# What We Talk about When We Talk about Torture

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**Understanding Torture: Law, Violence and Political Identity**
Jonathan T. Parry
Ann Arbor: University of Michigan Press, 2010

**Torture and Democracy**
Darius Rejali
Princeton: Princeton University Press, 2007

**Torture Team: Uncovering War Crimes in the Land of the Free**
Philippe Sands
London: Penguin, 2009

The Library of Congress holds over eleven hundred volumes with the word "torture" in the title. Nearly half of these have been written since 2001. The records of the British House of Commons show that the word "torture" was mentioned fourteen times in parliamentary debates during 1904, and three hundred and thirty-five different times in 2004. In many people's eyes torture is the dominant human rights issue of the twenty-first century. On both sides of the Atlantic it seems as if everyone has been talking about torture for most of the last ten years. Of all the harms committed over that decade, torture, though terrible, seems to have some heavy competition. Yet it has probably been the issue that has raised the most debate and caused the most soul-searching.

In much of the recent debate about torture, the events of September 11 and the response of American president George W. Bush and his administration are seen as a moment of rupture. For those who support the use of "enhanced interrogation techniques," the attack on the twin towers was a wake-up call. Al-Qaeda, they argued, represents an unprecedented threat, and the rules of the game have changed.[1] For those who support the universal and absolute prohibition of torture, the actions of the Bush administration represented a dangerous step back from the progressive elimination of torture over the last two hundred years.[2] Either way, after September 11, as far as approaches to torture are concerned, things are fundamentally different.

In this review essay I want to suggest that the recent increase in talk about torture is not simply an inevitable response to unprecedented interrogation tactics adopted by the Bush administration and its allies. Indeed, there is strong evidence that, in practice,

the techniques used at Guantánamo, Bagram and Abu Ghraib, or elsewhere have a history that stretches back throughout the twentieth century. What has changed are the processes and practices that we are able to talk about when we talk about torture. When we speak about torture in the early twenty-first century we speak about very different things than we would had we held the conversation even fifty years ago. Far from being an inevitable outgrowth of post-Enlightenment sensitivity to suffering, torture has moved from being understood as a legitimate technique for the production of evidence, to a mark of inefficiency, to a sign of barbarism, to be among the very worst of crimes against the person. It was only by the late twentieth century, with the end of the Cold War, medicalized notions of trauma, and international human rights campaigns, that torture became associated with a distinct form of cruelty and suffering and a matter of fine-grained debate about legal definitions. Many of the books in the Library of Congress could simply not have been written beforehand.

Talk about torture is often a proxy for wider debates about citizenship and the responsibilities of nation-states and those who speak in their name. When we talk about torture we are also able to talk about compassion for suffering and anger at cruelty and frame these in legal definitions and forms of accountability. Part of the attraction of talking about torture might be, though, the very things that it allows us not to talk about. In talking about torture, we can hold discussions that implicitly assume that violence has a technical solution, rather than being an issue of political and moral choices. We can also reduce politics to a discussion about the attempt to limit needless pain—rather than, say, redistribution. Finally, we can also pathologize only one very small form of violence, defined as torture, implicitly legitimizing many other equally pernicious forms. Talking about torture can narrow down the ways in which we talk about violence.

To stress the relatively recent history of our contemporary ideas about torture is not to trivialize the suffering of torture survivors. Neither is it to relativize torture or deconstruct it away into thin air. At its heart, the concept of torture contains a crucial moral concept, that people should not be treated cruelly and that the deliberate infliction of pain is something that should be avoided at (nearly) all costs. Rather, it is to stress that our contemporary concerns about torture are not a self-evident or inevitable response to violence and cruelty. Furthermore, our concepts of torture do not include all possible harms but rather a very limited and specific subset. We therefore need to ask what can be seen and said, and what has to be ignored, when we understand suffering and cruelty through the legal category of torture.

### The Law of Torture

One of the most careful products of the trend to lament, rather than celebrate, the Bush administration as a radical break with the past is Philippe Sands's *Torture Team.* Sands, an English human rights lawyer and academic, sets out to uncover how it was possible that the Bush administration could give official sanction to interrogation techniques that many people would call torture. In doing so, he focuses on Guantánamo Bay, but also draws conclusions that are relevant to interrogation policies elsewhere. For Sands, the "war on terror" saw a distortion of founding American principles, dating back to Lincoln's 1863 instruction that "military necessity does not

admit of cruelty." In particular, Sands argues that the Bush administration introduced interrogation techniques that were entirely new to the U.S. military (5). Prior to this moment, for Sands, there was a strong commitment in the U.S. armed forces to adhere to the international rules of law, and the prohibition of torture, in particular. He cites the signing of the 1949 Geneva Conventions and its 1977 Protocols as evidence. Sands is not naive enough to think that the U.S. government and its agents had never mistreated anyone, but he argues that there was a strong assumption against such treatment, especially in the military.

Sands's book is part travelogue and part legal demolition job. He travels across the United States getting interviews with many of the key lawyers and officials who gave advice on the use of interrogation techniques. The investigation follows a paper trail that leads from the interrogation rooms of Guantánamo and Bagram to offices in Washington. What is most immediately arresting about the book is that all these people were so willing to talk so openly to Sands. When doing the research, Sands had already published a book that accused Tony Blair and George Bush of conspiring to invade Iraq in direct violation of international law.[3] A quick search on Google would have revealed that he was highly unlikely to write positively about what they had done. Yet you get a strong sense that even if they felt they had been let down by their colleagues, none of the people he interviews feel that they have done anything to hide.

Little of what Sands writes about will come as a surprise to anyone who has been following the issues closely. What he does best is to give a feeling of the organizational and professional culture that could lead to Abu Ghraib and Guantánamo. You get a sense of the panic and frustration among those charged with collecting intelligence information. You get a sense of the instrumental way with which legal advice was treated, as a way to get around a problem, not as providing any form of moral guidance. You get a sense of the limited opposition that did exist to coercive interrogation, not on humanitarian grounds but simply the belief that violent techniques were unlikely to produce useful and reliable information. Sands convincingly shows that Abu Ghraib was not an aberration but has to be understood as part of a wider culture, encouraged from the very top, of detainee treatment.

Sands sees torture as primarily a legal problem, rather than one to do with military discipline, political will, or humanitarian sentiment. Sands, though, is too nuanced a writer to rule out any of these other approaches, and they are not mutually exclusive. Indeed, he appears to find the technical hair-splitting in documents such as the Jay Bybee–John Yoo memo authorizing harsh treatment abhorrent in the face of human suffering. It is perhaps for this reason that Sands includes the details of Mohammed al-Qahtani's interrogation throughout his book. Qahtani is a Saudi citizen, captured in Afghanistan and accused of being one of the missing September 11 hijackers. He was transferred to Guantánamo Bay in 2002. The log on Qahtani describes the use of white noise, being forced to act like a dog, extreme temperatures, forced nudity, body searches, threats, prolonged stress positions, and beatings, among other things. Sands turns to a psychiatrist to get her opinion on whether the treatment of Qahtani amounted to torture. Her conclusion is that it did. However, ultimately Sands seems

to understand the events in Guantánamo Bay in reference to international law: they were above all a product of the failure to respect the law.

For Sands, if the U.S. military had been given the right legal advice and had followed international humanitarian law, things would not have got out of hand. Thing went wrong because the Bush administration lawyers decided to push and squeeze the law to do their bidding. The key moment for Sands was when Secretary of Defense Donald Rumsfeld signed the memo written by William Haynes, the former Counsel General of the Department of Defense, in late 2002, authorizing the use of a new category of interrogation techniques. The starting point for Sands is always the legal documents; and it is lawyers, he argues, who bear a large measure of responsibility for what happened in Guantánamo and the decisions that lead to violations of the Geneva Conventions (275). Indeed, seen from the other side of the Atlantic, the extent to which American lawyers became involved in the precise calibration of interrogation techniques is astounding. Almost certainly such legal involvement would not and did not occur in the United Kingdom. The judicial inquiry into the death of an Iraq citizen during interrogation by British troops following the 2003 invasion, for example, has shown that there was virtually no institutional awareness of the implications of international law for the ways in which they should treat detainees. For the Bush administration, there seems to have been a concern to make sure that the legal ducks were all in line.

### Torture in Historical Perspective

The problem with treating the Bush administration as a moment of rupture in American military and legal tradition is that it that it is far from clear how great a break it really was. It is arguable that the ways in which the Bush administration sought to publicly legitimize the use of coercive questioning represented a shift in policy from previous administrations. However, both in terms of actual interrogation policy and legal interpretation, the events since September 11, 2001, cannot be straightforwardly thought of as an aberration. Instead, they must be understood as building on important historical precedents. First, America and its allies have long been involved in the use of violent interrogation techniques. The "war on terror" did not represent such a radical shift here as people might like to think. Second, the assumption that the law has been and continues to be opposed to the brutal treatment of detainees is problematic. I will look at each of these issues in turn.

As shocking as the photographs from Abu Ghraib and the reports coming out of Guantánamo were, it is not as if people have not committed similar abuses before. Europe has an inglorious history in this regard, with a line going back through Northern Ireland, Cyprus, Algeria, Kenya, the Congo, and many other colonies, not to mention two world wars. The United States has not been entirely innocent either. As Darius Rejali shows in his monumental *Torture and Democracy,* United States officials have a long track record of similar involvement. Waterboarding was not invented by Dick Cheney and Donald Rumsfeld, or those under their command, but has a trajectory going back to Vietnam and earlier and was used at the turn of the twentieth century by the police force in mainland America. As Rejali shows, the U.S. military was not immune either. During the Vietnam War, the U.S. Army's own

Investigation Division reported the use of electric shock and "water-treatment" on Vietcong prisoners. The placing of pressure on eyeballs was used as an interrogation technique by American troops during World War I. Decades earlier, American soldiers had forced funnels down the throats of detainees during the Spanish-American war.

Far from being a residue of some barbaric past, or a practice reserved for more authoritarian regimes, Rejali persuasively argues that there is a distinct form of torture actually born out of liberal democracies (3–5). This is a torture that is designed to leave no marks. "Clean tortures" have been deliberately developed in order to evade detection. Rejali links the growth of clean torture techniques to the parallel growth in the forms of monitoring, both domestic and international, that are designed to prevent torture. Many of the "clean" techniques described by Rejali were first used in democracies, as it is these states that have the greatest level of inspection, scrutiny, and accountability, thereby increasing the need to inflict pain in ways that leave no marks. It is not that democracies are worse than authoritarian states when it comes to torture; they just do it in a different way.

Whereas for Sands torture is a product of a decision not to follow the law, for Rejali the distinct nature of "democratic" torture can only be understood as an attempt to get around the law. He argues that it cannot be a coincidence that forms of torture that left no marks took off worldwide in the 1970s, just at the point when Amnesty International put torture on the international agenda as a human rights issue in new ways. As such, human rights monitoring is not an irrelevance, as some might argue, but can have indirect and often unperceived consequences. Humanitarian sensitivity to signs of pain can result in forms of violence that are less obvious, harder to see, and more insidious. Human rights monitoring tries to prevent torture through the soft power of persuasion and shame. Yet shame results not only in regret but also in an attempt to hide what has been done. The development of stun technology can, for Rejali, be seen as a product of the same processes and logics. Tasers, for example, have been developed as form of control through pain, which deliberately leaves few marks and does not result in fatal injury (224–57). For Rejali, far from being anathema to American and European democracy, torture by stealth is deeply embedded in its procedures of law and order.

Rejali's book is both a manual of torture techniques and an analysis of how and why those techniques have been used. It is encyclopaedic in scope, covering much of the twentieth century on five continents. Chapters trace the development and export of techniques such as whips, water, electric shock, noise, and drugs, among many others. For Rejali, there is not any deliberate policy behind the spread of torture techniques. Instead, methods spread by word of mouth, from practitioner to practitioner, most often from direct experience and in an ad hoc manner. Nevertheless, there are clear paths through which it is possible to trace the growth of particular techniques. Often, torturers learn from their own torturers. Palestinians, for example, seem to have learned many of their techniques from the Israelis, who seemed to have learned from the British. Magneto devices, or hand-cranked electric generators, apparently first were used in French Indochina in the 1930s (108–19). As such, electric torture in occupied France was not introduced by the Germans but by French members of the Gestapo. The South Vietnamese appear to have learned from the

French, and the Americans from the South Vietnamese. From there electric torture seems to have spread to Latin America and beyond. It is from the United Kingdom, the United States, and France that some of the most sophisticated torture techniques have been exported to Latin America and the Middle East.

### Legalizing Torture

A large part of Sands's critique of the Bush administration is based on the claim that it was responsible for the smuggling into American law of an alien and corrupting sanctioning of brutality and cruelty. The assumption is that torture is simply, absolutely, and irreconcilably illegal. However, as John Parry argues in his book *Understanding Torture*, the "law of torture is . . . less categorical and less constraining than it first appears" (2). For Parry, the prohibition of torture is far from absolute.

Torture is often said to be an international crime, and it is to international law that Parry turns first. He rightly points out that while the Geneva Conventions might prohibit torture, the scope of their protection is far from absolute (21). The Conventions set out a number of "grave breaches" for which states are required to prosecute perpetrators, including torture.[4] Crucially, however, the Conventions apply only to international armed conflict. The additional protocols of 1977 have a broader remit but still apply only to what amounts to full-scale civil war, rather than broader armed disturbances and tensions. Furthermore, in neither case is torture defined. The result, Parry argues, is that states have plenty of wiggle room in deciding who is protected under the Conventions and what those protections demand.

International human rights law also has its own ambiguities. The European Court of Human Rights is often thought to have the most developed and fine-grained jurisprudence on the prohibition of torture. However, as Parry argues, the court has often moved between subjective and objective definitions, creating flexibility for states to deny that their actions count as torture (53). In 1969 the European Commission on Human Rights argued that some prisoners "may tolerate . . . a certain roughness of treatment."[5] They were implicitly saying that whether an act counted as torture depended on the subjective expectations of the victim. More recently, in 1999, the European Court ruled that the level of severity was "relative; it depends on all the circumstances of the case."[6] Torture is not always the same thing. This can be seen as good, in that it prevents the creation of a firm line between torture and other forms of ill-treatment toward which states will move. Ambiguity keeps states on their toes. However, at the same time, such ambiguity can also lead to a lack of precision in attempts to hold states to account.

Parry also argues that the European Court has been very reluctant to label state actions as torture (53). Perhaps the most famous example is the case of *Ireland v. United Kingdom*. The Irish government had brought a case to the Court following the use of what became know as the "five techniques" by the British security services in Northern Ireland. These included wall-standing, hooding, noise, a bread and water diet, and sleep deprivation. The Court ruled that

> Although the five techniques . . . undoubtedly amounted to inhuman and degrading treatment . . . they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.[7]

The judgment insisted on the distinction between torture and inhuman or degrading treatment or punishment, arguing that torture "held a special stigma" that could not be applied to the United Kingdom.

For Parry, the United Nations human rights instruments do not offer much more clarity. The International Covenant on Civil and Political Rights Article 7 holds: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Yet it does not define torture. The United Nations Convention against Torture does seem to provide a definition of torture, in Article 1, 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.[8]

However, even this, according to the two most significant figures in its drafting, is not really a definition at all but rather a general guide to policy implementation.[9] As Parry argues, it places the inherently subjective notions of severe pain and suffering at its heart. The Convention does not address what types of suffering reach the required levels. How we draw the line is in specific circumstances is not clear.

Although Parry does not elaborate on this point, the placing of pain and suffering at the heart of definitions of torture can create special problems when it comes to the assessment of claims about particular incidents of torture.[10] On one level, as Rejali shows so well, torture is often deliberately inflicted so as not to leave any evidence of abuse. Furthermore, even if we could agree on a level of suffering, the problem with the prioritizing of torture as a particular type of pain is that, in a world obsessed with measuring everything, pain constantly resists measurement. Doctors are often called on to testify to the effects of torture. Indeed, Sands cites such testimony in his book. However, torture is simply not a straightforward medical category. There is nothing necessarily medically distinct about a torture victim. The prioritizing of pain rests on the assumption that suffering is self-evident and objective. Yet, when documenting torture, clinicians must search for traces that are often indirect, contradictory, or vague.[11] It is difficult to attribute a cause to most scars, which, on a surface reading, could equally be either the result of falling out of a tree or several weeks in a torture chamber. Psychologically, torture survivors can vary from having no more mental health problems than the general population to profound psychosis. There is only an indirect link between torture and mental health.

This has important implications for the recognition of torture in concrete cases. In practice, the key issue is not so much whether torture is right or wrong, or how we define torture in the abstract, but whether we can produce the right kinds of evidence to make the claim of torture stick. The issue is usually not people claiming that torture is legitimate but rather claiming that what they are doing does not count as torture.

Suffering is at the heart of most understandings of torture, but suffering resists easy documentation, meaning that claims about torture can all too often break down.[12] A prohibition which seems absolute in principle is on much more shaky ground when it comes to assessing evidence in individual cases.

While the Bush administration has been widely taken to task for its interpretations of the United Nations Convention against Torture, Parry shows that there is a much longer history of Washington trying to restrict its scope. During the 1980s negotiations over the Convention, the Reagan administration proposed that torture should be defined as a "deliberate and calculated act of an extremely cruel and inhuman nature . . . intended to inflict excruciating and agonizing physical or mental pain or suffering" (56). It also suggested that the common law principle of self-defense should mitigate the absolute prohibition of torture (57). Although these proposals fell by the wayside, American president George H.W. Bush argued that torture should be limited to "barbaric cruelty" and conduct which "the mere mention of sends chills down one's spine" (57). In ratifying the Convention, the Senate eventually defined torture as "an act . . . primarily intended to inflict severe physical or mental pain or suffering" (58). This was a more restricted definition than found in the Convention itself, which had no requirement that the principal aim of the act was to cause severe pain and suffering.

The United Nations Convention against Torture was ratified by the U.S. Senate on the basis that it went no further than already existing constitutional rights (60). Yet, as Parry shows, in practice American constitutional protections are far from absolute. The Supreme Court has ruled that the U.S. Constitution permits harsh and degrading prisons so long as inmates receive the "minimal civilized measure of life's necessities" (70). The Supreme Court has also concluded that the Constitution does not interfere with the discretion of law enforcement officials to engage in conduct that threatens a person's life, as long as that conduct is "reasonable" (76). As Parry argues, the criminal prosecution of state officials is extremely rare, creating an effective form of impunity. Perhaps most importantly, torture is not a crime for actions carried out within the United States. A person can be charged with the specific crime of torture only for acts committed abroad.[13] Pulling out someone's fingers nails does not count as torture if it is carried out in New York or New Orleans; it does if it takes place in Baghdad or Kabul. It is worth remembering, however, that no individuals were ever charged with the specific crime of torture for the events of Abu Ghraib. Instead they were prosecuted for dereliction of duty, conspiracy to maltreat detainees, and battery.

Parry argues that there is no absolute constitutional right not to be tortured (77). He also claims that despite the widespread criticism of the "torture memos" produced by the Bush administration lawyers, the memos are actually "defensible under existing law" (177). In several areas, such as the delegation of authority to the executive branch and the compromises written into the Convention against Torture, the memos cannot be simply dismissed. For Parry, they may go too far, but they are not an aberration. Instead, they exploit "tendencies and tensions in the law" (177). These tensions include the focus on the narrow notion of intent, the insistence on a narrow definition of torture, and the stress on the distinction between torture and other forms of ill-treatment. In doing so, the memos draw on the ambiguities written into the Convention against Torture and stressed by the Senate when ratifying the Convention.

**Why Do We Talk about Torture?**

Why, if torture was widely practiced by U.S. officials and their European allies prior to the "global war on terror," and the legal prohibition of torture is not so straightforwardly absolute, has a concern with torture been so prevalent in the early twenty-first century? Seen from the other side of the Atlantic, much of the focus on torture in the United States looks like an attempt to criticize the "war on terror" without sounding unpatriotic. It is not the critics of the war who are un-American, so the argument goes, but rather those who have condoned the brutal treatment of detainees. After all, even George W. Bush insisted that the pictures of Abu Ghraib did not represent the America that he knew, and he expressed regret that "people who see these pictures do not understand the true nature and heart of America."[14]

For some U.S. commentators, the presence of torture threatens the core of American values.[15] As Senator John McCain told the Senate:

> We are Americans, and we hold ourselves to humane standards of treatment of people no matter how evil or terrible they may be. To do otherwise undermines our security, but it also undermines our greatness as a nation. We are not simply any other country. We stand for something more in the world—a moral mission, one of freedom and democracy and human rights at home and abroad. We are better than these terrorists, and we will we win. The enemy we fight has no respect for human life or human rights. They don't deserve our sympathy. But this isn't about who they are. This is about who we are. These are the values that distinguish us from our enemies.[16]

McCain is not alone in such an approach. In Sands's book too there is a clear line of argument that the Bush regime corrupted the traditional American approach to the treatment of detainees.

As John Parry suggests, debates about torture are often implicitly debates about identity. Talking about torture is a way of talking about how you perceive the nation-state. There is a long history in common-law countries, in particular, of hitching a self-perception about the uniquely national virtues of a commitment to the rule of law to the prohibition of torture. As far back as the eighteenth century, commentators were self-congratulatory about the relative absence of torture in common law and saw it as a key point of distinction from the civil law of the European continent. In his treatise on the history of the common law, for example, the English judge and academic William Blackstone praised England as a place where

> our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown.[17]

For Blackstone, torture was something that happened on the other side of the English Channel. Crucially, it was not humanitarian sentiment that accounted for the relative absence of torture in common-law countries. More important was the fact that compared to civil-law systems, common-law jurisdictions could convict with virtually no evidence.[18] There was no need to extract a confession. It is also worth noting that

torture continued in England under special warrant until 1640.[19] Executing traitors by drawing and quartering continued until 1814 and beheadings were not abolished until 1870.

In the nineteenth century torture was used as a key marker in drawing the line between the modern and the backward, the human and the inhuman, the enlightened and the barbarous. In this context, the abolition of torture was also a key factor is justifying the "civilizing mission" of colonialism. One of the justifications for British intervention in the Sudan during the late nineteenth century, for example, was the prevention of torture by the Islamic state headed by the *mahdi* Muhammad Ahmed and his successors.[20] Similarly, as Parry shows, in the 1850s reports reached the United Kingdom of the use of torture as a policing method in the Madras Presidency, in what is now southern India. The official report into the incidents placed the primary blame on native police. It argued that "the whole cry of the people . . . is to save them from the cruelties of their fellow natives, not from the effects of unkindness or indifference on the part of the European officers of Government."[21] The British colonial presence was not seen as a cause of these abuses but instead as necessary to prevent them from taking place.

Parallels with the invasion of Iraq in 2003 come to mind. Before the second Gulf War, and even after, it was argued that what distinguished the United States and its allies from Iraq was that one side practiced torture and the other did not. In the United Kingdom, even when pictures emerged from Abu Ghraib, the stock response was that British troops would never do the same. Subsequent events of course proved that torture did not separate the United Kingdom from the United States. In this process, though, much of the worry about allegations of abuse was more concerned with the damage they would do to the image of the British military than with the suffering of the detainees.[22] At times commentators have come close to the claim that if an act is carried out by a British citizen, it cannot almost by definition be torture, as the British simply do not behave that way.

Talk about torture has therefore historically been a way of talking about the nature of the democratic nation-state and the nature and limits of its obligations to citizens and noncitizens alike. Even those who would condone the use of torture in very specific circumstances say they do so with heavy hearts.[23] From this perspective, torture is still very wrong, but just not quite as wrong as other things. Indeed, it might be argued that for some of its supporters, the fact that they are willing to condone torture becomes an index of their patriotism, of a willingness to "do anything to protect the American people." By talking about torture you can also talk indirectly about who counts as a legitimate citizen, how far rights should be granted, and to what extent state officials should be accountable for their actions.

### Why Do We Talk about Torture Now?

Given the long history of using the category of torture to make a distinction between the civilized and the uncivilized, we are still not much nearer to understanding why, in the early twenty-first century, we talk about torture with quite the intensity that we currently do. The key explanation is that to talk about torture in the early twenty-first century allows us to invoke a range of issues in a way that would not previously

been possible. In particular it allows us to foreground a concern with individual suffering and legal definition.

The objection to torture among eighteenth-century reformers was not principally that it was cruel but rather that was inefficient and unreliable, as well as a breach of due process. For Cesare Beccaria, perhaps the most famous of eighteenth-century antitorture polemicists, "torture is a certain method of acquittal for robust villains and for the condemnation of innocent but feeble men."[24] Crucially, when torture was prohibited, it was as an infringement of due process rather than a crime against the person. Torture was not seen by campaigners such as Beccaria as a unique form of cruelty or suffering. Rather it was understood as part of a broader process of arbitrary state violence. If suffering was a concern, the implications for the victim were less important than the coarsening effect on those who witnessed the suffering. But the major objection to torture was that it produced unreliable evidence. Our contemporary notion of torture, however, still contains important residues of its judicial past, in its focus on state officials and the deliberate infliction of pain for specific purposes.

World War II is often thought of as a moral threshold in the ways in which Europeans and Americans think about torture. After all, it was in the wake of the war that we got the Universal Declaration of Human Rights, with its statement in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Yet the prohibition on torture was far from an inevitable product of the moral rejection of the horrors of Nazi Europe. Indeed, it is conceivable that such prohibition might not have been included in the Declaration at all. There were various draft human rights conventions and declarations making the rounds during the war, and if torture was mentioned at all, it was mostly in passing. H. G. Wells's polemical *Rights of Man* contains a draft declaration in which the word "torture" is embedded deep in the text. He writes:

> No man shall be subjected to any short of mutilation or sterilisation, except with his own deliberate consent, freely given nor to bodily assault, except in restraint of violence, nor to torture, beating or other bodily punishment; he shall not be subjected to imprisonment with such an excess of silence, noise, light or darkness as to cause mental suffering, or to imprisonment in infected, verminous or otherwise insanitary quarters, or to be put in the company of verminous or infectious people.[25]

For Wells, torture was certainly wrong, but it was just one of many wrongs and was given no particular priority. It is of course important not to overstate the political influence of Wells's book, but it gives a good sense of the popular concerns of the time (and was, after all, translated into over thirty languages). Torture was also absent from many of the early drafts of the Universal Declaration. When it did make it in, many of the leading drafters worried that the language was too vague. Charles Malik, the Lebanese philosophy professor thought by many to be the intellectual powerhouse behind the Declaration, wondered whether dental work might count as torture.[26] The British were concerned that the prohibition of torture might rule out the use of the cane in schools, whereas the Scandinavians were worried about the prohibition of forced sterilization.[27] Reassurances that corporal punishment would still be allowed in

British public schools were not sufficient, and the British delegation abstained from the first vote on the draft article.[28]

There was also some debate in the drafting of the Universal Declaration over whether torture was primarily a right that related to the integrity of the person or was linked to principles of due process.[29] In the various drafts the treatment of torture therefore moved between being next to the right to life on the one hand, and the right to a fair trial, on the other.[30] The association of torture with judicial interrogation and punishment was almost certainly heavily in the minds of many of the delegates, and several proposed that torture should be prohibited "even when guilty of a crime."[31] In any case it is important to remember here that the Universal Declaration contains no definitions of torture, and torture is given no particular significance over other wrongs but is listed alongside other forms of ill-treatment and comes after slavery. As Charles Malik argued, it was "better to be on the side of vagueness than on the side of legal accuracy."[32] For Malik this meant that Article 5 could act as a general moral statement that explained "in an international instrument that the conscience of mankind had been shocked by inhuman acts in Nazi Germany."[33]

Even as late as the early 1970s, torture had still not gained the precise associations that it has in the early twenty-first century. For example, following the outbreak of civil unrest in the late 1960s and a bombing campaign by the Irish Republican Army, internment without trial was introduced in Northern Ireland on August 9, 1971. Over three hundred and forty arrests of Republicans were made on the first day alone. By the end of the week, allegations of brutality had made their way into the press.[34] Almost exactly the same techniques would be used thirty yeas later by British troops in Iraq. However, unlike in the early twenty first century, torture was not the default word used to describe the actions on the British soldiers. The key distinction being made by the British government was between "brutality" on the one hand and "ill-treatment" on the other. The distinction between brutality and ill-treatment, which has no legal meaning, rests on the intention of the perpetrator. Lord Compton, asked by the government to look into the allegations, defined brutality as "an inhuman or savage form of cruelty, and that cruelty implies a disposition to inflict suffering, coupled with indifference to, or pleasure in, the victim's pain."[35]

It was not simply that the British government and its appointees were too coy to use the term "torture" in the early 1970s. Although torture was widely referenced in the protests against the treatment of Republican detainees, it was far from the default term used to describe the techniques. The initial *Sunday Times* article that broke the story on mainland Britain referred only to "brutality," setting out the allegations of what it called "psychological pressuring, . . . virtually unrelieved harassment, and psychological intimidation."[36] One of the first written accounts of the treatment of internees was by Seamus Ó Tuathail, a Sinn Fein member and journalist who was rounded up in mid-August 1971.[37] He accuses the British army of "brutality and torture." The same phrase is widely used in other publications.[38] "Torture" is used here to describe the physical act, but "brutality" is the multiplier referring to both the cruelty of the perpetrator and the suffering of the victim. Torture here does not stand alone as a moral harm.

In the protests against British interrogation methods in the early 1970s there is

little direct reference to the law or to human rights. Where Ó Tuathail makes reference to the European Convention on Human Rights, it is to the right to a fair trial and the prohibition on arbitrary arrest, rather than the prohibition of torture. Edward Heath's government recognized that under the current laws in Northern Ireland and the rest of the United Kingdom the techniques were illegal.[39] In the discussions held over the issue by British politicians and bureaucrats, the law in question was that of assault, and mention was only made in passing of international obligations. It was only after the European Court of Human Rights ruled in 1977 that British acts were a form of inhuman or degrading treatment or punishment but did not deserve the special "stigma" attached to torture that the "five techniques" became seen as fundamentally an issue of international human rights law.[40]

By the late 1970s torture had begun to gain its current associations and moral prioritization. The recent history of Amnesty International provides a way of illustrating these general points. Amnesty had begun campaigning for the international prohibition of torture in the early 1970s, and this work was cited when it was awarded the Noble Peace Prize in 1977. However, Amnesty came to torture relatively late. Torture was not within its original mandate and was only included in 1966 after much internal debate about the dilution of expertise and resources.[41] Even in its work on British interrogation policies in Northern Ireland in the early 1970s, Amnesty did not routinely use the word "torture."

When Amnesty did start to emphasize torture, the history of supporting individual prisoners of conscience meant that the experiences of individual survivors were given prominence. Torture survivors were also seen as heroic and principled. Amnesty also highlighted the pain associated with torture as a cause of special horror. According to the 1973 report, "pain is a common human dominator, and while few people know what it is to be shot, to be burned by napalm, or to starve, all know pain. Within every human being is the knowledge and fear of pain, the fear of helplessness before unrestrained cruelty."[42] Out of this Amnesty campaign, medical groups sprung up. In the United Kingdom, Denmark and the Netherlands, and elsewhere, the groups were concerned with providing medical documentation of past events of torture but also increasingly sought to provide therapeutic care to survivors of torture. Torture increasingly became an object of medical and psychological knowledge. In his book, Sands turns to the London-based offshoot of the Amnesty Medical Groups, now known as the Medical Foundation for the Care of Victims of Torture, when looking for evidence about whether the treatment of detainees in Guantánamo amounts to torture.

The Amnesty Campaign Against Torture also increasingly emphasized the norms of prohibition rather focus on the political causes. Until the early 1970s Amnesty employed no lawyers on its full-time staff and its focus on torture was primarily moral in orientation. From the 1970s, it campaigned for specific legal prohibition, with a focus on international law in particular. In the context of the Cold War, human rights was increasingly being used by the United States and Western Europe as a tool to criticize the Soviet Union and its allies.[43] However, many of the regimes that were attracting the most criticism for torture in Latin America and southern Europe were allies of the United States. Amnesty International walked into the spaces that this created in a United Nations usually frozen by bipolar rivalries. Given its turn to

human rights as an instrument of foreign policy, the United States was never going to oppose a convention against torture, and the Soviet bloc saw this as a potential useful stick with which to beat American allies. Amnesty International, together with several other NGOs, began lobbying for such a convention, which eventually resulted in the United Nations Convention against Torture.

The Convention brought into focus three of the dominant threads running through our contemporary ideas about torture. First, it singled out torture as a significantly worse offense than other forms of ill-treatment. Signatory states, which were being asked to introduce criminal sanctions, were worried that the phrase "inhuman or degrading treatment or punishment" was too vague to be applied to the criminal law. As a result, the bulk of the Convention addresses torture alone. Second, the Convention brought into focus the concern with legal definitions. For most of the twentieth century torture has been treated as a broad ethical issue involving the abhorrence of cruelty. Only by the end of the century was torture an issue of precise legal debate, hence a debate about its acceptability could become a debate about legal definitions rather than human dignity or the abhorrence of authoritarian politics. Finally, the Convention clarified the association of torture with particular forms of trauma and singled it out as a unique and horrific form of suffering. This is not to say that people had not thought about torture in terms of legal definition and suffering earlier; but from the 1970s on it was impossible to talk about torture without doing so.

### What Can We Talk about When We Talk about Torture?

The ways in which the meanings and implications of torture have been understood from the late twentieth century have yielded a new language through which we can talk about the deliberate infliction of suffering. Talking about torture in the early twenty-first century allows us to talk about politics, and international politics in particular, in a very specific way. It allows us to debate international interventions and the infliction of violence, as if they were a mater of applying the right law in the right way. It allows us to take positions such as the one held by Sands, and imply that the mistreatment of detainees is due to failure to follow the letter of the law. Violence here becomes a matter of legal calibration, rather than political choice or ethical deliberation.

In his book, Parry is skeptical about whether legal prohibition is the best way to prevent torture, which he sees above all as a political problem. He argues that the law is actually a very weak and limited way of combating cruelty. Focusing on the law does not tell as anything about the political contexts that enable torture. Nor does it take into account the processes so well described by Rejali, by which states attempt to develop new techniques and methods as ways of bypassing formal prohibitions. Legalization does not, of course, necessarily result in depoliticized discussions about the causes and consequences of violence. It would be fair to assume that none of the people involved in the litigation around accusation of torture in the United States or United Kingdom would think that the issue is not inherently political. However, by talking in terms of law, the ground has already been ceded in terms of where and what types of debate can be had.

Talking about torture also allows us to talk about international politics generally,

and the treatment of detainees specifically, as if they were a matter of the eradication of pain. However, as Wendy Brown, writing more generally, puts it: "When social 'hurt' is conveyed to the law for resolution, political ground is ceded to moral and juridical ground."[44] In this process, there is a focus on victimhood, on the suffering passive individual, who needs to be rescued, rather than an engagement with the broader political and economic processes that produce the infliction of violence. The debate can turn into an issue of the precise level of pain permitted in interrogation techniques, rather than the wider politics of U.S. and European intervention in Middle East politics. Indeed, this is precisely what the "torture memos" tried to do when they argued that torture amounted to pain equivalent to serious organ failure. They seem to have missed the point that organ failure can be painless.

Above all, a focus on torture can bracket it from other forms of violence. Ethically, this separation can be seen as important, as it marks off some behavior as particularly abhorrent. Politically, the separation of torture from other forms of violence entails saying that such behavior is not par for the course in the normal run of liberal democracies. The distinction between torture and other forms of ill-treatment, for example, was important in the U.S. treatment of detainees in Guantánamo and elsewhere, as the Bush administration argued that different prohibitions were attached to the different categories. However, Parry is skeptical about the value of separating torture off as unique and distinct (12–13). On one level, the separation of torture from other forms of ill-treatment invites states to play games over where the line lies, rather than dealing with the issue of ill-treatment more broadly. On another level, the separation of torture draws an arbitrary line through a wider spectrum of violence. The United Nations Torture Convention's definition of torture excludes pain or suffering arising from "lawful sanction," but it is not clear why pain inflicted for legal reasons is any better than other forms of deliberately inflicted suffering. In focusing on the abhorrent and the seemingly abnormal practice of torture, there is an obvious danger of implicitly legitimizing other forms of violence perpetrated by the state under the cover of law.

## NOTES

1. See for example Jean Bethke Elshtain, "Reflections of the Problem of 'Dirty Hands,'" in *Torture: A Collection,* ed. Sanford Levinson (Oxford: Oxford University Press, 2004).

2. See, for example, Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York: Doubleday, 2008).

3. Philippe Sands, *Lawless World: Making and Breaking Global Rules* (London: Penguin, 2006).

4. Geneva Convention I, Art. 50, Geneva Convention II, Art. 51; Geneva Convention III, Art. 130, Geneva Convention IV, Art. 147.

5. European Commission on Human Rights, "Greek Case," *Yearbook of the European Convention of Human Rights* (The Hague: Nijhoff, 1969).

6. *Selmouni v. France*, App. no. 25803/94 (ECtHR, July 28, 1999), para. 100.

7. *Ireland v. The United Kingdom*, App. no. 5310/71 (ECtHR, January 18, 1978), para. 167.

8. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

9. J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrect: Martinus Nijhoff, 1988), 122.

10. Tobias Kelly, *This Side of Silence: Human Rights, Torture and the Recognition of Cruelty* (Philadelphia: University of Pennsylvania Press, 2011).

11. Didier Fassin and Estelle D'Halluin, "Critical Evidence: The Politics of Trauma in French Asylum Policies," *Ethos* 35, no. 3 (2007): 300.

12. Kelly, *This Side of Silence*.

13. U.S. *Federal Extraterritorial Torture Statute*, 18 USC § 2340A.

14. Cited in Ian Buruma, "Ghosts," *New York Review of Books*, June 26, 2008.

15. Karen Greenberg, "The Rule of Law Finds Its Golem: Judicial Torture Then and Now," in *The Torture Debate in America,* ed. Greenberg (Cambridge: Cambridge University Press, 2006).

16. "Statement of Senator John McCain Amendment on Army Field Manual," July 25, 2005, available at http://mccain.senate.gov (accessed October 12, 2005).

17. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (London: Sweet, 1829), 4:3.

18. John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago: University of Chicago Press, 2006), 78.

19. Ibid., 81.

20. Hansard, House of Commons, Debate of March 20, 1884, cols. 305–308.

21. *Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency, Report of the Commissioners for the Investigation of Alleged Cases of Torture in the Madras Presidency* (Madras: Fort St. George Gazette Press, 1855), 35.

22. See, for example, Ian Cobain, "David Cameron Announces Torture Inquiry: Prime Minister Says the Inquiry, Chaired by Sir Peter Gibson, Will Remove the 'Stain' on Britain's Reputation," *Guardian*, July 6, 2010.

23. See, for example, Elshtain, "Reflections of the Problem of 'Dirty Hands.'"

24. Cesare Beccaria, "An Essay on Crimes and Punishment," in *The Phenomenon of Torture: Readings and Commentaries*, ed. William Schulz (Philadelphia: University of Pennsylvania Press, 2007), 35.

25. H. G. Wells, *What Are We Fighting For? The Rights of Man* (London: Penguin, 1940), 83.

26. Commission on Human Rights, Drafting Committee, First Session, Preliminary Record of the Third Meeting. E/CN.4/AC.1/SR.3, June 13, 1947.

27. See Kelly, *This Side of Silence.*

28. Commission on Human Rights, Drafting Committee, Second Session, Summary Record of the Thirtieth Meeting. E/CN.4/AC.1/SR.30, May 20, 1948.

29. Collation of the Comments of Governments on the Draft International Declaration on Human Rights, Draft International Covenant on Human Rights and the Question of Implementation. E/CN.4/85, May 1, 1948.

30. Report of the Drafting Committee to the Commission on Human Rights. E/CN.4/95, May 21, 1948.

31. Draft International Declaration of Rights Submitted by Working Group Drafting Committee (Preamble and Articles 1–6). E/CN.4/AC.1/W.1, June 16, 1947. See also E/CN.4/82/Add.8, May 6, 1948, Commission on Human Rights, Third Session, Observations of Governments on the Draft International Declaration on Human Rights, the Draft International Covenant on

Human Rights, and Methods of Application, Communication Received from the French Government.

32. Commission on Human Rights, Drafting Committee, Second Session, Twenty-Third Meeting. E/CN.4/AC.1/SR.23, May 10, 1948.

33. Commission on Human Rights, Drafting Committee, Second Session, Twenty-Third Meeting. E/CN.4/AC.1/SR.23, May 10, 1948.

34. "Catholics Force Inquiry into Ulster Brutality," *Sunday Times*, August 22, 1971.

35. Edmund Compton, *Report of the Enquiry into Allegations against the Security Forces of Physical Brutality in Northern Ireland Arising out of the Events of the 9th August, 1971* (London: HMSO, 1971), 15.

36. John Barry and Phillip Jacobsen, "Brutality? What the Army Is Accused of," *Sunday Times*, August 22, 1971.

37. Seamus Ó Tuathail, "They Came in the Morning" (pamphlet, 1971, on file with author).

38. Denis Faul and Raymond Murray, "British Army and Special Branch RUC Brutalities" (pamphlet, n.d., on file with author); the Campaign for Social Justice in Northern Ireland, "Northern Ireland—The Mailed Fist: A Record of Army & Police Brutality, from Aug. 9–Nov. 9, 1971" (pamphlet, 1972, on file with author).

39. A civil action was later taken in Lurgan County Court against the Royal Ulster Constabulary Chief Constable, which resulted in an award of £300 for wrongful arrest and assault. Damages were also awarded a few months later to nine internees and seven former internees. Two army privates were fined £25 after pleading guilty to assault and causing actual bodily alarm.

40. *Ireland v. The United Kingdom*, App. no. 5310/71 (ECtHR, January 18, 1978).

41. Amnesty International, *Amnesty International, A Chronology: 1961–1976* (London: Amnesty International, 1976). The mandate was expanded to refer to all of Article 5 of the Universal Declaration of Human Rights, rather than specifically to torture.

42. Amnesty International, *Report on Torture* (London: Gerald Duckworth, 1973), 17.

43. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010).

44. Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), 27.