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The American Torture Problem

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Abstract: This essay offers a brief account and (partial) critique of the Central Intelligence Agency's enhanced interrogation program which was utilized during the wars in Iraq and Afghanistan.

The current president of the United States, Donald Trump, vocally supported the use of torture on terrorist suspects during the 2016 presidential election when he stated, "I will bring back waterboarding, and I will bring back a hell of a lot worse than waterboarding" (Myre 2018). And in 2018, President Trump nominated Gina Haspel to be the director of the Central Intelligence Agency. Haspel is an individual who was previously in charge of operating a CIA "black site" where the enhanced interrogation program was used on terrorist suspects. Although it is undisputed that the United States of America was severely violated by the terrorist attacks on September 11th, many of the controversial "enhanced" interrogation methods that the government has used on terrorists since that time fulfill the criteria necessary to be deemed torture; these techniques should not be utilized for any purposes as there are other interrogation options available that are far more productive and humane.

Regarding interrogation, there is a science and an art to successfully drawing information from suspects and prisoners without the use of any physical force. The body language of people who are trying to hide information often inadvertently changes; sometimes, their eyes blink at irregular intervals, there is a shiftiness in their movements, or minuscule nervous ticks such as foot-tapping and nail-biting are present. A proficient interrogator may pick up on these subconscious movements. He may also be so skilled in the art of questioning that he can phrase interrogatives in such a way that suspects will reveal vast amounts of information by their use of verb tense and word choice. Veteran interrogators do not frequently fail to learn *something* from suspects, even when not using physical force. Heather MacDonald writes on the subject, "Pentagon doctrine, honed over decades of cold-war planning, held that 95 percent of prisoners would break upon straightforward questioning."(MacDonald 2006, 84). Thus, simply asking suspects and prisoners questions in a skillful manner is often sufficient by itself as a technique for information gathering—so thought the government and virtually everyone else. However, the "terrorist" posed to be a much more challenging form of interrogee than any enemy before it. Al Qaeda fighters captured in Iraq or Afghanistan were not giving up information. They were not cooperating. Instead, they were silent, unmoving, and often knew that the interrogators' hands were tied (MacDonald 2006, 85). In a war where acquiring information was urgently necessary, the enemy of the United States was far from ideal.

As a result, the United States government resorted to rather unconventional and intense practices to get the silent enemy talking. It should be noted that the government cannot be blamed for prioritizing urgency as some detainees undoubtedly knew where Improvised Explosive Devices (IEDs) awaited American convoys and knew where their dangerous radical-Islamic friends were hiding. However, exigency alone does not necessarily justify the following tactics green-lighted for use on detainees at various American facilities and beyond: waterboarding, rectal feeding and rehydration, sexual humiliation, beatings, intensive *fear-up* procedures, and extraordinary rendition.

The aforementioned methods are clearly prohibited according to the Eighth Amendment, the Geneva Conventions, and the Convention Against Torture from use on suspected and convicted criminals within U.S. borders and on enemy-state actors who qualify for prisoner-of-war status; this is not without reason as these tactics do, at *prima facie*, meet the criteria to be deemed

torturous and unlawful against protected persons. The Eighth Amendment of the United States Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This amendment was written and historically considered with a two-fold purpose: to prevent numerous and arbitrary financial punishments and barbaric and indecent physical punishments from being inflicted on individuals within U.S. territory. The Third Geneva Convention relates to the treatment of prisoners of war. In Article 4, it explicates "prisoner of war" as anyone captured by the enemy who is an official member of an armed force participating in the conflict; anyone who is a member of a militia or volunteer corps that is included in armed forces; anyone belonging to a militia, volunteer corps, or resistance movement functioning outside of their own territory; anyone who accompanies the armed forces without being an official member thereof; and any locals who spontaneously take up arms to resist invading forces. Regarding these individuals' protections, Article 14, Respect for the Person of Prisoners, states that "[p]risoners of war are entitled in all circumstances to respect for their persons and their honour." In a commentary on Article 14, the International Committee of the Red Cross explains *respect for the physical person of the prisoner* as the prohibition of killing, wounding, or endangering prisoners of war (ICRC 1960). It also includes protection from "…any direct injury: blows, torture, cruelty, mutilation, medical or scientific experiments which are not in the interest of the prisoner" (ICRC 1960). The Third Geneva Convention paints with a seemingly wide brush in its inclusion of categories of actors that qualify for POW status and also in its protection of those persons. Article 32 of the Fourth Geneva Convention, relating to the protection of civilian populations, states, "Like murder, torture is one of the acts listed in Article 147 as a 'grave breach'."

The Geneva Conventions very clearly prohibit any form of torture and cruel treatment of POWs, civilians, and participant enemies who have surrendered. They go to great lengths to ensure the protection of basic human rights for individuals and groups who may, in times of war, be susceptible to having those rights violated. If any specific party could reinterpret Geneva to allow torture, then that party could reinterpret anything. Likewise, the United Nations's "Convention Against Torture" (CAT) sought to achieve similar goals with a greater emphasis on torture. The document was ratified by the United States in 1994. It contains 53 articles outlining the inherent rights of human beings and the responsibilities of governments to protect people against torturous and inhumane treatment. The CAT explicitly prohibits agreeing parties, including the United States, from making any circumstantial exceptions or justifications for torture by invoking authority (Article 2) or practicing rendition (Article 3).

After a look at the U.S. Constitution and two international treaties related to torture, it certainly seems to be clear that criminals in U.S. territory may not be subject to any cruel and unusual tactics; the wide array of persons who qualify for prisoner-of-war status are protected from all forms of torture and cruelty in all circumstances; civilians and surrendered enemies may not be murdered or subject to inhumane, humiliating, or cruel treatment for any reason; no person may be extradited to a state where it is believed torture will take place; and no person may be subject to severe pain or suffering to draw out information or to punish by an individual acting in the capacity of a public official—no exceptions.

How then did the United States government seem to get it all so wrong? —because it wanted to. In order to justify using unlawful tactics—clearly forbidden by the previously mentioned

conventions—for interrogations in the War on Terror, the George W. Bush administration assigned the enemy a new status and adopted unreasonable criteria for what counts as torture in order to bypass nearly all legal restrictions and prohibitions; the infamous "Torture Memo" from the Office of Legal Counsel (OLC) gave the go ahead for agents of the state to use virtually any tactics they saw fit on terrorist suspects and prisoners. One of the primary steps of the justification process was to assign captured enemies of the War on Terror a status that is unprotected by the Geneva Conventions and the Convention Against Torture (Office of the Deputy Assistant Attorney General, 2003). The OLC also specified that Congress could not interfere with the President acting in his role as Commander in Chief , who subsequently concluded that Al Qaeda and the Taliban were to be referred to and treated as *unlawful* and *illegal* combatants. Regarding which actions were then prohibited against unlawful combatants, the OLC made the determination that the U.S. Military, the Central Intelligence Agency, and other agents of the state could not be restricted by criminal statutes barring "simple assault" and other use-of-force violations, specifically 18 U.S.C.§ 113, as long as they had no intent to commit murder during interrogations and were outside U.S. territorial jurisdiction. Throughout the rest of the memorandum, the OLC continued this same pattern of finding loopholes in any laws, treaties, and regulations that would normally prohibit cruel and unusual conduct and arguably torture.

The Office of Legal Counsel may have been successful in bypassing legal barriers to government-sanctioned torture, but it had no way of changing the proven ineffective nature of using the tactic as an interrogation tactic. A victim who is being tyrannized, dominated, and humiliated *does* cooperate to some degree—but not often in the sense that he or she unveils a real knowledge about requested information. Instead, he fabricates information that will get the oppression to stop. For example, Khalid Shaikh Mohammed, one of the masterminds behind the September 11th terrorist attacks, was waterboarded by U.S. intelligence agents during interrogations. He confessed to and took credit for 31 different terrorist operations including 9/11 and the beheading of journalist Daniel Pearl. However, experts argue that no single terrorist, not even one as distinguished as Mohammed, could be responsible for 31 separate plots (Stern 2007, 217). Some people may argue that he deserves everything he gets for any level of responsibility or involvement with September 11th, but the issue is not whether men like Mohammed *deserve* torturous treatment. The problem is that if a small number of high-value detainees are confessing, when tortured, to numerous atrocious crimes they did not commit on top of those offenses that they did commit, then many of the individuals who are truly responsible are walking freely today and investigations that should not be closed are closing. It is important for several reasons that intelligence-gathering agencies use the most effective tactics at their disposal to ensure the best possible sense of security rather than an illusion of it.

In 2009, President Barack Obama banned torture with an executive order. In 2015, Congress succeeded in passing its own torture ban into law. The current *Army Field Manual* does not allow torture, and, more specifically, it does not allow waterboarding (Myre 2018). For about a decade now, the CIA has not used the tactics that were once a part of its enhanced interrogation program (Timsit 2018). However, there is a *distinct* set of highly effective interrogation tactics that the United States government used within the CIA's program that was often categorized by critics and the public as "torture," though not rightfully so. These tactics were far more humane and infinitely more productive; they are called *stress techniques*. Unfortunately, when the

interrogation program was heavily criticized, with good reason, and the Abu Ghraib scandal broke, many effective stress techniques were thrown out alongside torturous ones (MacDonald 2006, 93). “Stress techniques” is a broad category used to describe tactics such as stress positions, minor sleep deprivation, irritably monotonous conditions, etc. These methods maximize the effectiveness of an interrogation while minimizing negative physical and psychological effects on interrogees. The CIA describes stress positions as “producing mild physical discomfort from prolonged muscle use, rather than pain associated with contortions or twisting of the body (CIA 2002).”

The activities that fit under this rubric (e.g., subject sits on the floor with legs extended and arms above his or her head) are far from sadistic and are quite possibly even similar to what an individual might witness if he or she were observing an aerobics class at the YMCA. The CIA memo involving the description of stress positions also includes instructions for the appropriate use of sleep deprivation. It explains that preventing sleep for controlled periods of time reduces the ability of suspects to think and react quickly and motivates them to cooperate with interrogators. The effects of sleep deprivation are remitted by simply allowing detainees to have a normalized sleep schedule for one to two days. The side effects are minimal and counteracting them is effortless. In the case of Mohamed al-Kahtani, a Saudi who had fought alongside some of the bin Laden bodyguards, interrogators gathered outside his cell and sang “Time Is on My Side” by the Rolling Stones for lengths of time or played Metallica songs through a stereo. After 18 hours of these methods accompanied by questioning, Kahtani became convinced that he was sold out by his partners and gave up information about several most-wanted terrorists, including Usama bin Laden (MacDonald 2006, 90, 92). On another occasion, a young bomb maker who had been blowing up aid workers was being held by the U.S. government; he was told to stand up until he gave up the name of another certain high-value suspect. Then, the interrogator sat down and began reading a book. Several hours later, the detainee was terrified, gave up his friend, and disclosed information on where he had planted bombs. The interrogator merely made the man stand up while, in the meantime, he read a book. Furthermore, when sleep deprivation was used as an interrogation tactic, intelligence gatherers doing the questioning were awake for the same amount of time as the detainees being questioned (MacDonald 2006, 87-88).

The United States government encountered a new kind of enemy in the War on Terror, resulting in conditions of exigency and uncertainty. Consequently, individuals in charge panicked, covered their legal bases to justify illegal acts, and used inhumane treatment on human beings. Did torture save some lives? *Possibly*. Did it cause the destruction of others? *Certainly*. The descriptions of the torture tactics used by the CIA, and facts about the facilities in which they were carried out are evidence of this. The prime concern is not only that torture is generally illegal for good reason, but it is often ineffective for confessions and information gathering because unbearable pain often prevents authentic results. The only methods that proved to be tried and true on terrorists were *stress techniques*, which are also more humane.

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