. The key architects of these revolutionary transformations were influenced by theories of natural law and social contract, and inspired by ideas of inalienable rights and human dignity (Hunt 2007). Torture was perceived as inimical to their goals and visions because it is “tyranny in microcosm” and its history was bound up with pre- and anti-liberal forms of “absolutist government that liberalism abhors” (Luban 2005b, p. 1438).

In America, the delegitimization of torture traces back to the founding of the Republic and was enshrined in the 8th Amendment to the Constitution, which prohibits “cruel and unusual punishments.” This phrase first appeared in the English Bill of Rights and “seems to have been directed against punishments unauthorized by statute, beyond the jurisdiction of the sentencing court, or disproportionate to the offense committed” (Dayan 2007, p. 6). Along with habeas corpus (“the great writ”) and the separation of governmental powers, the US ban on unconstitutional cruel treatment served as a foundation of the modern rule of law because it was understood as essential for conditions of liberty, limited government, and due process to thrive.

Dayan (2007, p. 88) counters the “humane fiction” that the American founding fathers renounced torture, suggesting that the choice of the words “cruel and unusual” may have been determined by the drafters’ accommodation of slavery into the Constitutional system. The legal rules governing the treatment of slaves—those deemed rightless and non-human—were an amalgamation of Roman civil law and slave codes of the European colonies. Antebellum jurisprudence delineating between permissible versus excessive cruelty in the treatment of slaves was transposed into the post-emancipation era through the jurisprudence of penalty. The abolition of slavery excluded the unfreedom or civil death of incarceration, a legacy of rightlessness and dehumanization that “still haunts our legal language and holds the prison system in thrall” (Dayan 2007, p. 16; see also Parry 2009, p. 1023-1028).

The jurisprudence of the 8th Amendment, which has been interpreted to prohibit “unnecessary and wanton infliction of pain,” is a slave-era legacy of line drawing between lawful and unlawful cruelty. This jurisprudence legitimizes lawful punishments, including painful or dehumanizing methods, and tends to excuse harmful acts against those in custody if perpetrators were deemed to lack the intent to be cruel. By extension, this vestige of slave-era line drawing informs 20th and 21st century line drawing between torture and cruel, inhumane and degrading treatment, and the exclusion of all lawful punishments from international definitions of torture (see Levinson 2007; Schabas 1996).

SPECTACULAR INSECURITY AND TORTURING SOVEREIGNS

Sovereign insecurity links the practice of torture from the classical age of the *ancien regime* to the era of modern states. The changing nature of sovereignty itself is

essential to understand the changing purposes and targets of torture. The classical sovereign was omnipotent and insecure; his authority, like his law, was personal. The public “spectacles of pain” (Foucault 1977, pp. 44-50) functioned as rituals of royal dominance and revenge through which the sovereign could restore “himself” by attacking his “enemy,” the law breaker. The need for such spectacles was testimony to the weakness of pre-modern governing institutions to penetrate and control society, except through fear.

Rejali’s (1994) analysis of torture in 19th century Iran under the Qajars illustrates this sovereign insecurity. As in pre- and early modern Europe, Iranian judicial torture was a strictly regulated investigative procedure, dependent on at least a partial proof of an offense. Penal torture was symbolic—in one case a baker who overcharged for bread was baked alive in his own oven (Rejali 1994, p. 20). The despotic but weak Qajar regime’s ability “to inflict extraordinary punishments constituted a major pillar of an otherwise invisible dynasty” (Rejali 1994, p. 32).

Foucault’s *Discipline and Punish* (1977) can be read as a teleological account of torture’s declining legitimacy because his analytical trajectory presents this transition in terms of the classical sovereign’s “slackening hold on the body” to the “birth of the prison,” and the concurrent emergence of a “disciplinary society” to fabricate “docile and useful” bodies. Foucault emphasizes the sway of arguments about the disutility of pain to control society and govern “well,” part of his larger counter-argument to the progressive humanistic narrative of history (i.e., expanding freedoms and declining tortures). Modern discipline, he argues, is more pervasive and more thoroughly coercive (and, thus, more sinister) than the brutal bodily tortures of the few in the classical era. This trajectory lends

itself to criticism that he failed to acknowledge that modern states torture (Lazreg 2008, pp. 273-274, n. 26). In fact, he confirms such a reading: “We are now far away from the country of tortures, dotted with wheels, gibbets, gallows, pillories...The carceral city...is governed by quite different principles” (Foucault 1977, p. 307).

However, there is an alternative way to interpret Foucault’s work on governing logics and practices (see Burchell, Gordon & Miller 1991; Foucault 2007; Rose, O’Malley & Valverde 2006), which lends itself to understanding not only why the omnipotent and insecure classical sovereign tortured bodies publicly, but illuminates the logic of torture by modern states as a response and recourse to national insecurity. *Ancien regimes* have been replaced by modern bureaucratic states around the globe.⁸ The personalized rule and divine rights of kings have been replaced by states’ rights and the politics of representative rule. Modern states, despite the manifold forms they take, base their sovereign right to rule (domestic authority and international recognition) on their status as the institutional representative of “the people,” usually configured as a national society or community. (Even the most autocratic dictators claim that they rule on behalf of some socio-political constituency.) Defending the collective interests of society, including biological existence, law and order, and public welfare, are the responsibility and right of modern sovereign states (Foucault 1978, pp. 138-145; see also 2007).

The politics and practices of national security combine two principles: states’ rights to defend themselves, and states’ obligations to ensure the safety of those whom

⁸ By the 1970s, as the period/process of decolonization wound down, the international order assumed the form of a globalized array of (ostensibly) independent sovereign bureaucratic states. All sovereign states are modern, and even modern monarchies are bureaucratic. The exceptions to this general rule would be so-called “failed states” and non-sovereign entities, such as the Palestinian Authority in the West Bank and Gaza.

they represent. When states deem themselves to be at risk or national interests threatened, they have the capacity to employ spectacular, terrifying and deadly tactics (Kahn 2008). As Peters (1996, pp. 6-7) writes: “Paradoxically, in an age of vast state strength, ability to mobilize resources, and possession of virtually infinite means of coercion, much of state policy has been based upon the concept of extreme state vulnerability to enemies, external or internal.”

The politics and practices of national security distinguish between “legitimate communities” and “enemies.” The former are conceived as those members of the nation in good standing whose safety and security are the responsibility of the state, and the latter are those categories of people deemed to threaten security, who either need to be tortured (or executed, massacred, relocated and so on) or who do not deserve not to be. In this regard, torture for national security compares to warfare, since both are forms of state violence directed at “others” (see Scarry 1985, pp. 60-63, 139-145; Ron 2003).

The perpetration of violence against individuals in custody exemplifies the modern sovereign’s omnipotent insecurity (McCoy 2006, pp. 12-14), albeit the *raisons d’etat* vary. For liberal regimes, the rationalization to torture, however the practice is euphemized, is articulated in terms of what is “necessary” for the security of an innocent and vulnerable society, which Luban (2005b) has aptly termed the “liberal ideology of torture.” But the practice of torture is ineluctably illiberal. Consequently, torture perpetrated by modern states as a prerogative of sovereign discretion and/or necessity bears more than a faint resemblance to the “warring” on rightless bodies in the era of the *ancien regime* (Foucault 1978, pp. 135-139; Kahn 2008, p. 34).

MODERN TORTURE REGIMES

In the 20th century, torture became a pervasive globalized phenomenon. Peters calls this “a second revival,” although this phrase is misleading since sanguinary but lawful punishments have been excised from the category of torture. Judicial torture has undergone a revival of sorts in legal systems that lack meaningful judicial impartiality and where confessions are the preferred or essential ingredient to ensure convictions and interrogation methods used to produce them are shrouded in secrecy (see Conroy 2000; Hajjar 2005; Human Rights Watch 1999). False confessions extracted through judicial torture may be as valuable as true ones if the state’s objective is to persuade domestic constituencies that those being prosecuted and imprisoned are guilty and/or to stage self-renunciations in show trials (see Abrahamian 1999; Bernstein 2009; Chandler 2000). Interrogational torture, a modern innovation integrally related to national security, is employed for the purpose of extracting intelligence and other “forward-looking” information of security value (Kremnitzer & Segev 2000). Terroristic torture describes rampant custodial violence in the context of state terror, often coupled with extra-judicial execution. According to Shue (2004, p. 53), its purpose is “intimidation of persons other than the victim,” for example to deter opposition and signal the costs of resistance (see also Bufacchi & Arrigo 2006, p. 360; McCoy 2006, pp. 75-78). Terroristic torture is an invisible spectacle because people are made fearful of torture that they know is occurring but don’t actually see (Harbury 2005; Weschler 1998).

Understanding why modern states (i.e., militaries, secret services and police forces) torture involves a comparative consideration of the nature of the state, and the particular (context-specific) interests and risks that drive official policies. For totalitarian

states, of which the USSR and Nazi Germany are the archetypal models, torture was part of a larger repertoire of state terror. According to Arendt (1973, p. 453), torture “is an essential feature of the whole totalitarian police and judiciary apparatus; it is used every day to make people talk.” She adds, in addition to this “rationally conducted torture” for information, Nazis had another “irrational, sadistic” variant that seemed to be “a concession of the regime to its criminal and abnormal elements.” Améry (1980, p. 31) is unpersuaded that there is a distinction: Nazis “tortured because they were torturers.”

The centuries-long record of horrific torture by Western colonizers and rulers in Africa, Asia and the Americas for purposes of subduing, exploiting or exterminating indigenous populations (Fanon 2004; Hochschild 1999; Taussig 1984) acquired a 20th century purpose in “counter-insurgency” operations mounted to counter nationalist/anti-colonial resistance to imperial rule; in many places, the use of torture heightened during wars of independence (Elkins 2005; Kramer 2008). In 1931, French colonial police pioneered the use of electric torture to thwart nationalist resistance in Vietnam (Rejali 2007, p. 5). Torture by the French in Algeria, immortalized in the opening scene of Pontecorvo’s (1966) film, *The Battle of Algiers*, is the most extensively documented and analyzed case of colonial torture (Alleg 2006; Aussaresses 2002; Branche 2004; Hoffman 2002; Horne 1978; Lazreg 2008; Shatz 2002). Although some members of the Algerian nationalist resistance who were subjected to the French mix of water torture, electric shock, and beatings did provide information, and the French army won the Battle of Algiers, revelations about the use of torture undermined public support for the war, and France left Algeria in 1962. Thus, if torture’s purpose was to sustain French control of Algeria, it didn’t “work.”

In the decades after World War II, geopolitical expansion of Western “spheres of influence,” and the “containment” or “rollback” of communism became the predominant goals and objectives of US foreign policy. Political and military interventionism was employed in many countries to influence the course and outcome of anti-colonial struggles, as well as the economic policies and political alignments of regimes across the global south (i.e., the Third World).⁹ Torture was instrumentalized as a counter-insurgency tactic to pursue the Cold War agenda of fighting global communism locally. During the Vietnam War, the CIA trained over 85,000 South Vietnamese police (McCoy 2006, pp. 60-61), who operated a network of interrogation and torture sites across the country. The failure of these measures and the burgeoning military campaign to decisively defeat the Viet Cong led to the development of the CIA’s Phoenix program, which typified terroristic torture in its combination of brutal interrogations and extra-judicial executions (Moyar 1997). Over 26,000 prisoners were killed, the vast majority of whom were almost certainly not Viet Cong (McCoy 2006, p. 68). In addition to the indiscriminateness and brutality, the Phoenix program was an intelligence-generating failure. The CIA’s Vietnam operation did, however, have the “benefit” of providing a limitless supply of human subjects on whom various torture tests could be run (until they died or were summarily executed) with no accountability. These torture-terror counter-insurgency models honed in Vietnam were transported to Latin America through Project X, a secret training program of Army Intelligence for police and militaries, and were

⁹ The US mounted coups or supported coup-makers to install pro-Western right-wing regimes in Iran (1953), Guatemala (1954), Paraguay (1954), Laos (approximately one per year from 1957-73), Haiti (1959), Democratic Republic of Congo (1960), Dominican Republic (1963), Brazil (1964), Indonesia (1965), Greece (1967), Uruguay (1969), Cambodia (1970), Bolivia (1971), and Chile (1973).

incorporated into the curriculum of the School of the Americas where agents of allied Western hemisphere countries were trained (Gill 2004; Kepner 2001).

Authoritarian regimes (e.g., military juntas, dictatorships, theocracies, racist regimes, one-party states) share the common characteristic of an illiberal unaccountability of the state to society. Torture is a common means for authoritarians to sustain power, advance agendas, intimidate or destroy opponents, and/or reinforce the ruling ideology. When political democracies occupy foreign territories as a result of war and/or rule populations that aspire for political independence (e.g., the British in Northern Ireland; Israel in the West Bank and Gaza; the US in Afghanistan and Iraq), they are not democratically representative—and thus not liberal—in those contexts. On this singular point, I disagree with Rejali's (2007) labeling of them as "torturing democracies," although there is no obvious alternative label, which is why I stress illiberalism to characterize unrepresentative state rule as key to understand the security-rationalized temptations to torture those who strive for a different government and to whom the state is not accountable.

The Cold War/post-colonial era spawned a dramatic increase in authoritarianism (left and right) and torture around the globe. In South America, regime torture from the 1960s through 1980s is the subject of extensive scholarship (Feitlowitz 1998; Huggins, Haritos-Fatouros & Zimbardo 2002; Kornbluh 2003; Langguth 1979). Klein (2007) and Weschler (1998) stress the confluence of US Cold War hemispheric politics and the radical free market theories of Milton Friedman and the "Chicago Boys" as influential factors in military takeovers and a subsequent transnationalized campaign of state terror. As Weschler (1998, pp. 98-99) explains, the mid-20th century adoption of the import-

substitution-industrialization (ISI) model in many countries included nationalization of important industries and delinking of economies from the global capitalist market. As this ISI model began to fail and social unrest increased, militaries seized power with US encouragement and assistance. These military regimes characterized their “wars” against domestic “subversives” and “enemies” as part of the West’s war against international communism. Those targeted by the regimes were construed as national traitors and/or guilty by association to leftist political movements. The doctrine of national security guiding these regimes was “a fearsome piece of work...The enemy—the International Communist Movement—is perceived as covertly operating everywhere, all the time, in all fields of human endeavor” (Weschler 1998, p. 121).

Klein (2007) explains how Friedman’s fascination with the 1950s CIA-funded research into shock therapy on individuals (see McCoy 2006; Rejali 2007) inspired his ideas about how whole societies could be shocked into free market compliance (privatization, deregulation and the termination of social programs). In 1973, Friedman advised Chilean dictator Augusto Pinochet to impose economic “shock therapy” while society was in shock from the coup, making Chile the first place where “Chicago boy” theories could be applied in the real world. Terroristic torture and disappearance (i.e., extra-judicial execution) were hallmarks of military rule in the Southern Cone to quell resistance and press societal acquiescence. While all of the regimes perpetrated torture, its uses varied from country to country. According to Pereira (2008, p. 27), in Brazil, 23 political prisoners were prosecuted in security courts for every one who was extra-judicially executed; in Chile the ratio was 1.5 to one; and in Argentina, only one person was tried for every 71 who were disappeared (the fate of approximately 30,000 people).

Uruguay had the highest per capita torture and incarceration rate in the world at the time; one in every 50 citizens was interrogated, and one in every 500 received a long prison sentence for political offenses (Weschler 1998, p. 88).

Although it is impossible to calculate exactly how many people were tortured by these Southern Cone military regimes, the number is between 100,000 and 150,000, tens of thousands of whom were killed (Klein 2007, p. 95). To contemplate whether torture “worked,” it is necessary to consider the fates of the regimes: Most abandoned or were driven from power by the late 1980s, and in some countries their legacies became the subject of investigations and published reports that took as their titles “never again” (*nunca más, nunca mais*), a signal of their failures. Since 1990, a number of leaders of the former military regimes have faced prosecution (Roht-Arriaza 2009). While prosecutions can erode cultures of impunity (Dorfman 2002), retributive justice cannot untorture victims or repair the societal damage of state terror (Bufacchi & Arrigo 2006, pp. 367-368; Robben 2005; see also Minow 1998).

Over the latter half of the 20th century, odious innovations were devised to break the mind while leaving the body unscathed. McCoy (2006) traces the CIA’s role in the development and propagation of what he terms “no touch” torture tactics. Fearful of a “Manchurian candidate” breakthrough by Chinese and Soviet communist regimes, in 1953 the CIA established the MK-Ultra program and invested in mind-control research that began with “brainwashing” (hypnosis, electroshock and hallucinogenic drugs) and evolved into psychological torture. The CIA’s psychological paradigm fuses “sensory deprivation” and “self-inflicted pain,” a combination that “causes victims to feel responsible for their suffering and thus capitulate more readily to their torturers” (McCoy

2006, p. 8). The use of various combinations of tactics that systematically attack all of the human senses, first enshrined in the *Kubark Counterintelligence Interrogation* (1963), is designed to produce effects of “debility, disorientation and dread.” This paradigm remained a stock element of US intelligence agencies into the 21st century, as the torture memos, Abu Ghraib photos and testimonials about “war on terror” interrogation tactics have revealed (Danner 2009a; McCoy 2009; Physicians for Human Rights 2008).

Rejali’s (2007) *Torture and Democracy* is the most detailed and comprehensive study to date of the history, variations, transmission, and clustering combinations of what he terms “clean” or “stealthy” torture (i.e., those that leave no long-lasting visible physical marks). The tactics he surveys are physical as well as psychological, but not “scarring”; they include employing the prisoner’s body against itself (stress positions), disorienting the mind (sleep deprivation and sensory manipulations), and varying uses of water and/or electricity. There is a political explanation for the surging preference for stealth tactics: By targeting victims’ psyches, the harmful and damaging effects are often greater than beatings and burnings, but they have a certain aura (among the untortured) of being more humane, and thus more resistant to the label of torture (Wolfendale 2009). Stealthy tactics are certainly easier to deny, and this became increasingly important over the last quarter of the 20th century because of the growing capacity by human rights organizations to monitor and report on torture around the world.

FRAIL HUMAN BODIES AND CORE INTERNATIONAL CRIMES

The international legal prohibition of torture in the post-World War II era is one manifestation of the international community’s recognition and response to the

universality of the “frail human body” (Turner 1993, 2006; see also Butler 2004, p. 20), and the need for legal protections from the vicissitudes of state violence and technologies of destruction. The right not to be tortured equals the prohibition of torture, which is absolute under all circumstances, including war and conflict (Nowak & McArthur 2008). Torture ranks as one of the core crimes under international law,¹⁰ along with genocide,¹¹ war crimes,¹² and crimes against humanity.¹³

The international rights that were created by criminalizing these practices under international law are negative rights: Human beings have a right not to be tortured, genocidally exterminated, or willfully killed by militaries or militants if they are unarmed because there is no legal right to torture, perpetrate genocide or commit war crimes. Hagan, Schoenfeld and Palloni aptly term these the “‘harder’ human rights” (2006, p. 330) within a broader spectrum of international human rights (Somers & Roberts 2008).

Three essential and common elements characterize these core international crimes: They are all forms of political violence that are (1) intentionally (2) perpetrated by people acting in a public capacity for public, not private, purposes (3) against captive

¹⁰ The UN Convention against Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment (1984) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to, lawful sanctions.”

¹¹ The UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) defines genocide as “acts committed to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”

¹² War crimes are grave breaches of international humanitarian law (IHL), codified in the four Geneva Conventions (1949) and their Additional Protocols I and II (1977). For a summary of the cumulative list, see Ratner (1999); see also Dörmann (2003b); Henckaerts & Doswald-Beck (2005).

¹³ International law definitions of crimes against humanity vary, but the term has come to mean large-scale and/or systematic attacks against civilians or civilian infrastructure, whether in war or peace (see Bassioni 1999; Robertson & Roth 2007).

or otherwise defenseless people (Arendt 1970, pp. 46, 51; Kahn 2008, ch. 4). For example, killing unarmed civilians is not necessarily a war crime unless it is determined that they were targeted intentionally or victims of the use of disproportionate force; the reciprocal violence of warfare among militaries or other types of armed forces circumscribes legal interpretations of civilian defenselessness and, thus, liability for their “incidental” deaths or injuries (see Shue 2004, p. 51). Mass graves certainly indicate defenselessness but evidence of genocide hinges on proof (often *ex post facto*) that the perpetrators’ intentions comported with those identity-based requirements elemental to the crime. Crimes against humanity offer the broadest conceptions of defenselessness and culpability because victimization is not contingent on identity or status, the practices that fall within this crime’s compass include a wide array of harms (e.g., apartheid, ethnic cleansing, suicide bombings) and, unlike genocide or war crimes, evidence of criminality is not so tightly latched to perpetrators’ intent.

In the case of torture, the necessary condition in which the proscribed practices can occur—and what distinguishes torture from the other core crimes—is a custodial relationship. If the custodian is inclined or authorized to perpetrate torture, victimization is unavoidable because the prisoner is defenseless to fight back or protect himself or herself, and is imperiled by that incapacitation. Other violent practices, like domestic violence, battery and sado-masochistic sexual behavior also involve the purposeful causing of pain in the context of inter-personal (i.e., face-to-face) relationships, but they lack the public dimension of custodianship.¹⁴

¹⁴ Copelon (1994) argues that domestic violence *is* torture and its prohibition and criminal liability should be as clear and universal. Asad’s (1996) skepticism about the universal prohibition of torture because it represents a “modern dedication to eliminating pain and suffering” misunderstands the significance of the custodial relationship.

Legally, severe pain, suffering and injury constitute torture only if the status and power of the perpetrator emanates from a public authority and if the person being harmed is in custody. An “authority” obviously includes state agents and anyone acting “under the color of law” (e.g., government-hired contractors), but it does not exclude non-state groups. Torture is not contingent on legitimacy, jurisdiction or international recognition. It is contingent on an organized capacity to take people into custody and then harm them for a purpose that is public rather than personal.

The combination of torture and cruel, inhumane and degrading treatment (CID), as well as physical and psychological pain and suffering in the same international laws contributes to an interpretative morass about where and how to draw the line between practices that are absolutely prohibited and those that are merely unacceptable (Michaelsen & Shershow 2006; Scheppele 2005; Balkinization N.D.). The torture/CID combo-distinction creates ambiguities which governments wishing to “legalize” or otherwise legitimize torture exploit by characterizing their practices as “not torture.”

HOW TORTURE WORKS ON VICTIMS AND PERPETRATORS

A. Victims

Victims’ accounts and victim-centered perspectives (Alleg 2006; Begg 2006; Danner 2009a; First 1965; Partnoy 1986; Rose 2004b; Scarry 1985; Timerman 1981; Worthington 2007) are invaluable means of conveying the experiences and effects of torture for those on the receiving end. Améry, who was tortured by Nazis when they occupied Belgium and then deported to Auschwitz, writes: “on the basis of an experience that in no way probed the entire range of possibilities, I dare to assert that torture is the

most horrible event a human being can retain within himself” (1980, p. 22). Améry describes how torture worked on him: “The first blow brings home to the prisoner that he is *helpless*” and he loses “trust in the world” (Améry 1980, pp. 27, 28). If the purpose of his torture was to produce these subjective experiences, to prove his incapacity to help himself, to “unmake” and “destroy” his world (Scarry 1985), then from his perspective, it worked very well. “Whoever was tortured, stays tortured” (Améry 1980, pp. 34; see also Arendt 1973, pp. 443-444; McCoy 2006, pp. 205-206). However, if the purpose was to obtain information important to (Nazi) national security, torture made him speak, but he had nothing of value to say: “I accused myself of invented absurd political crimes... Apparently I had the hope that, after such incriminating disclosures, a well-aimed blow to the head would put an end to my misery” (Améry 1980, p. 36).

Among the psychic traumas of torture, by many victims’ accounts, forms of sexualized violence are the worst experiences. Rape, sexual mutilation and humiliation are used to exploit individuals’ most susceptible physical and psychological vulnerabilities, to degrade and dehumanize victims, and to destroy their relations with families and communities (see Blatt 1992; Ortiz 2002; Yunis 1983, pp. 76-77). Public awareness of the widespread use of sexual torture as a tactic of warfare increased dramatically following the conflict in the former Yugoslavia (Oosterhoff, Zwanikken & Ketting 2004). *Calling the Ghosts* (Jacobson & Jelincic 1996), a documentary film featuring two Bosnian Muslim lawyers who survived the Serbian concentration camp of Omarska, traces how they came to terms with their own rapes, and then worked to document the abuses that they and their fellow female prisoners suffered. When the UN established an ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY),

their documentation was instrumental in preparing indictments for perpetrators from Omarska.¹⁵

The sexual torture of males is underreported because survivors often internalize gender stereotypes (i.e., men as aggressors, women as victims), as well as the pervasive social stigma (and in around 70 countries criminalization) of same-sex activities (Oosterhoff, Zwanikken & Ketting 2004, pp. 68, 70). Between 2001 and 2004, public exposés of sexual torture and abuse of male prisoners in Egypt, Israel/Palestine and US-occupied Iraq exposed “a sub terra network of international state actors and security agencies that deploys sexual torture against Arab and Muslim detainees...in a manner that manipulates perceived notions of authentic Arab/Muslim masculine identity” (Menicucci 2005, p. 18). In Egypt, dozens of men suspected of homosexual activity were arrested, many of whom were sexually tortured to elicit confessions of their allegedly transgressive behavior and/or to shame and humiliate them (Human Rights Watch 2004). In Israel/Palestine, Mustafa Dirani, a Lebanese militia leader who had been kidnapped in 1994 and disappeared into the secret prison (Facility 1391) where he was held incommunicado for more than six years, brought a civil suit against the government for torture (his Israeli lawyer was a former intelligence agent). At his court hearing in Tel Aviv on January 27, 2004, he testified that he had been raped by one soldier and sodomized by the head of the interrogation team. His testimony provided a public

¹⁵ In its *Celebici* judgment, the ICTY established that sexual violence constitutes torture when it is intentionally inflicted by an official, or with official instigation, consent or tolerance, for purposes such as intimidation, coercion, punishment, or eliciting information or confessions, or for any reason based on discrimination. In 1998, the International Criminal Tribunal for Rwanda broadened the legal definition of sexual violence to include “acts which do not involve penetration or even physical contact,” such as forced nakedness.

account of institutionalized sexual torture, as well as a refutation of the idea that a man would be too ashamed to speak about his rape (Menicucci 2005, p. 18).

The only novel aspect of the sexualized humiliation and torture that occurred in the Abu Ghraib prison in US-occupied Iraq was the abundance and publication of photos exposing the abuses (Taguba 2004). The photographing of naked male prisoners¹⁶ was intended to intensify victims' experiences of degradation and pressure to cooperate with interrogators. Photographs serve as a "shame multiplier," compounding the dehumanization and terror of torture. One of the Iraqi men in one of the naked pyramids that people around the world have seen later gave sworn testimony that he would have killed himself that night if he had had the means (Danner 2004, p. 240). One of the women victims of torture and rape at Abu Ghraib sent a letter begging the resistance to bomb the prison and kill everyone inside—including herself—so the suffering could end (Apel 2005, p. 99).

The political context can affect the experiences of the tortured, which vary (not categorically, but to a degree) between those who are fighting for a cause for which they are prepared to sacrifice, and those who are not. In his ethnographic study, *Formations of Violence*, Feldman (1991) locates Britain's use of torture on Irish Republican Army (IRA) prisoners within the broader conflict over Irish sovereignty and unity. Unlike Scarry's (1985) analysis, which focuses tightly on the torture relationship to stress that victims lose agency as the pain "unmakes" their world, Feldman's informants, at least the

¹⁶ Existing photos and videos allegedly worse than those made public, including of female and child prisoners, have not been made public. President Obama reversed his initial stated intention, and a 2005 federal court order, to release these images on the claim that they "would not add any additional benefit" to the ongoing public debate about the abuse of prisoners and would increase the risk of attacks against US forces.

more “hardened” paramilitaries, discuss interrogation as a “shared political arena” in which both interrogators and interrogees are participants, rather than actors and objects. These IRA members retained their agency because they comprehended their torture as part of a national struggle in which they were actively engaged. Prisoners counteracted their torture through “counterinstrumentation” of their own bodies, for example, provoking a beating to force the interrogator to play his “ace card” right away, thereby diminishing his control (see also Doumani 1996; Hajjar 2005; Thornhill 1992). The IRA prisoners’ “blanket,” “dirty” and hunger strikes were means of strategically and collectively using self-degradation and harm to maintain a collective sense of purpose and to pressure the British state. (For a report on hunger striking prisoners at GITMO, see Center for Constitutional Rights 2005.)

B. Perpetrators

In comparison to victim-focused literature and victims’ testimonials, accounts by and scholarship about perpetrators of torture is more limited. Most first-hand accounts are from ex-torturers or others who worked in torture sites (Crelinsten 1993; Neely 2008; Saar & Novak 2005; Sharrock 2008; Snapp 1980). Information also comes from testimonies at court martial or other kinds of prosecutorial proceedings, and, in some countries, from truth and reconciliation processes. In recent years, a number of documentary films about US torture have featured first-person accounts by people who perpetrated or witnessed prisoner abuse (Gibney 2007; Kennedy 2007; Morris 2008).

Huggins, Haritos-Fatouros and Zimbardo’s (2002) *Violence Workers*, which focuses on Brazilian police during the military regime, is a model of interdisciplinary

analysis about why “ordinary” men torture for the state, and how they explain and justify their violence. Four interrelated patterns structure the experiences of the direct perpetrators of state-sponsored violence: (1) secrecy of their mission, (2) occupational insularity through professional and institutional isolation, (3) organizational fragmentation through division of violent labor, and (4) personal isolation and social separation in their daily lives (Huggins et al. 2002, p, 2). In Brazil, as in many other contexts, torturers’ self-perceptions of their activities and roles are shaped by the prevailing national security ideology, including the discourse of war and the dehumanization of enemies; norms of obedience within military and militarized institutions; and competitiveness among individuals and units for professional success (e.g., breaking prisoners, eliciting information).

Wartime interrogators, especially in unconventional (i.e., not state-to-state) conflicts, are likely to regard their work as a kind of front line service because intelligence is ammunition for the state against elusive or civilian enemies. In contexts where interrogation rules are muddled or unenforced, interrogators might develop torturous innovations (Mackey & Miller 2004; Ron 1997). In contexts where there is a clear, if clandestine, license to torture prisoners, a “paranoid hostile climate” is nurtured (Huggins et al. 2002, p. 246; see also Bernstein 2009; Weschler 1998).

As in any kind of specialized work, torturers must learn to master their craft (Rejali 2007, pp. 420-425, 573-579). Military training to endure pain and suffering can be used to overcome individuals’ natural aversion to inflicting pain and suffering on others (Crelinsten 1993, p. 56; Mayer 2005), and witnessing or assisting in torture can provide the social situational pressures to comply and conform. Osiel’s (2004) research on the

mental state of Argentine torturers highlights the influential role of Catholic clergy in persuading soldiers to overcome the “moral enormity” of torturing and killing prisoners by framing these activities in just war, natural law, and biblical terms (e.g., citing the parable of separating wheat from chaff).

The power that torturers have over prisoners fosters negative transformations in some perpetrators’ personalities (Zimbardo 2007a; Haney 2000), including a dangerous expansion of ego, escalating cruelty and lasting emotional disorders (Fanon 2004, pp. 267-68; McCoy 2006, p. 9; Rejali 2007, pp. 524-526). While such experiences are not universal, there are no studies objectively attesting to torture as a positive and enriching experience for perpetrators. Torture can have pathological effects on perpetrating institutions, and on the societies in which they operate. In the case of Brazil, torturers turned into smugglers, blackmailers and extortionists, and eventually were purged from the army “to save the army” (McCoy 2006, p. 77; Weschler 1998). The Philippines during the Marcos dictatorship provides a potent lesson about the corrosive effects of torture on the nation’s military (McCoy 2006, pp. 75-77). Rogue military clichés, who got their start as torturers, mounted more coup attempts in the 1980s than any other country in the world, and through the early 1990s waged a protracted civil war and perpetrated numerous acts of domestic terrorism.

The practice of torture is embedded in larger institutional settings within prisons and interrogation centers. According to research on torture survivors, between one-third and half report that physicians were present during—and in some cases overseeing—their abuse, a number that does not include those who treat torture-related injuries or certify deaths in detention (Miles 2006). Information that American doctors and psychologists

were involved in abusive interrogations first emerged in 2004 when a report by the International Committee of the Red Cross (ICRC) characterizing GITMO tactics as “tantamount to torture” was leaked to press (Bloche & Marks 2005; Mayer 2005).

The involvement of American psychologists in devising and implementing abusive interrogation procedures spurred a protracted dispute within the American Psychological Association (Benjamin 2007; Eban 2007; Soldz & Olson 2008). Psychologists are subject to the same influences and curbs on independent thought as other types of actors in violent social situations (Zimbardo 2007b), but their multiple roles pose distinctive ethical dilemmas: They are subject to military discipline and chain-of-command; their professional standards are compromised by national allegiance and secrecy; and their professional caring roles are complicated by orders or confounded by willingness to help interrogators identify prisoners’ weaknesses and phobias (Fink 2009; US SASC 2008).

DOES TORTURE WORK? LESSONS FROM THE US CASE

The Bush administration’s interrogation and detention policies have affected tens of thousands of prisoners.¹⁷ The overwhelming majority was innocent or had no meaningful intelligence (e.g., swept up in raids, sold for bounty, named by others under torture, mistaken identities), but remained in custody, many continuing to be interrogated,

¹⁷ Considering only foreign prisoners held overseas, there is no publicly available total count for Afghanistan, but approximately 500-600 have been in custody at the Bagram prison at any given time since the invasion (Greenberg 2009), a number that does not include prisoners held “off the books” by Special Forces in Afghanistan. In Iraq, the number rose at the end of 2007 as a result of the “surge” to 51,000, including hundreds of juveniles (Gilmartin 2008). GITMO has held approximately 775. An estimated 100 have been held in secret CIA detention facilities. As of January 2009, there were 245 detainees at GITMO, and approximately 18,000 in US custody in Iraq, 700 in Afghanistan, 200 in the Horn of Africa, and 39 in CIA custody (Harpers 2009).

long after their innocence or intelligence valuelessness was known (see Danner 2009b, section 6; Lasseter 2008). Since mid-2004, a vast amount of information about “war on terror” policies and practices has become available to the public, including thousands of pages of policy documents and memoranda (see ACLU N.D.), unclassified reports of official investigations (e.g., Taguba 2004; US SASC 2008), journalistic investigations (Benjamin 2007; Eban 2007; Hersh 2004; Mayer 2005, 2008; Rose 2004a, 2004b; Suskind 2006) and photos (Salon.com N.D.), as well as accounts by prisoners (Begg 2006; Danner 2009a, 2009b; Democracy Now 2006, 2007; Worthington 2007, 2008), interrogators (Alexander & Bruning 2008; Mackay & Miller 2004; Gibney 2007; Kennedy 2007; Morris 2008; Nance 2007; Neely 2008; Saar & Novak 2005; Sharrock 2008; Swenson 2006), lawyers (Ahmad 2008; Stafford Smith 2007; Wax 2008), and others with access to prisoners (Physicians for Human Rights 2008; ICRC 2007).

This wealth of information makes any serious denial that the US engaged in systematic and pervasive torture unsustainable, notwithstanding the resilience of euphemization. A grim benefit of the torture policy, according to Coulam (2006, p. 10), is that the accumulated experience of interrogating so many people has produced “data that could be systematically analyzed...to evaluate methods with unprecedented vigor.” Although some important details and documents remain classified, and the first efforts to systematically study the relationship among the motivations, methods and fruits of interrogation have just begun, enough information has come to light to assess the efficacy and effects of torture in order to draw conclusions about the titular question: “does torture work?”

Indeed, the torture debate has evolved into a debate about whether torture works, or more specifically whether American torture worked for America.¹⁸ The scope of the question is as contentious as the answers it elicits. For pro-torture consequentialists, the scope is the narrowly construed perspective on the relationship between interrogators and prisoners, and their affirmative answer that torture works is premised on the belief that torture can make—and the claim that it has made—the latter say true and useful things. Anti-torture consequentialists answer in the negative that pain, suffering and humiliation are ineffective means of eliciting truth, a problem that is compounded when interrogators don't know the answers to their questions and thus cannot judge the veracity of utterances (Arrigo 2003; Scheppele 2005). Those who engage the question from a broader perspective consider torture's effects, drawing varied conclusions about how the practice has served the goals and objectives that motivated its authorization and justified its use (e.g., military victory, enhancement of national security).

The changing political and legal landscape has affected the torture debate. Immediately after his inauguration on January 20, 2009, President Obama's first act in office was to sign three Executive Orders: 1) to close GITMO within one year, 2) to require that all US interrogations (including by the CIA) must be conducted in accordance with the 2006-revised *Army Field Manual for Human Intelligence Collector Operations*, and 3) to cancel the military commissions and develop a plan to handle GITMO cases. Throughout the winter and spring, a steady flow of new revelations and responses kept torture a constant topic of media reporting.

¹⁸ Opponents of torture whose main concern is "what is legal?" tend not to engage with the question of whether torture works (see Danner 2009b, section 5), which is why, as I suggested at the beginning, an article addressing this question may seem anomalous for a socio-legal publication.

In May, the debate crescendoed when three interlocutors took to the public stage, each giving voice to one of the interpretative positions about whether torture works. Former Vice President Cheney and former FBI agent Ali Soufan represented, respectively, the pro- and anti-torture consequentialist positions, and Obama addressed the broader perspective on torture's effects.

Since leaving office, Cheney had become uncharacteristically voluble in his efforts to defend the Bush administration's record. In numerous media interviews and a May 21 speech at the American Enterprise Institute (AEI), he delivered the message that government-approved brutal interrogation tactics (which, in his view, are "tough" but not "torture") produced excellent intelligence that had kept the nation safe, and admonished the new administration for sacrificing security by relinquishing methods that work. In defiance of the public record (US SASC 2008), Cheney insisted that "our enhanced interrogation program...[was] used on hardened terrorists after other efforts failed...[The use of these methods] prevented the violent death of thousands, if not hundreds of thousands, of innocent people." (For a debunking of claims of actionable intelligence ostensibly elicited through torture that had direct disaster-averting effects, see Horton 2009; Luban 2008; Rose 2008; Soufan 2009; Suskind 2006; see also Bell 2008; Bufacchi & Arrigo 2006; Danner 2009a, 2009b; Horton 2009; Mayerfeld 2008.)

In his AEI speech, Cheney attempted a *coup de grace* by claiming that several classified documents prove the efficacy of CIA interrogations. "For reasons the administration has yet to explain, they believe the public has a right to know the method of the questions, but not the content of the answers. Over on the left wing of the president's party, there appears to be little curiosity in finding out what was learned from

the terrorists.” On May 29, Carl Levin, chair of the Senate Armed Services Committee, in a counter-*coup de grace*, reported that he had examined the documents to which Cheney was referring which “say nothing about numbers of lives saved, nor do the documents connect acquisition of valuable intelligence to the use of abusive techniques. I hope that the documents are declassified, so that people can judge for themselves what is fact, and what is fiction.”

Soufan, a top al-Qaeda profiler, had interrogated Abu Zubaydah (*nom de guerre* for Zayn al-Abidin Muhammad), the first “high value target” to be captured in early 2002. In an April 2009 op-ed, he broke his seven-year silence about “the false claims magnifying the effectiveness of the so-called enhanced interrogation techniques.” On May 13, he testified (from behind a screen) at a Senate Judiciary Committee hearing (Benjamin 2009). Soufan, who is fluent in Arabic, explained that he had used conventional interrogation methods (deception and rapport-building) to elicit information from Abu Zubaydah, including names of people affiliated with al-Qaeda. His most significant revelation, according to Soufan, was the identity of the 9/11 mastermind: Khalid Sheikh Muhammad (KSM).

At that point a CIA team headed by James Mitchell, a psychologist contractor with no interrogation experience, took over. They stripped Abu Zubaydah naked and began applying the reverse-engineered SERE tactics on him. He stopped talking. Several days later, Soufan and his team were permitted to resume their interrogation, but when he started talking, the CIA took over again, and again he stopped talking. The third time the CIA took over, Soufan got so agitated at the illegal and ineffective methods they were using, he called FBI headquarters and threatened to arrest the CIA agents on the spot.

Soufan and the FBI team were pulled out, and the Bureau stopped working with the CIA on interrogations. Soufan's first-hand account of the Abu Zubaydah interrogation is an authoritative refutation of Cheney's contentions that harsh methods were used as a last resort after other methods had failed, and his witnessing of the prisoner's shutting down as a result of CIA violence and humiliation belies the efficacy claims that animate pro-torture consequentialist reasoning.

Although Soufan did not make this point in his public interventions, Abu Zubaydah's treatment set the stage for the CIA interrogation program, which subsequently "migrated" to GITMO and then to Iraq.¹⁹ A factor contributing to the escalating harshness of Abu Zubaydah's treatment was that his importance had been overestimated (Finn & Warrick 2009; Rose 2008; Suskind 2006; Worthington 2007). Contrary to the initial presumption that he was al-Qaeda's chief of operations and top recruiter, in fact, he was more like a receptionist responsible for moving people in and out of training camps, and was mentally ill to boot. He had not even joined al-Qaeda until after 9/11. In the CIA's quest for actionable intelligence, with pressure and permission from the White House, Abu Zubaydah was waterboarded 83 times, confined in a coffin-like box with insects, and subjected to brutal and degrading treatment for the duration of his detention in CIA black sites (see Danner 2009a; ICRC 2007). According to former senior government officials who followed his interrogations, "not a single significant plot was foiled as a result of [his] tortured confessions," but false statements (e.g., about

¹⁹ The "golden shield" memos authored by OLC lawyers for the CIA in August 2002, months after Abu Zubaydah's capture, aimed to inoculate agents from criminal liability by "legalizing" the torture to which he and others in CIA custody were subjected. The legal rationales in these OLC memos influenced subsequent Pentagon directives for military interrogations at GITMO in the autumn of 2002. When top JAG lawyers protested, in early 2003 the OLC wrote memos that the Pentagon used to override JAG opposition (Sands 2008). In August 2003, the GITMO commander went to Iraq to advise on interrogation and detention operations, and Iraqi prisons were subsequently "GITMOized" (Hersh 2004).

planned attacks on shopping malls, nuclear plants, the Brooklyn Bridge and the Statue of Liberty) that he made to stop the torture “sent hundreds of CIA and FBI investigators scurrying in pursuit of phantoms” (Finn & Warrick 2009; see also Rose 2008; Suskind 2006).

Unlike Abu Zubaydah (and the overwhelming majority of prisoners subjected to US torture), KSM was a valuable intelligence asset. He was captured in 2003 not as a result of information gleaned by torture but rather a \$25 million dollar reward. KSM was subjected to waterboarding 183 times along with the full panoply of stealth tactics in the CIA’s repertoire. According to former CIA and Pentagon officials with direct knowledge of his interrogations, most of what he said under torture was lies, and he gave up no actionable intelligence. Torture’s inefficacy in the interrogation of someone as valuable as KSM was true of the entire torture program. According to Rose (2008), who interviewed numerous counterterrorist officials from the US and elsewhere, their conclusions were unanimous: “not only have coercive methods failed to generate significant and actionable intelligence, they have also caused the squandering of resources on a massive scale..., chimerical plots, and unnecessary safety alerts....” Thus, the indirect costs of interrogational torture include misallocation of resources to follow false leads and, as falsehoods accrete, an increasing incapacity to detect the difference between accurate and inaccurate intelligence.

The other key pro-torture consequentialist claim that the use of harsh interrogation methods was motivated by the need for actionable intelligence to prevent future attacks has become far less plausible in light of information in recently declassified memos. The Bush administration’s political will to justify war against Iraq was the

motivation that caused a major spike in the use of the harshest methods (Horton 2009). In the weeks prior to the 2003 invasion, CIA and military interrogators were under intense pressure to produce evidence that would persuade Britain that Iraq did have an active weapons of mass destruction (WMD) program and that the regime of Saddam Hussein had links to al-Qaeda. The evidence that the administration presented to the world to make the case for war included information that Iraq had been training al-Qaeda operatives in the use of chemical weapons, thus connecting Iraq to 9/11. This information was extracted by torture from a Libyan prisoner, Ibn al-Shaykh al-Libi, who subsequently recanted the lies he had told interrogators to make the pain stop. The second spike in the use of the harshest methods occurred several months into the occupation of Iraq, when the WMD failed to materialize, and was motivated to stay cracks in public support for the war. The Abu Ghraib debacle emanated from the desperate quest for intelligence about the insurgency because the administration was suffering politically for the rising American death toll.

The third interlocutor, Obama, has been articulating the broader perspective in numerous speeches and interviews, including a March 22 interview on 60 Minutes in which he said, “I fundamentally disagree with Dick Cheney.” This disagreement, elaborated in his May 21 speech to the nation, engaged only passingly with the narrowly construed perspective when he stated that “brutal methods like water-boarding...are [not] the most effective means of interrogation.” Rather, his substantive disagreement with Cheney (and all pro-torture consequentialists) was that the effects of torture have been overwhelmingly deleterious: “[Brutal methods] undermine the rule of law. They alienate us in the world. They serve as a recruitment tool for terrorists, and increase the will of our

enemies to fight us, while decreasing the will of others to work with America. They risk the lives of our troops by making it less likely that others will surrender to them in battle, and more likely that Americans will be mistreated if they are captured. In short, they did not advance our war and counter-terrorism efforts - they undermined them...”

Obama’s harsh assessment of the torture policy has substantial empirical foundations. In terms of the rule of law, the policy and its effects are thoroughly illiberal: Those who secretly colluded to authorize torture excluded and ignored dissenting expert perspectives, supplanted institutional checks and balances with unfettered executive discretion, and relied on ideologically radical legal reasoning to rationalize the disregard for applicable laws. The apt characterization of GITMO as a “legal black hole” emanated from the decision that prisoners would be held incommunicado with no status review hearings and limited access to ICRC monitors (who are prohibited from reporting publicly on their findings), thus leaving them utterly vulnerable to torture and CID by dint of the administration’s claim that no laws governed their treatment. Until 2004 when the administration lost the Supreme Court case of *Rasul v. Bush*, they were afforded no habeas corpus rights, a contravention of, arguably, the most basic rule of law norm that dates back to the Magna Carta.

When the torture policy was first exposed in mid-2004, its authors deflected their own responsibility by lying to the public. They blamed Abu Ghraib on “bad apples” ostensibly acting autonomously. Official lying was compounded by refusal to authorize investigations to look up the chain-of-command, thereby fostering a culture of impunity for gross violations of law. In 2006, although Republicans lost control of the Senate, the combination of partisan politics and continuing executive secrecy and stonewalling

impeded prospects for rule of law-restoring measures and accountability, which enabled the torture policy to endure to the end of the Bush presidency.

One of the main themes of Obama's May 21 speech was how the use of torture has fouled prospects for legal justice for 9/11 by making it difficult to prosecute suspects (see Carter 2004; Colson & Cover 2008). The Bush administration had attempted to circumvent this problem by establishing military commissions that admit coerced confessions and deny the accused and their attorneys the right to confront third parties whose evidence also might have been coerced. In June 2006, the Supreme Court had ruled in *Hamdan v. Rumsfeld* that the military commissions were unconstitutional. Confronted with the problem of what to do about tortured suspects, in October 2006 the administration successfully pressed a majority in Congress to pass the Military Commissions Act, which not only negated the *Hamdan* decision, but also immunized officials who had violated the Geneva Conventions, who otherwise would be punishable under the War Crimes Act of 1996. Six military prosecutors quit rather than go along with a system that relies on torture (Horton 2008a; Umansky 2008; Worthington 2008). In November 2008, the convening authority for the military commissions, Susan J. Crawford, ruled that Muhammad al-Qahtani, the prisoner suspected of being the "20th hijacker" and for whom the "special measures" at GITMO were initially devised (Sands 2008), was unprosecutable because he had been tortured. Only three people, none of them charged with planning 9/11, were prosecuted in the commissions during the Bush years.

In his speech to the nation, Obama was blunt about the legal "mess" he inherited and the complicated problems of cleaning it up. There are, he explained, five categories and courses of action for GITMO prisoners: First, those who violated criminal laws will

be prosecuted in federal courts. There is strong indication that these are people who can be charged for pre-9/11 crimes to avoid the problem of tortured evidence and to circumscribe defense lawyers' ability to make their mistreatment in GITMO and elsewhere part of the case. Second, those who violated the laws of war will be prosecuted in military commissions. Thus Obama essentially rescinded his January 20 cancellation, but promised that the reformed commissions would not admit evidence elicited through torture or CID. The third and fourth categories are, respectively, people who can and must be released (e.g., the Uighurs), and those who can be transferred to other countries. Fifth, those posing the "toughest" problem are "people who cannot be prosecuted yet who pose a clear danger to the American people." Although vague about plans, Obama implied that some form of preventive detention was being considered. One obvious reason that people in this category—such as al-Qahtani—are unprosecutable is because they have been tortured. But the alternative, indefinite (possibly permanent) detention without trial, is a far cry from the restoration of rule of law standards.²⁰

In terms of the US's international status and relations with allies, the effects of the torture policy have been deleterious. In November 2005, the *Washington Post* reported that the CIA engaged in kidnappings and ran black sites in Europe, which Human Rights Watch revealed to be in Poland and Rumania. This prompted several investigations into illegal US activities associated with the extraordinary rendition program. The Council of Europe report, released in June 2006, concluded that 100 people had been kidnapped in

²⁰ Since 2006, the Bagram prison in Afghanistan has supplanted GITMO and the CIA black sites to detain foreign prisoners overseas (other than those captured and detained in Iraq). In April 2009, a federal District Court judge interpreted *Boumediene v. Bush* (granting GITMO prisoners a constitutional right to habeas) to apply to Bagram, too. The Obama administration filed a motion appealing that decision, thus endorsing Bagram's status as a "legal black hole" where prisoners have no right to challenge their detention.

Europe, and recommended a review of all US-European Union bilateral military basing agreements. The European Parliament report, released in February 2007 (and endorsed by a large majority), exposed extensive collusion with the CIA's extraordinary rendition program by European security services and other government agencies. The ire that these revelations provoked among domestic constituencies has increased governments' wariness about cooperating with US intelligence agencies.

The US torture program also prompted national investigations, some of a criminal nature, in various European countries. In 2005, an Italian court issued indictments for 22 CIA agents who had kidnapped Hassan Mustafa Osama Nasr (aka Abu Omar) in Milan in February 2003 and transported him to Egypt for torture. In 2007, a German court issued arrest warrants for 13 CIA agents involved in the December 2003 kidnapping of Khaled el-Masri, a German citizen, from Macedonia. He was transported to Afghanistan where he was tortured and held incommunicado for months. When the CIA realized that el-Masri was not who they thought he was and decided to release him, in an attempt to avoid public acknowledgment and thus embarrassment they dumped him in a remote area of Albania, from which he eventually made it back to Germany.

The Canadian government had colluded with the US in the extraordinary rendition of their citizen, Maher Arar, to Syria where he was tortured for 18 months until this innocent man was released and returned home. The Canadian government ultimately apologized to Arar and paid him compensation of \$10 million; the US has yet to apologize or even acknowledge culpability, and he remains on the "no fly" list. The Second Circuit Court of Appeals dismissed Arar's civil suit against US officials responsible for his rendition and torture because the government invoked the "state

secrets” privilege, but the case was reheard en banc in December 2008 and a decision is pending.

The New York-based Center for Constitutional Rights and a number of European human rights organizations have been pressing for criminal investigations of top US officials abroad on the principle of universal jurisdiction, which attaches to torture and war crimes (and for which there is no legal immunity). A case in France against former Defense Secretary Donald Rumsfeld was dismissed in 2008 (on erroneous legal reasoning that officials have immunity for activities connected to their work). In Germany, a motion was submitted in May 2009 to reconsider the dismissal of a case against a number of officials in light of new evidence. Currently, Spanish investigating judges are developing a case against six US lawyers who helped author the torture policy and provide its legal cover. These efforts to seek accountability in European courts are likely to increase if the US Department of Justice does not pursue domestic prosecutions.

The British government is implicated in the torture of Binyam Mohamed (see Rose 2008), a resident who was arrested in Pakistan in 2002 and extraordinarily rendered to Afghanistan, then to Morocco where he was held for 18 months. In addition to being beaten repeatedly to the point of unconsciousness and threatened with rape and execution, his penis was repeatedly sliced with a razor and hot stinging liquid was poured on the wounds. From Morocco he was transferred to Afghanistan’s “dark prison” (a black site near Kabul), and then to GITMO in 2004. Mohamed knew that British intelligence was involved because of the detailed questions interrogators asked about his youth. His lawyers, armed with CIA flight logs attesting to the truthfulness of his claims, pressured the British government to press for his release. The Bush administration offered to release

him on condition that he would agree to remain silent about his treatment, which he refused. He was finally released and returned to Britain in March 2009. The public disclosures about his treatment and the government's involvement sparked intense political controversy in the UK, and led to the first criminal investigation against British intelligence agents for their collusion in CIA torture. However, the British High Court had to dismiss Mohamed's case against the government in the interest of national security because, according to the judges, the Obama administration threatened to interrupt bilateral counter-terrorism cooperation if documents detailing his torture by the CIA were revealed (Greenwald 2009).

The torture policy has had damaging effects on US national security, and deadly consequences for US forces as well as civilians in Iraq, Afghanistan and elsewhere. The torture of Arabs and Muslims has been a major recruitment tool for al-Qaeda and other terrorist organizations (Alexander & Bruning 2008; Herrington 2007). According to Matthew Alexander (pseudonym), a retired Air Force major who has extensive interrogation experience in Iraq, the number one reason foreign fighters gave for coming to Iraq was the torture and abuse at Abu Ghraib and Guantánamo. In light of this fact, Alexander offers a damning indictment: Because the majority of casualties and injuries (military and civilian) are the result of suicide bombings, the majority of which are carried out by foreign fighters, "at least hundreds but more likely thousands of American lives (not to count Iraqi civilian deaths) are linked directly to the policy decision to introduce the torture and abuse of prisoners as accepted tactics" (Horton 2008b). Former Navy JAG Alberto Mora, who testified to the Senate Armed Services Committee, concurs that "there are serving US flag-rank officers who maintain that the first and

second identifiable causes of US combat deaths in Iraq...are, respectively, the symbols of Abu Ghraib and Guantánamo.”

To date, no one has studied whether there is a direct connection between post-traumatic stress disorder (PTSD) and the perpetration or witnessing of torture by US soldiers and contractors. (For a study of “atrocities” perpetration and PTSD drawn from earlier conflicts, see MacNair 2002.) But PTSD is afflicting returnees at epidemic rates, with tragic manifestations that include suicides, as well as drug and alcohol abuse, domestic violence and other violent crimes. Given that tens of thousands of soldiers in Afghanistan and Iraq have been involved in arrest, interrogation and detention operations, it would be well founded to hypothesize a connection. The PTSD-causing effects of fearing, witnessing or surviving suicide attacks, and the causal connection between the torture policy and these attacks suggest an indirect causal connection between torture and PTSD. Moreover, this epidemic adversely affects the military, as well as families, communities and indeed society as a whole. These costs should be part of the calculation in determining whether torture “works.”

CONCLUSION

From the narrowly construed perspective, the lessons learned from the American case confirm timeless truisms about the consequentialist relationship between torture and truth. “Torture,” as 3rd century AD/CE Roman jurist Ulpian observed, “is a difficult and deceptive thing for the strong will resist and the weak will say anything to end the pain.” As for truth, according to the German Jesuit Friedrich von Spee in 1631, “It is incredible what people say under the compulsion of torture, and how many lies they will tell about

themselves and about others; in the end, whatever the torturers want to be true, is true.”

For a contemporary judgment about the efficacy of interrogational torture, Rejali’s (2007, p. 478) comparative global assessment is a fitting description of the American case: “[O]rganized torture yields poor information, sweeps up many innocents, degrades organizational capabilities, and destroys interrogators. Limited time during battle or emergency intensifies all these problems.” Thus, if torture is the means and actionable intelligence is the desired end, the US case demonstrates that harming and humiliating prisoners was ineffective in eliciting accurate information. Rather, the torture policy generated a vast amount of false and useless information that caused the waste of valuable time and resources. This truth should silence assertions that such methods are a necessary “lesser evil.” Rejali writes, “Apologists often assume that torture works..[but if it] does not work, then their apology is irrelevant” (p. 447).

From the broad perspective, the lessons that can be learned from the American case confirm that torture cannot be employed with strategic precision, nor is it effective in enhancing security. What the US lacked and desperately needed after 9/11 was human intelligence (HUMINT) about al-Qaeda and affiliated organizations. But the decision to authorize torture to compensate for the lack of HUMINT had the reverse effects: It undermined the willingness of critical constituencies to cooperate, notably those in which terrorists operate and populations to whom they appeal for support. By indiscriminately arresting so many innocent people from these communities, and by subjecting prisoners in US custody to violent and dehumanizing treatment—starting in January 2002 with the publication of “trophy shots” taken in cargo planes transporting prisoners to cages at GITMO, the quest for intelligence assistance in those communities, let alone “hearts and

minds” was damned. American torture squandered “we are all Americans” global empathy after 9/11 and invited righteous condemnation by allied foreign governments. The torture policy reduced domestic support and confidence in the administration, especially among military officers, legal professionals and the intelligentsia.

Perhaps the most important lesson is the falseness of the “trade-off theory” that human rights must be sacrificed for security when contending with the threat of terrorism. Proponents argue that legal rights constrain effective options and actions; this presumption motivated the Bush administration’s “gloves off” approach after 9/11. In a new study, Walsh and Piazza (forthcoming)²¹ find that government respect for “physical integrity rights” is consistently and significantly associated with fewer terrorist attacks. These rights, of which the right not to be tortured is supremely important (see Hajjar forthcoming), are so critical because their violation is so universally offensive. Walsh and Piazza argue that respecting physical integrity rights is more effective because it legitimizes counter-terror efforts and fosters active or passive support from crucial constituencies. Conversely, violations confirm or augment the grievances that animate terrorist organizations. This is true of American torture, which multiplied the number of people who would count themselves as enemies.

At a very high cost, the US case confirms that torture does not work by any measure. No modern regime or society is more secure as a result of torture. Its use spreads, its harms multiply, and its corrosive consequences boost rather than diminish the threat of terrorism. *Nunca más*, indeed.

²¹ Walsh and Piazza use the Cingranelli and Richards (CIRI) Human Rights Dataset, which covers 195 countries from 1981 to 2004.

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KEY WORDS

Interrogation, punishment, rights, security, sovereignty, war.

ABSTRACT

Torture is absolutely prohibited, and constitutes one of the core crimes under international law. There is a substantial body of socio-legal literature that addresses torture's illegality. But this essay tackles the question "does torture work?" The analysis locates the practice of torture in historic and global perspective, accommodating but not constrained by post-9/11 scholarship on American torture. The titular question is treated more critically and comprehensively than a narrowly construed focus on the value and veracity of utterances produced as a result of pain and suffering. The analysis draws on scholarship from a variety of fields that address how torture works (i.e., why it has been used and its effects) in order to highlight the role of torture in the mutually constitutive histories of law-state-society relations. The final section uses the American case to offer conclusions about the efficacy and effects of torture.

SUMMARY POINTS

US Torture Policy

History of Torture

Legal Abolition of Torture

Sovereign Insecurity

Modern Torture

Torture as a Core International Crime

Effects of Torture on Victims and Perpetrators

Does Torture Work? Lessons from the US Case