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Torture and Habeas Corpus as Information-Forcing Devices*

MARC D. FALKOFF**

I appreciate this opportunity to speak with you, as a lawyer and former member of the Modern Language Association, about torture and interrogation. My remarks tonight are shaped by my experience representing sixteen Yemeni prisoners, all of whom have been held at Guantánamo for nearly seven years without charge, trial, or even a court hearing about the legality of their detention. They have all been abused, and some have been tortured (by any definition of the term). My thoughts about the topic, in short, are based on experience and not just theory.

Let me start, then, by saying just a word about my clients. Most have been interrogated hundreds of times. The “ordinary” techniques to which they have been subjected during interrogation have included beatings, questioning at gun point, sexual humiliation, sleep deprivation, forced grooming, exposure to extremes of heat and cold, and prolonged solitary confinement which has stretched, in some instances, for years. In addition, between January 2002 (when Guantánamo opened for business as a War on Terror interrogation center) and the fall of 2004 (when the courts ordered the military to allow me and a small group of lawyers to visit our clients for the first time), all of these abuses took place in secret. Even today, no journalist has ever interviewed a single prisoner while at Guantánamo. The stress has been unbearable for some of my clients, including one who has attempted suicide multiple times—once by biting off and swallowing a six-inch length of the naso-gastric tube that the military uses to force-feed him twice a day. Another time this same client tried to hang himself in his cell—an incident the military dismissed as a “hanging gesture,” rather than a suicide attempt. In a similar Orwellian vein, suicide attempts are generally described by the military as acts of “manipulative self-injurious behavior.”¹

So-called “high-value detainees” have been subjected to worse at secret CIA “black sites,” whose location remains a secret. The “enhanced techniques” to which they were subjected include, as everyone now knows,

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1. See David Rose, *Guantánamo Bay on Trial*, VANITY FAIR, Jan. 2004, at 88.

waterboarding—which is often misdescribed in the press as a technique that gives the victim a “sensation” of drowning, when in fact it is controlled, actual drowning. One of my clients was kept in total darkness for weeks before being transferred to Guantánamo; he was subjected to blaring music in what is commonly known as the “Dark Prison” at Bagram, with the darkness and noise interrupted only by an occasional interrogation session which took place in a red-lit room. At times, this man was hanged by chains from a wall with his feet barely touching the ground. Another of my clients was rendered to Jordan where he was repeatedly beaten on the soles of his feet with some type of bamboo pole.

So yes, having litigated in federal court to stop torture, I do have some thoughts on the topic.

But I want to talk about something more than my clients’ plight tonight. The title of my remarks is *Torture and Habeas Corpus as Information-Forcing Devices*. My purpose is to talk briefly about the “real” motives for torture and why it is important for us to determine what they are. All of you are familiar with the cultural theorists who have written about torture over the years, and I am sure you will agree that academics like Michel Foucault and Elaine Scarry have been inventive, moving, and insightful about what actually motivates states to inflict pain on their prisoners. We have come to think about torture as a spectacle or performance or theater,² to understand it as an instance of sacred violence that pulls our community together in some manner,³ and to recognize that its emergence in contemporary society proves the principle that “sovereignty names the power which withdraws and suspends the law.”⁴ Of course, the states that torture tend to offer a simpler and more straightforward reason for their deployment of such tactics: to gather information from hardened criminals in order to keep the public safe. This official explanation, however, is routinely dismissed by those of us looking for a deeper understanding of the cultural work being done by state-sanctioned torture.

My suggestion here is that we should pause before dismissing the states’ information-gathering rationale for torture as pretextual. The Bush administration’s Guantánamo experiment (along with its abusive detention policy more broadly) is a case in point. I do believe, to some limited degree, that our new torture regime may be explained in part as spectacle and in

2. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON*, chs. 1-2 (Alan Sheridan trans., 2d vintage bks. ed., Random House 1995) (1977).

3. See PAUL KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* 79-81 (2008) (suggesting that the “ticking time bomb” hypothetical used to justify torture appeals to us in particular as a “political community” of “citizens”); see also ROBERT HAMERTON-KELLY, *SACRED VIOLENCE: PAUL’S HERMENEUTIC OF THE CROSS* (1992).

4. JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 60 (2004) (discussing the writings of Giorgio Agamben).

part as an effort to bond together a political community. Nonetheless, academic theorizing does not capture for me a central and obvious political fact about what has led to our post-9/11 embrace of torture and coercive interrogation methods—that the administration’s information-gathering explanation for its behavior was offered in good faith by administration officials and that it has been rather successful from a public relations point of view.

Academics discount the importance of information-gathering as a true motive for torture in the modern state. The deeply ingrained prejudice starts—and for my purposes here, ends—with Elaine Scarry and her tour-de-force description of the dehumanizing effects of torture, *The Body in Pain*.⁵ Scarry provides an overwhelming case against torture, painting a compelling portrait of the torture victim and showing how his very humanity shrinks as he suffers the pain inflicted upon him by the state. Indeed, Scarry suggests that the torture victim’s language itself is “deconstructed” (not, she explains carefully, just “destroyed”) by the torturer.⁶

Rereading Scarry now, as a lawyer with clients who have been tortured, I am struck by many things, including the array of torture techniques that she describes and that have been passed down through history and that I recognize as having been suffered by my clients (including, for example, forced standing and sleep deprivation).⁷ I also find compelling her definition of torture as the sum of pain and questioning—an equation that, interestingly, allows Scarry to argue that the torturer asks his questions *in order* to deconstruct the voice and dismantle the humanity of the torture victim. “Nowhere,” Scarry writes, “does language come so close to being the concrete agent of physical pain as here where it not only occurs in such close proximity to the raising of the rod.”⁸

As I said, Scarry’s polemic against torture is utterly convincing, and I willingly follow when she tells us that the torturer can continue to torture only if he blunts his sympathy and refuses to acknowledge to himself that he is meting out pain to a human being, thereby deconstructing the victim’s voice and humanity. I also am sympathetic to the flip side of her argument: if torture takes away the victim’s humanity by deconstructing his voice, then efforts to make the victim’s voice heard will, in a real sense, help to *reconstruct* the humanity of the torture victim, resulting in “a partial reversal of the process of torture itself.”⁹ I thoroughly enjoy reading passages

5. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* (1985).

6. *Id.* at 19-20.

7. *Id.* at 47. For a discussion of the Bush administration’s “reverse engineering” of such Cold War torture techniques, see MICHAEL OTTERMAN, *AMERICAN TORTURE: FROM THE COLD WAR TO ABU GHRAIB AND BEYOND* (2007).

8. SCARRY, *supra* note 5, at 46.

9. *Id.* at 50.

like this, particularly since this reconstructive process was precisely my motive in publishing a volume of poems written by prisoners inside the wire at Guantánamo.¹⁰

But Scarry's elegant thesis comes at a cost. Her focus is on the victim of torture, and she spends relatively little time discussing the motives of the *torturer*. She takes it as a given that the torturer—in her book, usually, but not always, the “regime” rather than the actual person inflicting the pain—deploys torture in order to undergird its fiction of power. Scarry rarely gives actual examples of the professed motivations of the torturing regimes, though she does occasionally reference Nazi Germany,¹¹ leaving it to the reader to just “get” that whatever justifications these regimes may have had for torture, they cannot be legitimate. The implicit argument—a logical fallacy which I think is a “negative pregnant”—is that if the Nazi's torture, then torture cannot be justified by any regime.

Now, I am not a fan of torture, obviously. And I hesitate for obvious reasons to accept any rationale for torture, since I have seen the effects of my government's torture policy on my clients, who are (believe it or not) innocent men. But there is a motive for torture that we must take seriously, at least because our fellow citizens take it seriously: that torture is necessary to gather information, particularly information that may stop an imminent disaster. I am speaking, of course, of the “ticking time bomb” justification for torture.

Professor Scarry refuses to engage with such arguments, claiming repeatedly that any argument that torture is necessary to gather information must necessarily be flatly false. Scarry asserts, for example, that it is a “misdescription” to describe torture as a “form of *information-gathering*,”¹² that the purpose of torture “is *not* to elicit needed information but visibly to deconstruct the prisoner's voice,”¹³ and that information gathering “masquerades as the motive for torture” and “*is a fiction*.”¹⁴ So, questions are asked by the torturer “*as though* they motivated the cruelty” and “*as if* the answers to them were critical”¹⁵ and are put forward with “feigned urgency.”¹⁶

10. See POEMS FROM GUANTÁNAMO: THE DETAINEES SPEAK (Marc Falkoff ed., 2007); Marc D. Falkoff, *Conspiracy to Commit Poetry: Empathetic Lawyering at Guantánamo Bay*, 6 SEATTLE J. FOR SOC. JUST. 3 (2007).

11. SCARRY, *supra* note 5, at 58.

12. *Id.* at 12 (emphasis added).

13. *Id.* at 20 (emphasis added).

14. *Id.* at 28 (emphasis added).

15. *Id.* at 28–29.

16. *Id.* at 29. Scarry does, however, concede in a footnote that “there is, of course, no way to demonstrate conclusively that the need for information is a fictitious motive for the interrogation.” SCARRY, *supra* note 5, at 329 n.7.

Scarry suggests that even to *ask* the question whether torture is justified is to begin to be complicit in the torture itself. "It is difficult to think of a human situation," she writes,

in which the lines of moral responsibility are more starkly or simply drawn, in where there is a more compelling reason to ally one's sympathies with the one person and to repel the claims of the other. Yet as soon as the focus of attention shifts to the *verbal* aspects of torture, those lines have begun to waiver and change their shape in the direction of accommodating and crediting the torturers.¹⁷

Maybe so. But Scarry's dismissal of information gathering as a legitimate or true motive for torture argues away the one justification for torture that, in our modern society and especially after 9/11, *resonates* not only with our fellow citizens generally, but also with liberals in particular. Thus, whether the information-gathering rationale is offered in good faith or not, it is persuasive and must be dealt with.

David Luban, a scholar of law and philosophy, has recently written about why liberals have difficulty rebutting arguments meant to justify torture in the abstract. He provides a nice catalog of five reasons that regimes torture, four of which account for the liberal revulsion to prisoner abuse that we would expect. I will note them quickly. First, torture may be used to terrorize a population into submission (along the lines of the "spectacle" that we associate with Foucault's opening chapter in *Discipline and Punish*); second, as a form of criminal punishment (presumably made unconstitutional by the Eighth Amendment); third, to extract confessions (a historically contingent fact that arose as a perverse consequence to premodern legal rules requiring either two eyewitnesses or a confession for a conviction for most crimes); and fourth, simply, to lord it over a vanquished foe.¹⁸ Liberal revulsion can be explained by the fact that each of these reasons for torture makes the victim "in every respect the opposite" of the liberal vision of a man—

isolated and reduced instead of engaged and enlarged, terrified instead of active, humiliated instead of dignified. And, in the paradigm case of torture, the victor's torment of defeated captives, liberals perceive the living embodiment of their worst nightmare—tyrannical rulers who take their

17. SCARRY, *supra* note 5, at 35.

18. David Luban, *Liberalism, Torture and the Ticking Time Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 40–42 (Karen J. Greenberg ed., 2005).

pleasure from the degradation of those unfortunate enough to be subject to their will.¹⁹

Liberals hate torture, in short, because torture is “tyranny in microcosm, . . . a veritable catalog of the evils of absolutist government.”²⁰

Luban goes on, however, to identify the problem that liberals face when trying to make a principled argument against torture. A fifth rationale that apologists for torture regimes offer is that “enhanced interrogation techniques” are necessary to gather information about imminent attacks that might kill hundreds, thousands, or perhaps tens of thousands. He is referring, of course, to the “ticking time bomb” scenario. Although Luban suggests it is probably the “least common motivation” for torture in real life, he likewise notes that it provides an argument for torture that is difficult for liberals to reject, since the evils of torture on this model can be seen as forestalling even greater evils, on a utilitarian calculus. The information-forcing rationale transforms and rationalizes the motive for torture and acts, in Luban’s words, as a “last resort” for people profoundly reluctant to torture—thus providing what he calls the “liberal ideology of torture.”²¹

It is of course true, as we all see immediately, that the ticking time bomb story is highly stylized and artificial. The sole purpose of the torture in the hypothetical is to collect information to prevent a catastrophe; torture is presented in the hypothetical as an exception to normal state action and not the rule, so that it does not raise the specter of state tyranny; and the torturer, like Jack Bauer when he is not in one of his depressive funks, is motivated solely by preventing the looming catastrophe, with no sully hint of cruelty in his actions. All of this is crystallized in the “ticking time bomb” scenario, whose purpose is to persuade liberals to concede a single situation where even *he* would torture and, having obtained this concession, prove that he really does not have a *principled* stand against torture. As Luban says, once you accept that torture is okay in *this* situation, “all that is left is haggling about the price.”²²

I will concede that even I am a victim of this highly stylized story. I can state forthrightly that if I had someone strapped into a chair and I knew for certain that he had the key to dismantling a nuclear bomb that was set to go off in Times Square in two hours and that he would not talk unless I twisted a knife into his knee . . . then sure, I would do it. I am, therefore, willing to admit that my opposition to torture is not categorical and that it may in a sense be unprincipled.

19. *Id.* at 40.

20. *Id.* at 43.

21. *Id.*

22. *Id.* at 44.

It is easy, of course, to get seduced by simplistic examples that misrepresent the world we actually live in and by cheating around the difficulties of real life. How do we *know* that our suspect has the keys to the bomb? How do we *know* that torturing him will provide us with accurate information? Are we really *sure* that we have the right person? How sure do we have to be? Ninety percent? Seventy-five? Fifty?

In the real world, there is no pure safety; we live with risk, and our goal can only be to comprehend the true nature and likelihood of the risks and then seek to lower them. That means the best response to the “ticking time bomb” hypothetical is not to ignore it; indeed, the hypothetical is persuasive only because it is artificial and divorced from any empirical evidence. The hypothetical must be countered with *information* so that the public may make a reasoned judgment about the real-life likelihood that torture will ever prevent a ticking time bomb from exploding. In other words, we must gather information *ourselves* about whether our torture regime is working in the way that our political leaders claim that it is and whether it is truly reducing risks to our security. The right strategy is not to deny that abusive interrogations are necessary in order to gather intelligence, to dismiss the very notion that coercion is a regrettable but necessary tool to protect our national security, or to assert that the proffered need for gathering intelligence is always a “false” motive put forth by a torture regime.²³ Rather, the best strategy is to demonstrate to the public that we have in fact abused, coerced, and tortured prisoners who were innocent of all wrong-doing²⁴ and that the information we have gathered from coercive interrogations has turned out to be just as untrustworthy as experts have warned.²⁵

23. Some academics have adopted this position. Talal Asad, for example, has written that torture “is to be understood as a means used strategically for the maintenance of the nation-state’s interests. Like warfare.” TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 115 (2003).

24. The case of Maher Arar’s rendition is perhaps the most striking example. Arar, a Canadian citizen, was arrested in September 2002 by U.S. law enforcement at JFK Airport in New York on his way home from a Mediterranean vacation. He had earlier been identified by Canadian authorities as a terrorism suspect. A Canadian government commission of inquiry determined that Arar was flown by the United States to Jordan and then to Syria, where he was tortured. In September 2006, the commission issued a report exonerating Arar of any links to terrorism, and the Canadian government offered him a settlement in excess of ten million dollars. See COMM’N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR (2006), available at http://www.pch.gc.ca/cs-kc/arar/index_e.htm.

25. It may be plausibly argued, for example, that our prosecution of the Iraq War was in part a result of the administration relying on false information about a connection between Iraq and Al-Qaeda provided by Ibn al-Shaykh al-Libi after he was rendered to Egypt and tortured. See GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 353–54 (2007) (“We believed that al-Libi was withholding critical threat information at

And how do we come by information like that? Well, we coerce it out of the government. We file habeas corpus petitions in the federal courts and compel the government to justify the legality of their detentions. For centuries, the executive's legal duty when confronted with a habeas petition is to file what is called a "factual return," setting forth the legal and factual bases for the detention. The prisoner who has brought the petition is then entitled to traverse—or deny the allegations in—the return and to demand that the government provide discovery in support of its allegations.²⁶

The whole habeas process is an information-gathering machine, which over the centuries has worked to assure that the executive branch cannot do its work in secret. By flushing information into the public sphere, habeas corpus thus provides the public with an opportunity to review the motives, actions, and effectiveness of their leaders so that they can replace "regimes" when appropriate. Our working theory in a democracy is that the political process can solve most of our problems. So if you do not like torture, vote for a President who will refuse to have his subordinates torture people and who will not test the limits of executive authority.

Habeas corpus, I am arguing, is a democracy-enhancing device that works by operation of law to coerce the government to reveal information that it wants to keep secret. The habeas lawyer, I therefore suggest modestly, is the legal mirror-image of the state as torturer and as outlaw information-gatherer.

In sum, unless we face the fact that there is, even for liberals, a persuasive argument in favor of torture as an information-forcing device, we will be at a loss to devise an appropriate response. We cannot simply state that torture is immoral, period—at least not so long as we have to play the "ticking time bomb" game. Rather, an *effective* answer has to be one in which actual information about the inefficacy of torture is gathered and broadcast to the public. And that is what habeas corpus is all about.

the time, so we transferred him to a third country for further debriefing. Allegations were made that we did so knowing that he would be tortured, but this is false. The country in question understood and agreed that they would hold al-Libi for a limited period.").

26. The history of the "return" requirement and its information-forcing purpose is described in Marc D. Falkoff, *Back to Basics: Habeas Corpus Procedures and Long-Term Executive Detention*, 86 DENVER U. L. REV. (forthcoming 2009) (manuscript on file with the Northern Illinois University Law Review).