

UNDERSTANDING TORTURE



ISBN

Understanding Torture

Law, Violence, and Political Identity



John T. Parry



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Understanding Torture

Torture, properly understood, is prohibited absolutely, and states are obliged, *inter alia*, to prosecute those responsible.

—HELEN DUFFY,
The “War on Terror” and the Framework of International Law

Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. . . .

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.

—ARTICLES 2 AND 16 OF THE U.N. CONVENTION
AGAINST TORTURE AND OTHER CRUEL, INHUMAN, OR DEGRADING
TREATMENT OR PUNISHMENT

[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law.

—FIFTH AMENDMENT TO THE U.S. CONSTITUTION

The fact is, regardless of the terminology used, the precise content of most of the Constitution’s civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.

—*Anderson v. Creighton*, 483 U.S. 635 (1987)

No more torture, but . . . go on torturing just the same.

—COLONEL MARCEL BIGEARD, QUOTED IN RITA MARAN,
Torture: The Role of Ideology in the French-Algerian War

It was just for fun.

—PRIVATE LYNNDIE ENGLAND, QUOTED IN JAMES POLK,
“Testimony: Abu Ghraib Photos ‘Just for Fun,’” *CNN.com*

Preface and Acknowledgments

The impetus for this book was the use of coercive interrogation and detention tactics by U.S. personnel in the months and years after the September 11, 2001 attacks, and I completed the manuscript in the last days of George W. Bush's presidency. I was able to take account of some more recent events or disclosures during the editing process. But *Understanding Torture* is not a book about the Bush administration or the war on terror. It is neither a comprehensive account or chronology of events during those years nor an argument that a change of U.S. presidential administrations will moot the problem of torture. Rather, this is a book about the ongoing relationship of torture and state violence to contemporary liberal democracies and, even more, about the legal and political discourse of torture and the consequences and implications of that discourse. I spend significant time on the United States, but neither it nor the war on terror is my sole focus.

I received an enormous amount of substantive assistance while working on this book and its predecessor articles. People who commented on drafts or assisted me with issues related to this book include Elena Baylis, Harold Bruff, Bobby Chesney, John Grant, Oren Gross, Lisa Hajjar, Andrea Hibbard, Duncan Hollis, Sandy Levinson, Clark Lombardi, Ruth Miller, Sam Pillsbury, Darius Rejali, Alice Ristroph, Brad Roth, Juliet Stumpf, Doug Sylvester, Steve Vladeck, Elliot Young, and two anonymous reviewers for the University of Michigan Press. I also learned a great deal from participants at numerous talks and conferences, as well as members of the "Law of Torture" discussion list organized by Marty Lederman and Kim Scheppele. Andrea Hibbard's careful review of the manuscript helped me clarify my arguments and avoid embarrassing errors.

I particularly want to acknowledge my debt to my friend and mentor Welsh White. I regret that he will never see this book; his advice and guidance made it possible.

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INTRODUCTION



Law, Language, and Difference

In 1987, a short review in *Contemporary Sociology* offered mild criticism of a book about the complicity of health professionals in torture: "The evidence and arguments presented are compelling, although one needs little persuasion to condemn such practices; thus the inclusion of photographs of torture rack[s] and exhumed bones of victims seem unnecessarily lurid." Torture is so obviously wrong that there was no need to shock readers into agreeing with that proposition. Seven years later, in the same journal, Daniel Chirot took issue with Darius Rejali's claim that the use of torture in twentieth-century Iran reflects that country's modernity. In what may have been intended as the clinching argument, Chirot asked, "If the growth of torture in twentieth-century Iran and its changing forms are caused by efforts to modernize, why do we not torture in the modern United States or Western Europe?" Modern liberal democracies simply do not torture, and it was important to stress that fact.¹

Today, torture is a central legal and political issue in the United States. U.S. forces have abused prisoners at a variety of locations, including Guantánamo Bay Naval Base, Bagram Air Base in Afghanistan, Abu Ghraib prison in Iraq, and various CIA "black sites." Suspected terrorists have also been abused by U.S. allies, sometimes at the behest of U.S. officials. Newspapers, magazines, and Web sites published stories and reproduced pictures of the abuse to widespread interest and (it was assumed) revulsion. Remonstrating editorials accompanied each revelation. Members of Congress demanded information, held hearings, and decried the abuse (but sometimes defended coercive tactics). Human rights advocates researched, documented and condemned the abuse, while international lawyers called for more restrictions on interrogators and better enforcement.

Little emerged from this flurry of publicity and discussion. Accusations of torture were met by either denials or the assertion that the worst conduct was an aberration, a deviation from the norm of humane treatment. Arguments for respecting human or individual rights ran up against claims that it was time for the "gloves to come off" after the attacks of September 11,

2001. As one official said, “If you don’t violate someone’s human rights some of the time [during an interrogation] you probably aren’t doing your job.”² Criticisms of abuse thus occasioned a two-part response: the United States did not torture, but it might have to do some bad things to win what had become the “war on terror.”

Efforts to understand Abu Ghraib, Bagram, and Guantánamo—place-names that have become metonymic for arbitrary detention, state violence, and coercive interrogation—also split. On the one hand, concern over abuse became lost in legal debates and political finger-pointing. Torture became simultaneously a technical legal question that required parsing of the kind usually reserved for the Internal Revenue Code, a partisan political issue, and a test of patriotism. On the other hand, the media repeatedly presented “both sides” of the issue of coercive treatment, leaving many observers to wonder how they could assess events that happened far away under conditions about which they knew little.³ Better to shrug one’s shoulders, hope for the best, and move on.

Although participants frequently invoke legal rules, the role of law in the torture debate is far from clear. Most lawyers assume torture is illegal. They may also believe that the creation of legal prohibitions against torture during the twentieth century is one of the great achievements of domestic and international human rights. It is more difficult to support that conclusion through rigorous legal analysis, however, than nearly anyone, in the United States at least, would have thought even just a few years ago. In fact, lawyers for the Bush administration worked hard to portray the legal category “torture” as a narrow term of art. They argued that conduct that might appear to be torture could actually be legal interrogation. In many quarters, these arguments were dismissed as partisan, slipshod, or repugnant. But despite its many flaws, some of the analysis advances defensible interpretations of U.S. and international law. The law of torture, in other words, is less categorical and less constraining than it first appears. Moreover, as I will argue throughout this book, law and legal rights provide no certain bulwark against state torture.

This book seeks to advance the discussion of torture and related forms of abuse by considering more deeply what law has to say about it. In this context, when I use the term *law*, I mean primarily the idea of rules that seek to constrain the behavior of a state or of state actors, not social norms in general or legal ideals in the abstract. My initial focus on formal law will highlight not only the malleability of carefully written rules but also their tenuous status. Ultimately, though, my effort to untangle this issue of formal legal interpretation will require a broader consideration of legal discourse, state practice, the importance of emergencies and states of exception, and examination of the nature and role of rights in modern states and societies.

This book, in short, moves from considering the law of torture to assessing its role in shaping legal and political identity.

The path of my analysis roughly tracks the quotations that serve as the epigraphs to this book. I move, first, from general statements about understanding torture to specific prohibitions. I then study the way in which those prohibitions dissolve into “reasonableness,” as well as the impact of that dissolution on the political identity of rights-bearers. Finally, I examine the decisions of specific individuals to engage in torture for a variety of reasons, often with full knowledge that a ban on torture exists. In so doing, I seek to combine traditional legal analysis with history and something that might best be described as a cultural studies approach.

Along the way, I will stress that modern states pervasively regulate and control their populations and that their interactions with their citizens are regularly marked by violence that sometimes includes torture. Law’s interaction with this violence is complex. It constrains state violence, but it also creates personal vulnerabilities alongside protections. Further, one characteristic of torture in contemporary law is the effort to define it rationally, with precision, and to conceptualize it against a background of individual rights. Thus, nearly every definition of torture treats it as conduct so harmful that everyone has an absolute right not to be subjected to it. But law rarely works in absolutes. Most lawyers subscribe to the idea that there is an exception to every legal rule, and states will use the standard tools of legal argument to seek exceptions for torture. The easy response of prohibiting exceptions does not resolve the issue; it simply creates enormous pressure to narrow the definition of torture.

All of this is simply to say that language is critically important to the debate over torture. The rest of this introduction will consider some of the language of the U.S. debate over torture in the war on terror. In so doing, it will indicate just how difficult it can be to talk about torture.

Choosing Words Carefully



When allegations of abuse by U.S. forces in Afghanistan began to surface in late 2002 and early 2003, human rights groups quickly claimed that the United States was engaged in torture, although at least some of the practices probably were not torture under international law. The administration denied the claims and maintained that its actions were “humane and . . . follow all international laws and accords,” although that was almost certainly not the case for some of the reported conduct. Meanwhile, officials suggested that interrogation rules might need to be relaxed for the war on terror.⁴

In the spring of 2004, pictures of abuse at Abu Ghraib became public, and criticism reached a higher level. Once again, human rights advocates, joined more visibly now by editorialists and politicians, charged that U.S. forces had violated legal prohibitions against torture. Administration officials condemned the specific practices that had been made public, but they insisted that these were isolated actions that had nothing to do with government policy, let alone with American values. Thus, President George W. Bush asserted that the abuse at Abu Ghraib was the conduct of a few and “does not represent the America that I know.”⁵

Accusations of rough or degrading treatment continued to surface, including numerous claims of cruelty or torture by CIA operatives or at Guantánamo.⁶ Without the visual confirmation available for Abu Ghraib, however, these claims could be denied, recharacterized, or diverted into investigations. Further, unlike the thousands of people held at Abu Ghraib, the prisoners at Guantánamo—despite undoubted errors in many cases—were more likely to be connected with terrorist activity. Similarly, people held by the CIA were generally assumed to be “high-value” prisoners. Sympathy for their plight was more muted, and the official response was less contrite. Responding to an Amnesty International report that asserted ongoing abuse at Guantánamo, Bush asserted that the allegations were “absurd” and had been made by “people who hate America.” As for people in CIA custody, he unapologetically declared that “the CIA used an alternative set of procedures” that were “tough, and . . . safe, and lawful, and necessary.”⁷

The administration thus framed the debate in this way: torture is wrong, and we do not do it, but we use “tough” tactics that are both lawful and justified under the circumstances. Every official tactic is not-torture by definition, while tactics that qualify as torture are aberrations. Defenders of the administration could therefore argue that coercive measures short of “torture” are sometimes necessary against an enemy who operates in secret, across borders, and in violation of the laws of war. The debate over coercive interrogation, in short, seems to turn on whether the label *torture* can be attached to the conduct at issue.

Critics of the Bush administration thus had an incentive to use the term broadly. A 2005 report by Amnesty International, for example, used the word *torture* repeatedly—sometimes in conjunction with such terms as *abuse*, *ill-treatment*, or *cruel, inhuman, or degrading treatment*—to describe U.S. detention and interrogation practices. Yet the report does not provide any analysis of which practices actually rise to the level of torture. The report also described Guantánamo Bay as “the gulag of our times,” and the organization called on other countries to investigate U.S. officials for criminal violations of international law and to arrest them if they traveled

abroad.⁸ Describing Guantánamo as a gulag and calling for prosecution of U.S. officials tended to play as extremist in the context of public debate within the United States—just as similar claims likely would in any liberal democracy. My point is not that these claims were extremist but, rather, that they clashed with the felt truth that democracies do not do such things. As a result, President Bush’s statement that the report was “absurd” likely generated greater domestic agreement than Amnesty International’s characterizations of U.S. detention sites and conduct.

Just as critics had an incentive to define torture broadly, administration officials had an incentive to define it narrowly, to preserve a larger potential field of action. Government documents reveal that some officials succumbed to this incentive. Most famously, the Justice Department’s Office of Legal Counsel concluded in August 2002 that the phrase “severe pain” in the U.S. torture statute meant a level of pain “that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”⁹ As the writers of the memorandum must have known, this wording is significantly narrower than the definitions of severe pain in relevant international and U.S. legal sources. A Department of Defense working group advanced a broader definition of the pain associated with torture—“the adjective severe conveys that the pain or suffering must be of such a high level of intensity that the pain is difficult for the subject to endure”¹⁰—but most commentators likely would conclude it remains too narrow relative to international law.

The carefully negotiated U.N. Convention against Torture creates three categories of conduct with respect to interrogation and punishment: torture (which is illegal); other cruel, inhuman, or degrading treatment (which should be “prevented”); and conduct not covered by the convention and thus permissible unless subject to other international or domestic law constraints. The term *torture* is reserved for “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” by or with the consent or acquiescence of state actors. All other bad conduct is relegated to the category of “other cruel, inhuman, or degrading treatment,” which is apparently so capacious relative to torture that the drafters of the convention made no effort to define it.¹¹ The most one can say from reading the text is that this second category applies to any conduct that should be prohibited but falls short of torture.

The convention also suggests another consequence of splitting illegal conduct into two categories. Torture is banned absolutely: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”¹² But this language does not explicitly apply to

cruel, inhuman, or degrading treatment. The convention thus suggests the possibility of justifying violent interrogation or punishment that is illegal but does not rise to the level of “torture.”

Within this framework, a state accused of mistreating prisoners can flatly deny that it acted illegally, but it can also argue that whatever it may have done, it has not tortured. If the state can put forward a sufficient justification for the conduct that it claims is not torture, it has not violated the convention. The focus of the debate easily becomes a definition game: Is the conduct torture as defined by law? If not, is there a sufficient legal justification? This game is exactly the strategy that the Bush administration employed. That is to say, the administration’s public statements did not ignore international law; they followed its structure precisely.

Defining and Exploiting Difference



The language of torture also defines the victims of torture. One might say, for example, that people from different backgrounds or cultures expect or accept a certain level of violence from the authorities, so that a few slaps or blows are illegal when directed at some people but ordinary and permissible treatment when directed at others. The European Commission of Human Rights observed in the famous Greek Case of 1969 that some prisoners “tolerate . . . and even take for granted . . . a certain roughness of treatment . . . by both police and military authorities. . . . Such roughness may take the form of slaps and blows of the hand on the head or face.” According to the commission, this conduct was not inhuman or degrading treatment within the meaning of the European Convention on Human Rights, because “the point up to which prisoners and the public may accept physical violence as being neither cruel nor excessive, varies between different societies and even between different sections of them.”¹³ Put differently, people detained for political reasons by the Athens Security Police in the 1960s would have expected some rough treatment, and they—or at least some significant proportion of the public as a whole—would have found rough treatment acceptable in the context of Greek society. By contrast, in other parts of Europe, this conduct might have been flatly illegal during the same period, even if police sometimes engaged in it.

One could also argue in the other direction and contend that certain forms of treatment are particularly distressing to victims from certain backgrounds. Thus, Nigel Rodley suggests that “forcing a devout Muslim to fall to his knees and kiss the cross might well fall within the prohibition [against cruel, inhuman, and degrading treatment], whereas similar behav-

our towards prisoners who have no profound philosophical or religious aversion to the procedure would have no comparable significance.”¹⁴

Both ways of thinking about torture strive for sensitivity to cultural differences. The critical question is what to do with this sensitivity. Should legal rules respond to subjective experiences, so that a particular practice will be ruled torture for some but not for others, even if that means calling something torture in cases when most people would not experience it that way? Or should law classify conduct on an objective scale, so certain things simply are torture, even if that means ruling that some conduct is not abusive—despite the pain it causes in individual cases—because most people (perhaps even “reasonable” people) would not find it distressing.

These choices reflect familiar debates about the best ways to address individual perceptions and harm within a framework of rules meant to have general applicability and to provide notice and guidance to people in varying circumstances. But that is not all. Anyone seeking to draw on cultural difference to craft an appropriate legal rule might want to consider how difference has become a practice in the war on terror, both for U.S. officials seeking to gain an edge in interrogation and for journalists and human rights advocates seeking to explain why the abusive behavior of U.S. forces is particularly harmful.

On September 14, 2003, Lieutenant General Ricardo Sanchez approved several interrogation techniques for use on prisoners in Iraq, including the “presence of military working dogs.” According to Sanchez, this tactic was useful because it “exploits Arab fear of dogs while maintaining security during interrogations.”¹⁵ The source of this idea remains obscure, but it indicates that officials made an effort to learn about what they might have described as “Arab culture”—if only for the purpose of better controlling people from that culture. Importantly, accounts that discuss and deplore this use of dogs and its effect on prisoners also treat this understanding as correct.¹⁶

In the same way, U.S. officials at Guantánamo developed fairly strict rules on respect for what they understood to be Muslim religious practices. They took the trouble to think about the ways in which Muslim prisoners might be different from prisoners of other religious traditions. We find proof that Muslims require sensitive treatment in the fact that people rioted (and several were killed) in Afghanistan and other countries after *Newsweek* magazine reported that guards at Guantánamo intentionally desecrated copies of the Koran.¹⁷ The fact that the religious attitudes of Guantánamo prisoners and the causes of the riots are more complex does not detract from the fact that U.S. officials sought to understand their detainees and to deploy those understandings.

Consider, too, the flurry of news reports about sexual aspects of the mistreatment of prisoners at Abu Ghraib and Guantánamo. Among other things, U.S. soldiers put women's underwear on the heads of male prisoners (sometimes while they were handcuffed), and male prisoners were forced to appear naked in front of women (and men) and were sometimes put on leashes. Women interrogated men, and female interrogators employed such tactics as making sexually explicit remarks, "rubb[ing] their bodies against the men," "sexual touching, wearing a miniskirt and thong underwear," and "numerous instances in which female interrogators, using dye, pretended to spread menstrual blood on Muslim men."¹⁸ Many of the reports take care to point out that these tactics are particularly distressing to male Muslims. The writers quote experts who stress the "tribal" and "religious" aspects of Iraqi, Muslim, or Arab culture and suggest that physical contact with most women is a taboo to Muslim or Arab men: "To Muslim Arabs it would have been inconceivable to be placed in that degree of vulnerability before a woman"; "Having a woman conducting torture was grossly insulting to Muslims."¹⁹ The logic, in other words, is that these practices may be more or less distressing to people in general—and some of these practices might not be objectively distressing at all—but when it comes to Muslim men, these practices are egregious because the victims are sensitive to and likely to be disturbed by women in positions of power and by open or aggressive displays of female sexuality.

The actions of U.S. forces and the reports and charges of journalists, experts, and advocates draw from an identical set of attitudes toward the victims of U.S. abuse. Concerns about Arab or Muslim cultural sensitivities are equivalent to the culturally sensitive mistreatment inflicted by U.S. forces in the specific way that both practices define, position, and control the victims of torture and the people who inflict, witness, or write about it. More broadly, this common element reveals the significant risks in using perceived cultural differences as a way of framing discussions about torture.

Either version of the cultural difference approach to torture—that people in some cultures can endure more pain or that people in some cultures are particularly sensitive to certain practices—exoticizes the victims of torture. This exoticization takes place regardless of whether the overarching goal is to harm or to rescue. Either way, the objects of this approach are from "traditional" or "tribal" societies in which rights do not exist, justice is rough, religious practices are more "profound," and people hold extreme views on issues of sexuality and gender, ideas that cause them to act or react in irrational ways.

Thinking about the victims of torture in this way works only if paired with a way of thinking about "us"—by which I mean not only the torturers but also those who condemn it or who seek to explain it away. Unlike the

victims, we are from modern, progressive societies in which human rights are taken for granted. Either we should know better than to treat people this way, or we have a special responsibility to expose and try to stop it. Either way, we are in a superior position, and we have access to greater, perhaps universal knowledge. We are able to know and understand the victims—perhaps better than they understand themselves—and to take concrete steps to exploit or improve their circumstances.

Although these attitudes about torture are not new, they have become pervasive in the United States during the war on terror.²⁰ Supporters of U.S. military action in the Middle East have argued that the use of military force is part of a broader cultural struggle. For Bush, it was part of a “crusade,” while British prime minister Tony Blair distinguished “between the civilized world and fanaticism.” Norman Podhoretz made the point more explicitly when he urged “a benevolent transformation of the Middle East” by the United States that would include “the reform and modernization of Islam.” Others who are less sure of military action nonetheless agree that something is wrong with Muslims and that they must be changed. *Time* magazine summed up the consensus view when it declared, “The war that began three years ago in lower Manhattan . . . is a fight for the hearts and minds and souls of millions of Muslims . . . whose life choices may have a greater impact on the long-term security of the U.S., its citizens and its allies than battlefield victories or intelligence reforms.”²¹

In short, U.S. forces used abusive or humiliating tactics against Muslim detainees and suspected terrorists at the same time that the problem of terrorism became equated with the Muslim world. Meanwhile, government officials and commentators defined this world as exotic, uncivilized, and in need of guidance. These conclusions became “facts” as they were enforced by violence, asserted as true by powerful officials, and reported on by media representatives who already believed or were ready to believe such claims. In the current war on terror, accounts and practices of torture or other abuse draw on what is in effect a nonpartisan cultural and political discourse. This discourse is “Orientalist” in the sense intended by Edward Said. It conceives of the Orient, particularly the Muslim world, as “in need of corrective study by the West,” and it draws on unreflective generalizations about people or cultures seen as different, backward, quaint, and exotic, but also as threatening. Importantly, these ideas about the Muslim world also help “to define . . . the West . . . as its contrasting image, idea, personality, experience.”²²

The talk and practice of difference in the context of torture and related forms of abuse goes further, however. Former Los Angeles chief of police Daryl Gates once claimed that “some blacks might be more susceptible than ‘normal’ people to injury when officers applied a choke hold.”²³ Choke holds, which involve briefly cutting off the flow of blood to the brain, are an