Torture and Historical Memory

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A picture of a "water detail," reportedly taken in May, 1901, in Sual, the Philippines. "It is a terrible torture," one soldier wrote.

NORTH AMERICANS SEEM TO BELIEVE that torture has no history here. It happened in medieval Europe, at the command of dictators in far-off places, or as part of leftist insurgencies. For the United States, torture is anathema to our way of life, violative of our liberal-democratic commitments. From George Washington to George W. Bush, U.S. presidents have denounced torture unequivocally. Or so it was, as the story goes, before the September 11 attacks. In the aftermath of those attacks, as collective grief, anger and vulnerability gripped the nation, voices emerged asking us to reconsider our prohibition on torture. Surely the post-9/11 world was different, and we needed to adjust our thinking and our actions in order to survive in it. And so for the first time, policymakers openly discussed the torture option as a means to preventing future attacks. The long-honored ideal of universal respect for human dignity had to give way to the new realities of a world facing global terror networks.

To anyone who has traced even the broad contours of U.S. history, however, the narrative presented above is plainly at odds with reality. Torture and associated practices of state violence have continued uninterrupted in the United States from colonial times through the present. To be sure, slavery, "settlement" of the frontier, and world war, among other events, provided increased opportunities for torture, but there has always been one or more segments of the population facing such treatment no matter what larger-scale conflicts were occurring. It is not something-we-might-have to-do-someday, but rather something our government has been doing all along.

Correcting the view that our nation is confronting the torture question for the first time can help build resistance to the seductive force of pro-torture arguments. Those arguments are "seductive" in two ways — first of all, in their apparent inevitability. Federal appellate judge Richard Posner has written that "only the most doctrinaire civil libertarians (not that there aren't plenty of them) deny that if the stakes are high enough, torture is permissible. No one who doubts that should be in a position of responsibility."[1] Statements like these, made from a position of assumed objectivity or authority, are deployed in a way that obfuscates the speaker's function as apologist for what those in power are doing. It just so happens that the "obvious answer" coincides perfectly with state actions needing justification. Then the "avuncular" voice of the apologist, as Alice Ristroph puts it, chides us for our naïvete in questioning the way things are.[2] It's like a parent talking to a child about how things work in the "real world." Or Judge Jerome Frank lecturing the Rosenbergs' lawyer on how judges have to make tough decisions sometimes.[3] It's a disabling argumentative move: the child must first exhaust herself establishing her right to speak before she can get to the merits of her argument. But a clearer view of the history of state violence shows that we have been here before. The turn to torture is neither unprecedented nor inevitable.

Pro-torture arguments are seductive in another way as well: they license the indulgence of violent impulses. The question of indulgence versus renunciation of violence is as old as government, at least. Killing captives, executing convicts, purging shame — all of those acts, so often repeated, amount to an expression of rage through violence. We know people commonly experience those impulses. Government was created to curb them. But renouncing them is frustrating, as Freud said, so there is a certain relief when violence is officially sanctioned.

What does history tell us? The Massachusetts Body of Liberties (1641) is an important document in the development of our modern civil liberties protections. However, it explicitly permits torture, though "not with such Tortures as be Barbarous and inhumane."[4] In 1776, complaining of atrocities committed by British troops, General Washington suggested that he might retaliate in kind, "however abhorrent and disagreeable to our natures in cases of Torture and Capital Punishments."[5] As Judge Ruffin presided in 1829 over a case involving the beating of a slave, he found the master not liable, ruling that a judge could not disturb the political order structured by laws protecting slavery.[6] Filipino insurgents in the early 1900s were tortured using the "water cure": U.S. soldiers held them down and forced water into their stomachs until they bloated dangerously. In 1936, a Southern sheriff's deputy hung a murder suspect from a gallows until he "confessed," prompting Chief Justice Hughes to remark that the case record "reads more like pages torn from some medieval account."[7] And in the 1960s, the CIA developed and disseminated a manual, KUBARK, that instructed interrogators on coercive interrogation techniques, including the use of pain, fear, drugs and electrical stimuli.[8] In the 1980s, Chicago police in "Area 2" beat, burned, and shocked suspects with such frequency that a federal judge claimed their torture routine was "common knowledge."[9]

This partial and highly abbreviated list of incidents is drawn entirely from official sources. Each item reflects an official statement by a government actor; there is no doubt as to whether the documents exist, or what they say. I have collected more than one hundred such state documents, dating from 1641 through the "war on terror." Taken together, these documents provide a record of state torture from colonial times until the present, showing that there has been no torture-free or cruelty-free period of U.S. history. In fact, if one divides U.S. history into five parts — the colonies and the early republic; slavery and the frontier; imperialism, Jim Crow and World War; the Cold War; and the War on Terror — it is apparent that each of those periods saw numerous acts of state torture and violence.

A striking similarity is evident as well, even among documents created centuries apart. Rhetoric of violence links marginalized groups in a number of ways. First, the justification of adopting the methods of a "savage" enemy appears repeatedly. State actors claim that the United States abhors certain violent or brutal tactics, but in the same breath declare those tactics necessary in fighting a particular group that uses them. Consider, for example, the words of a U.S. cavalry officer testifying to Congress about the 1864 massacre of Cheyenne and Arapaho non-combatants at Sand Creek:

> It is the general impression of the people of that country that the only way to fight them is to fight as they fight; kill their women and children and kill them. At the same time, of course, we consider it a barbarous practice.[10]

In similar terms, Secretary of War Elihu Root in a 1902 letter described brutalities committed by Filipino insurgents and opined that U.S. soldiers' retaliation by "unjustifiable severities, is not incredible."[11] At the same time, similar racialized language is used to dehumanize targeted groups, as in the case of Native Americans, Filipinos, North Vietnamese, Arabs, and African-Americans.

A second theme in the rhetoric of violence is the logic of exception. The logic of exception is not entirely dissimilar from the theme of adopting the enemy's tactics: both are employed rhetorically to suggest that a necessary deviation from the norm has occurred — that the event in question is to be understood as unusual, aberrational. Torture is justified by the need to preserve the nation or protect its people. Here, Justice Jackson's famous dictum is often invoked: "The Constitution is not a suicide pact." In the literature of political theory, the "state of exception" is associated with Carl Schmitt. In Schmitt's terms, the sovereign claims the power to act outside the "normal" law-bounded political order; this claim can be grounded in a specific constitutional provision, or it can be based on a commitment to preserve the very state itself, a commitment that is analytically prior to the constitutional rules governing "ordinary" situations.[12] In either case, the state of exception provides a space for state action that suspends legal rules that could protect individual rights and restrict state power. Of course, a problem of scope results, in which the exception threatens to swallow the rule of "normal" constitutional politics. One commentator has claimed that "when exceptional circumstances arise justifying actions taken under the rule of necessity, and when the executive has the authority to decide when those circumstances exist, there is a risk that such exceptions may become increasingly normal." These exceptions to the "normal" liberal-constitutional political order simply happen too frequently to accurately be called exceptions. Violent events, often displaying patterns of repetition, are so numerous as not to appear exceptional at all. We can see, through the work of Schmitt and others on the "state of exception," how the executive accomplishes the normalization of a "necessity regime."[13]

Justification is cumulative. One excuse leads to another, especially when those repeated statements have to do with justifying objectionable state behavior. Justifications can take the form of legal doctrines (such as the Eighth Amendment jurisprudence of "cruel and unusual punishment"), in which case they actually gain precedential significance, but close reading of official statements of any kind can lead to better understanding of state violence: past, present, and future. Inaugural addresses by governors and presidents exhibit similarities. President Madison in 1813 and Mississippi Governor Charles Lynch in 1836 chose to include in their inaugural addresses a reference to violence that both condemns it (when done by others) and justifies it (when done by the state).[14]

This process can be seen even more clearly in the legal context. In 1942, a U.S. military tribunal tried eight Nazi saboteurs, and six of them were electrocuted within a week of conviction. As part of the justification for this summary process, the government claimed that the men were unlawful combatants who were not entitled to be treated as prisoners of war or as criminal defendants. Sixty years later, that same "enemy combatant" designation was used to strip rights protections from post-9/11 detainees, as Louis Fisher has shown.[15] Thus, legal jargon coined by the Roosevelt administration facilitated detainee treatment in the Bush administration. Colin Dayan's treatment of the law of "cruel and unusual" similarly exposes the way justifications for brutality became fixed in precedent.[16] We can see those same justifications employed in the post-9/11 context just as effectively as they were in the nineteenth-century slavery-related cases and the twentieth-century capital punishment cases. In the realm of law, such formulations assume, literally, life and death significance. If a justification is offered by the state and accepted by a court, the original defendant loses, and subsequent defendants as well lose their challenges to the state's decision to put them to death. As legal precedent, justifications for violence acquire a force that is often immovable.

What I have said so far serves one of my aims in building a fuller historical record on torture: that is, to show that the use of torture, and apologetic discourses about torture, have a long history in the U.S., one that is coextensive with the history of American political development. But I also hope to expand the conceptual understanding of torture in a particular way. I suggest that we think about torture on a continuum with other forms of state violence. "Torture" is often constructed in

opposition to other forms of state violence, such as the execution of a condemned prisoner. Foucault's reference to the public dismemberment of a convicted murderer is meant to show not only that such punishment was horribly painful but also (and more importantly) that by contrast modern punishment sought to eliminate the spectacle of public infliction of pain. Thus, modern penology moved away from such grotesque displays, and its methods appeared less like torture. But certainly the more "sanitized" versions of discipline and punishment still amount to state violence, even if they are not readily understood as torture. Execution by lethal injection, and shooting wounded prisoners, are examples of state violence that do not fit with conventional notions of torture. In fact, regarding capital punishment our jurisprudence says, quite circularly, that capital punishment is not torture because courts and legislatures consider it to be a lawful sanction that we actually use (and, conversely, we see it as lawful precisely because it is used). Forms of state violence such as capital punishment and summary execution are important to scrutinize because they shed light on what "torture" means — both in opposition to, and as extension of, the notion of state violence.

One reason to locate torture on a continuum of state violence is that we can then respond with condemnation to a range of actual violent practices, such as the ritual humiliation inflicted on prisoners at Abu Ghraib. Some of what military personnel and contractors did to prisoners there — photographing them naked, putting collars and leashes on them — does not fit the legal definition of torture stated in the 1984 Convention Against Torture (CAT) or the 1994 U.S. code provision prohibiting torture. Both the CAT and the US Code definitions require an act that causes "severe pain," whether physical or mental. In contrast to definitions of torture focusing on the infliction of severe pain, Parry suggests viewing torture on a continuum, as "potentially escalating pain" caused by state violence.[17] Presumably, his conceptualization would require us to look at use of threats, use of lesser pain, and use of fear and aversion. In addition to more iconic manifestations, then, for Parry, torture includes "also the infliction of potentially escalating pain for purposes that include dominating the victim and ascribing responsibility to the victim for the pain incurred." With this modification, Parry hopes to avoid "exoticizing" torture, which can happen when the term is reserved for the most extreme and shocking events — events that happen in secret or happen in faraway places.[18] Instead, the continuum approach reminds us of the state violence that happens around us, here in the United States, in varied contexts. Techniques used at Abu Ghraib that did not produce severe pain and techniques such as "walling" that are intended to suggest greater violence than what is actually happening are more easily addressed using Parry's approach. The virtue of his definition is that it shows "a kinship between torture and forms of domination that rely on discipline instead of pain. If there is such a kinship, then torture is not exceptional conduct that belongs in a separate category, and the torture/not-torture distinction can no longer be used to legitimate lesser forms of state violence."[19]

This is a crucial point. As another commentator has put it,

> To call something torture is almost always to condemn it, with the result that we have to confine the term, lest we be forced either to reexamine the legitimacy of our other coercive practices or to accept the fact of coercion as a routine aspect of our personal, social, and political arrangements.[20]

The argumentative move of saying, "We don't torture" is frequently used so that the state can condemn torture on the one hand while engaging in violent practices in the other. I noted above that President Bush followed past presidents in publicly denouncing torture, but at the same time he was denouncing it his administration was officially authorizing such practices as waterboarding (which simulates drowning by covering a blindfolded subject's nose and mouth with a water-soaked cloth)

and stress positions (prolonged standing in the same position, which produces intense pain and swelling in the joints). In a strange and ironic way, saying, "We don't torture" actually made it easier to engage in violent state practices such as these: they gained legal cover because they were constructed as not-torture. Let me be clear: I believe that both stress positions and waterboarding *do* meet the U.S. Code definition of torture, but my point here is simply that constructing them as not-torture has facilitated their use.

While legal definitions of torture are necessary to regulate the behavior of state actors, definitional exercises certainly have their limits. Philosopher Jeremy Waldron has suggested that "there is something wrong with trying to pin down the prohibition on torture with a precise legal definition." The reason that a "precise legal definition" was so important to the Bush administration, of course, was that it needed to green-light certain interrogation practices by calling them something short of torture. "Insisting on exact definitions may sound very lawyerly," Waldron cautions, "but there is something disturbing about it when the quest for precision is put to work in the service of a mentality that says, 'Give us a definition so we have something to work around, something to game, a determinate envelope to push.'"[21] Waldron suggests that inquiries into what constitutes torture, or what forms of state violence are out of bounds, should be guided by what he calls a "legal archetype" rather than a definitional exercise. The anti-torture archetype draws on a range of beliefs about the way individuals are to be respected in their personhood and about the limits of state intrusion on people's bodily integrity. Viewed this way, the question of whether to torture, or what the term "torture" means, goes deeper than positive (statutory) law and asks about the role of law in society and about what sort of people and what sort of community to be. It is not merely a matter of drawing a line between torture and "mere" cruelty, but rather of determining what kinds of cruelty have been possible (and actualized) in our world, now and in the past, and what they suggest about a state that decides to employ them.

The historical record teaches us that torture and other state violence have always been a part of U.S. politics, and from that fact we may conclude that the impulse to violence is always co-present with governments, even liberal-democratic governments. Such a conclusion suggests the need for continuous vigilance that should not slacken in view of the Enlightenment, or the end of the Cold War. But the liberal-democratic political order produces a profound ambivalence about torture that reflects a tension between political imperatives and ideological commitments. The global war on terror, or global political influence, requires violence, but that violence must be reconciled with principles of government restraint in order to preserve legitimacy. Thus we see what appears to be a compulsion to confess and justify actions at home and abroad. Simultaneously we see public disavowals of torture alongside public justifications of torture. This contested discursive terrain generates both an opportunity and an obligation for people of conscience to remain involved in contesting "torture."

Footnotes

1. Richard Posner, "Torture, Terrorism and Interrogation," in Sanford Levinson, ed., *Torture: A Collection*. New York: Oxford, 2004.

2. Alice Ristroph, "Professors Strangelove," 11 Green Bag 2d 243 (2008).

3. This conversation is recounted by Arthur Kinoy in *Rights on Trial: The Odyssey of a People's Lawyer*. Cambridge: Harvard University Press, 1984.

4. Massachusetts Body of Liberties, *Available at* Massachusetts Library. Accessed April 15, 2011.

5. Letter from George Washington to the Continenetal Congress. *Available at* American Memory, Library of Congress. Accessed April 15, 2011.

6. *State v. Mann*, 11 N.C. 263 (1829).

7. Brown v. Mississippi, 297 U.S. 278 (1936)

8. KUBARK manual. Accessed April 15, 2011.

9. *U.S. ex rel. Maxwell v. Gilmore*, 37 F. Supp.2d 1078 (N.D. Ill. 1999)

10. Report of the Committees of the Senate of the United States for the 2nd sess., 38th cong. (1864-1865). Washington, Government Printing Office, 1865, p. 26.

11. Moorfield Storey and Julian Codman, *Marked Severities: Secretary Root's Record in Philippine Warfare* (Boston: George W. Ellis, 1902), pp. 44-45

12. Thomas P. Crocker, "Overcoming Necessity: Torture and the State of Constitutional Culture," 61 *Southern Methodist Law Review* 221, 230 (2008).

13. *Ibid.,* p. 244.

14. American State Papers, 1789-1838: Foreign Relations, vol. 1, 13th Cong., 2nd sess., publication no. 36; Christopher Waldrep, *Lynching in America: A History in Documents* (New York: New York University Press, 2006), p. 67.

15. Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law*. Lawrence, KS: University of Kansas, 2003.

16. Colin Dayan, *The Story of Cruel and Unusual*. Cambridge, MA: Boston Review, 2007.

17. John T. Parry, "Fighting Terrorism with Torture: Where to Draw the Line?" *1 Journal of National Security Law and Policy* 253, 276 (2005).

18. Parry, "Fighting Terrorism with Torture," pp. 257-259.

19. *Ibid*. p. 275.

20. Gunter Frankenberg, "Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty," 56 *American Journal of Comparative Law* 403, 407 (2008).

21. Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," 105 *Columbia Law Review* 1681, 1687 (2005).