Theology, Torture and the United States:
Do Abrahamic Religions Have Anything Meaningful to Say?

Mohammad Fadel

Canada Research Chair for the Law and Economics of Islamic Law and Associate Professor of
Law
University of Toronto Faculty of Law

Introduction

Until the events of 9/11, most Americans, or at least most politically active Americans, probably assumed that torture was something that *Americans* did not do. If anything, the United States' refusal to countenance torture served as a bright-line demarcating the enlightened polity of the United States from other regimes that had not yet achieved our level of civilization. The prohibition of torture is of long standing in U.S. law, arguably dating from the original Bill of Rights to the constitution. The Eighth Amendment to the United States Constitution had prohibited "cruel and unusual" punishments, and as early as 1890, the United States Supreme Court, in *In Re Kemmler* (1890), construed its provisions as prohibiting torture. Justice Brennan, in *Furman v. Georgia* (1972), reaffirmed this interpretation of the 8th Amendment, writing that the 8th Amendment prohibited torture because it outlawed any punishment whose severity made it inconsistent with human dignity. The United States' revulsion to torture was also consistently reflected in numerous post-World War II international instruments and treaties which the United States signed, such as the 1948 United Nations Declaration of Human Rights (1948); the American Convention on Human Rights (1977); and, the International Covenant on Civil and Political Rights (signed 1977 and ratified 1992). Indeed, the United States signed the most important and comprehensive international treaty prohibiting torture, the United Nations Convention Against Torture in 1988, and the United States Senate, albeit with some reservations,

ratified it in 1994. The United States effectively criminalized torture pursuant to its domestic criminal law when 18 U.S.C. § 2340 became effective on April 30, 1994.

Given this history, no one can seriously doubt that the United States, from its earliest days as an independent republic, has always condemned torture as beyond the pale, even if it had failed – as all societies inevitably do – to fulfill perfectly its own aspirations. Yet, the scale of destruction visited upon the United States by no more than 19 terrorists from al-Qa‘ida seemed to shake Americans’ moral commitments to the core. The government’s response to 9/11 then was different than the episodic bouts of illegality that all regimes must face. Instead, 9/11 brought about a normative change in the way the United States viewed torture and an attempt to revise its anti-torture commitments. Instead of earnestly using its sovereign power to prevent and punish torture, lawyers for the Bush Administration used their legal talents to enable abuse and harsh treatment of prisoners – almost all of whom were Muslims – by excluding such abuses from the *criminal* definition of torture, with the aim of insulating public officials from any prospective criminal liability for such abuses.¹

The Bush Administration repeatedly told Americans that 9/11 had ushered in a new era, one in which conceptions of self-defense, freedom of expression and human rights would necessarily have to be re-defined in a manner consistent with the nature of a foe that was condemned as uniquely omnipresent, pathological, cunning, malevolent, deadly and nihilistic.² Vice-President Cheney famously told the American people shortly after 9/11 that effective defense of the United States from the threat al-Qa‘ida posed would require the U.S. government

¹ See J. Yoo, *Memorandum for William J. Haynes II, General Counsel of the Department of Defense, re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003), http://www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (last viewed, October 29, 2012).

² Alia Brahimi, *Just War Theories and Jihad in the War on Terror* (Oxford University Press: New York, 2010), p 82.

to operate on “the dark side.”³ Indeed, Usama bin Laden, in an interview conducted by the Arabic news channel al-Jazeera on October 21, 2001, predicted that because of the American government’s response to the attacks on 9/11, “freedom and human rights in America are doomed.”⁴

Unfortunately, Usama bin Laden proved all too prescient in his prediction: the U.S. government’s response to 9/11 came to be shaped, almost entirely, by those elements in the U.S. government who agreed with Vice-President Cheney that the methods of the “dark side” would be essential in the war on terrorism. This turn to the dark side was of course manifested most clearly in the eager willingness of the U.S. to resort to torture, which it euphemistically referred to as “enhanced interrogation techniques.” But it was in no way limited to the use of torture. The turn to “the dark side” also appeared in its ordinary justice system, where instead of a commitment to a neutral application of the law, both in investigation and enforcement, those in charge of the U.S. judicial system directed its full investigative and prosecutorial powers toward American Muslims. Through its actions, such as its round-up of Muslim immigrant men (and men from majority Muslim countries) all over the US through programs such as “special registration,” the U.S. government successfully communicated to the public its position that the best way to defend against the risks posed by al-Qa’ida was literally to reduce the numbers of Muslims in the US, by deportation if possible, and if they were citizens, to arrest and incarcerate them on any number of fatuous, pretextual or exaggerated offenses, always with the aim of maximizing the unfortunate targets’ sentences, without regard to the nature of the conduct

³ “The Dark Side,” PBS Frontline (June 20, 2006), <http://www.pbs.org/wgbh/pages/frontline/darkside/view/> (last viewed, October 23, 2012).

⁴ “Bin Laden’s Sole Post-September 11 TV Interview Aired,” CNN (January 31, 2002), http://articles.cnn.com/2002-01-31/us/gen.binladen.interview_1_al-jazeera-qatar-based-network-bin-laden?_s=PM:US (last viewed, October 23, 2012).

alleged. As then Secretary of Justice John Ashcroft put it, the goal of law enforcement would not be to investigate crimes, but to prevent terrorism by arresting allegedly “dangerous” individuals for conduct such as “spitting on the sidewalk” or for crimes where the conduct criminalized was either vague or at a far remove from any kind of any violence under the vague and sweeping category of “material support.”⁵

The illegality of explicitly targeting particular racial or religious groups, and the categorical rejection of the discrimination that such a policy necessarily entailed, were values that, like the immorality and illegality of torture, had been traditionally viewed as constitutive of the most basic political values of the United States, at least since Jim Crow had been legally dismantled in the 1960s. Nevertheless, the United States explicitly began to target Muslim individuals and Muslim organizations for investigation, usually with extremely flimsy evidence. Where Muslims were not expressly indicted or investigated before a federal grand jury, the United States, through the National Security Administration (NSA), instituted sweeping surveillance measures without even bothering to obtain warrants to permit electronic eavesdropping from judges. When such illegal eavesdropping was discovered, the United States has asserted the “states security privilege,” in an attempt to obtain dismissal of suits brought by victims of illegal electronic eavesdropping.⁶ The United States also asserted the “states security privilege” to dismiss suits against private parties who cooperated in “extraordinary rendition” by knowingly transporting prisoners to jurisdictions where they would be subject to torture.⁷ After investigating, indicting and convicting Muslims on dubious legal theories, the United States then

⁵ S. Doyle, “Civil Liberties Today,” *The New York Times* (September 7, 2011), <http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all> (last viewed, October 23, 2012).

⁶ See, for example, *Al-Haramain Islamic Foundation, Inc. v. Barack H. Obama*, 690 F. 3d 1089 (9th Cir. 2012).

⁷ *Mohamed v. Jeppesen Dataplan*, 614 F. 3d 1070 (9th Cir. 2010).

confined them in conditions which themselves often border on psychological, if not physical, torture.⁸ Could anyone then have been shocked when the Associated Press disclosed that the New York Police Department was engaged in a massive spying operation targeting American-Muslims, even in the absence of any individualized suspicion of wrong-doing, throughout the tri-state area,⁹ even monitoring the activities of Muslims students at Yale University?¹⁰

So the practical question before us is how did the United States change so radically in such a short space of time, from a country at the forefront of causes such as eliminating torture and insisting on fundamental fairness in the making and application of the law, to one that both endorsed torture in theory and practiced it in fact, and openly practiced a system of selective enforcement of its laws, targeting only a particular class of Americans for prosecution?

One possible answer is that there was no radical change: the United States' normative commitment to anti-torture policies, while broadly evidenced in normative American legal texts, was never as deeply rooted in American political culture as its formal legal commitments would suggest, particularly in circumstances when the American people confronted individuals or groups who constituted the "other." One paradigmatic example of popular culture's tolerance of torture of the other is the privileges the white southern overseer had over black slaves in order to maintain discipline among the slaves in the South's plantation economy. While such conduct was not at the behest of the United States government, nor were the overseers "acting under

⁸ C. Johnson and M. Williams, "'Guantanamo North': Inside Secretive U.S. Prisons," (March 3, 2011), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons> (last viewed, October 29, 2012).

⁹ M. Apuzzo and A. Goldman, "With CIA Help, NYPD moves covertly in Muslim areas," (August 23, 2011), available at <http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas> (last viewed, October 29, 2012).

¹⁰ A. Goodman and J. Gonzalez, "Spying on Campus: New York Police Caught Monitoring Muslim Student Groups Throughout Northeast," *Democracy Now* (February 21, 2012), http://www.democracynow.org/2012/2/21/spying_on_campus_new_york_police (last viewed, October 29, 2012).

color of law,” they were, nevertheless, inflicting unspeakable violence on racialized bodies for the purpose of maintaining their masters’ absolute control over their productivity.¹¹ This authority in turn had been granted to them by applicable principles of property law, the integrity of which was ultimately guaranteed by the United States constitution, and was only abolished by the force of arms. So too, the southern practice of lynching African-American males was crucial to reinforcing the norms of racial subordination inherent in Jim Crow, and while it too was technically in violation of applicable law, the United States proved itself incapable of passing federal legislation criminalizing this heinous practice, despite the fact that the civil rights movement struggled for years in a vain effort to convince the U.S. Congress to pass anti-lynching legislation. Likewise, the United States Army, when fighting manifestly imperialist wars, such as the Philippine-American War of 1899-1902, proved itself as capable of engaging in mass atrocities as any old world European power. Contemporaneous reports of American journalists raised allegations of widespread killing that reached almost a genocidal level, and accused the United States of routinely using torture against the general population in what would ultimately be a successful, but exceedingly brutal, war to defeat the Philippine pro-independence insurgency.¹²

Americans can only maintain the collective belief in the unblemished virtue of the United States – largely as evidenced by its formal legal commitments – by consciously suppressing a history that often violated in fundamental ways the ideals of the American republic. The Obama administration, by refusing to mount any serious effort to hold accountable before the law those public officials who approved the use of torture and those who engaged in it directly, was simply

¹¹ Edward Ball, *Slaves in the Family* (New York: Ballantine Books, 1998), pp. 186-187.

¹² H. Zinn, *A People’s History of the United States*, <http://www.historyisaweapon.com/defcon1/zinnempire12.html> (last viewed, October 30, 2012), Chapter 12.

following a well-established path of preserving the myth of American virtue rather than pursuing justice, when the pursuit of the latter would undermine the former.¹³

There are many approaches to understanding the problem of torture in U.S. law, history, and popular consciousness, and each provides its own unique insights into understanding torture as a phenomenon, practice and even a culture. But does religion offer anything instructive on how to understand torture, and in particular do the Abrahamic religions provide any unique resources to our understanding of the problem of torture? The three papers comprising this forum all share the belief that there is something deeply diabolical in torture that distinguishes it from garden variety sin. The kinds of venal sins that traditional religion condemns – lust, greed, gluttony – all, in one way or another, stem from an individual’s inability to control what is, in ordinary circumstances, a natural appetite. Torture, however, is *sui generis*, insofar as it requires the torturer to overcome his or her natural appetite toward kindness and overcome his or her natural aversion to cruelty. In so doing, the torturer must negate the humanity of the victim by communicating to him the complete and total control he or she possess over him. And in so doing, the torturer attempts to exercise the kind of unrestrained, absolute power that only an omnipotent god may wield. The blasphemous nature of torture is not mitigated if it is done in the name of a democracy or performed pursuant to due process, contrary to the claims of some.¹⁴ Paradoxically, as Bland suggested in his essay with respect to the Jewish tradition, and as the Quran expressly states, “torture is worse than killing.”¹⁵ It must be so because torture radically undermines the ontological relationship of equality between human beings that even capital

¹³ G. Greenwald, “Obama’s Justice Department Grants Final Immunity to Bush’s CIA Torturers,” (August 31, 2012), <http://www.guardian.co.uk/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer> (last viewed, November 1, 2012).

¹⁴ B. Gewen, “To Torture or Not to Torture,” *The New York Times* (September 17, 2008), <http://artsbeat.blogs.nytimes.com/2008/09/17/to-torture-or-not-to-torture/> (last viewed, Nov. 2, 2012).

¹⁵ *Al-Baqara*, 2:191.

punishment or killing on a battlefield continues to respect. The question then becomes how do we, as moral communities in a pluralistic state, act to prevent torture, now that experience has demonstrated conclusively that whatever previously existing moral consensus prohibiting torture has now been shattered?¹⁶

One way would be to revise the way we teach our national history: instead of teaching about a mythological America whose history is a succession of triumphs of the human spirit, we would be wise to teach students, alongside the United States' many achievements, the many instances in which it has failed to live up to its ideals. This is particularly important in the case of torture, where there is a fair amount of evidence that popular culture has played a large role in redeeming the morality of torture in the eyes of the average American.¹⁷

Religion here can play an important role. The Abrahamic religions all institutionalize through their quotidian rituals the obligation of remembrance, penance and seeking forgiveness. Most importantly, through their shared belief in a perfect transcendental Maker who holds us accountable, they deny perfection to any human instrumentality. And while Abrahamic religions can be appropriated to serve a narrative of national triumphalism, its adherents must resist the temptation to allow states to appropriate its symbols and instead jealously preserve religious teachings as a reservoir of critical values that can be deployed to resist, rather than empower, state oppression.

"This is the peer reviewed version of the following article: Mohammed Fadel, "Theology, Torture and the United States: Do Abrahamic Religions Have Anything Meaningful to Say?" (2013) 103:2 The Muslim World 223 - which has been published in final form at 10.1111/muwo.12010. This article may be used for non-commercial purposes in accordance with Wiley Terms and Conditions for Self-Archiving."

¹⁶ A. Zegart, "Torture Creep?" *Foreign Policy National Security* (Sep. 25, 2012), http://www.foreignpolicy.com/articles/2012/09/25/torture_creep (last viewed, Nov. 2, 2012).

¹⁷ A. Zegart, "Torture Creep?" http://www.foreignpolicy.com/articles/2012/09/25/torture_creep.