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ARTICLES

Torture and the Biopolitics of Race

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I. INTRODUCTION

In December 2005, in the midst of congressional debate about President Bush's policy on detainee interrogations, I happened upon a scene on *E-Ring*, a new television program on NBC set in the Pentagon.¹ An officer working for the Joint Chiefs of Staff is talking by phone to a member of his special-operatives team stationed in Uzbekistan about capturing a Muslim terrorist. The camera zooms in on a bearded man dressed in foreign garb as the officer describes the methods the operative should use to kidnap him. "I thought we couldn't do that on human beings any more," the operative says.² The officer responds: "That scum bag ain't no human being to us."³ The camera cuts to an American flag hanging on the Pentagon wall.⁴

This fictional officer expressed a common defense of torture: By classifying the enemy as less than human, it becomes acceptable to treat him inhumanely. The torturer then graphically imposes this wretched status on the victim's body, confirming and reproducing the classification. The physical imposition of inferior status makes torture a particularly effective technology for enforcing the racial order: race is a system of governance that classifies human beings into a political hierarchy based on invented biological demarcations. This essay explores the United States' past and contemporary uses of torture to reinforce the domestic and global racial hierarchy. Part II discusses how state-sanc-

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1. *E-Ring: Snatch and Grab* (NBC television broadcast Dec. 8, 2005). [Dialogue is written as recalled by author.—Ed.]

2. *Id.*

3. *Id.*

4. *Id.*

tioned torture of foreign detainees supports U.S. imperialism abroad while at home the same torture of black people preserves white supremacy, and together these mechanisms further the biopolitical logic of race. Part III demonstrates that the contemporary legal edifice erected by the Bush administration to shield torture has direct antecedents in the colonial and neocolonial jurisprudence that justified the uncivilized treatment of African and Asian natives under the racialized theory of savage war.⁵

Part IV discusses the implications of the parallel between the current normalization of torture and the resurgence of scientific and commercial interest in genetic differences among “races.” The re-biologization of race seems acceptable today precisely because prior forms of overt racial violence are now institutionalized in new ways that make them invisible to many Americans, providing a mechanism for the re-production of white supremacy in the post-civil-rights era.⁶ The acceptance of torture of enemy combatants does more than rationalize the abuse of black citizens. Foreign torture also supports racist forms of punitive governance, such as mass incarceration, and contains organized resistance against them. Thus, I argue that the imperialist defense of torture helps to legitimate a new coercive biopolitics of race at a time when the United States claims to have moved beyond violent enforcement of racial hierarchies.

II. TORTURE AND WHITE SUPREMACY

Contrary to the claim that torture is aberrational in the United States, racism and torture have a history intimately associated with domestic and foreign policy.⁷ Torture’s maintenance and production of racialized hierarchies links the current treatment of detainees in Afghanistan, Iraq, and Guantánamo to the status of African Americans in the United States. Torture functions similarly in both cases to mark the bodies of brown-skinned victims as savage objects undeserving of civilized legal protection and to violently impose their subjugated status. State-sanctioned torture of “enemy combatants” also reinforces a racial biopolitics within the United States that claims scientific confirmation of

5. See *infra* Part III.

6. See Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the US*, *NEW LEFT REV.* (Eng.), Jan.–Feb. 2002, at 41, 54–60 (discussing the effect of historical race-making institutions on the current societal creation of a minority underclass).

7. See generally David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC’Y REV.* 793, 809 (2005); Robert N. Strassfeld, *American Innocence*, 37 *CASE W. RES. J. INT’L L.* 277, 283–303 (2006) (discussing the United States’ use of torture abroad).

racial classifications to rationalize deepening social inequality.⁸

In the United States, torture has played a prominent part in the violence needed to maintain white supremacy.⁹ Enslavement of human beings placed a category of people outside the ambit of humanity, giving the slaveholding class unrestrained license to inflict physical pain on their bodies. The invention of race to justify enslaving human beings created a new torturable class in the Americas. The classification of human beings into biological races permitted infliction of suffering on the bodies of subordinated people who were deemed to be subhuman. White slaveholders classified Africans as an animal-like race, separate and inferior to whites that could be legally treated as chattel property.¹⁰ Blacks were perceived as being less civilized because they were deemed to be closer to animals; this idea was based largely on notions of wild people and wild animals originating in Africa.¹¹ Whites created the myth of blacks' wild behavior that stemmed from the race's inherent inability to control their bodily impulses.¹² Whites classified black people as biologically close to animals so they could treat black people legally as animals. Slave masters were therefore free to torture and rape their slaves with impunity. This torture, in turn, produced abjectly servile black bodies whose physical state confirmed their inferior position and whites' dominance in the racialized system of governance.

After Emancipation, Southerners instituted the ritual kidnapping and killing of blacks in highly publicized ceremonies to reestablish white rule.¹³ Among the thousands of lynchings recorded between 1882 and 1940, several hundred were unspeakably cruel spectacles attended by crowds of white onlookers.¹⁴ Torture was an integral part of the execution, in which murdering the victim was only one stage of the ritual.¹⁵ The first stage of lynching was often to extract a confession by whipping or burning the accused. Roosevelt Townes and "Bootjack" McDaniels

8. See *infra* Part IV.

9. See Garland, *supra* note 7, at 800 (discussing "the emergence of the ritual of public torture lynchings as a means" of expressing "white supremacist values"); Jerome H. Skolnick, *American Interrogation: From Torture to Trickery*, in *TORTURE: A COLLECTION* 105, 105-06 (Sanford Levinson ed., 2004) ("After the Civil War and into the 1930s, the public tortments of Southern 'lynchings' were inflicted on black men in the interests of upholding a racist social order." (footnote omitted)).

10. See generally GEORGE M. FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 74-90 (1987); AUDREY SMEDLEY, *RACE IN NORTH AMERICA* 118, 141-43 (2d. ed. 1993); NANCY STEPAN, *THE IDEA OF RACE IN SCIENCE: GREAT BRITAIN 1800-1960* (1982).

11. PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS* 99-100 (2004).

12. *Id.*

13. See W. FITZHUGH BRUNDAGE, *LYNCING IN THE NEW SOUTH* 6 (1993); PHILIP DRAY, *AT THE HANDS OF PERSONS UNKNOWN: THE LYNCHINGS OF BLACK AMERICA* 60 (2002).

14. See Garland, *supra* note 7, at 793-94.

15. See *id.* at 805-06 (describing the gruesome process of lynchings).

were the victims of the last recorded spectacle lynching in Duck Hill, Mississippi, in 1937.¹⁶ After they were arraigned for the murder of a white store owner, they were seized by a mob who tortured them with a chain and blowtorch to make them confess, before shooting, mutilating, and burning them to death.¹⁷ The truth of the allegations against lynching victims, as well as their so-called confessions, was immaterial; what mattered was their torturers' power to make them confess.

In what David Garland has called "public torture lynchings," the untried black suspects were mercilessly tormented in ways we usually associate with medieval ordeals.¹⁸ Although the victims were hung from trees and utility poles, they rarely died from strangulation.¹⁹ They were typically shot, mutilated, and burned to death.²⁰ Garland writes, "Lynch victims were maimed while still alive, their ears or fingers or genitals amputated, their bodies stabbed and cut, their entrails pulled out before their eyes."²¹ In 1893, seventeen-year-old Henry Smith became a victim of a public-torture lynching when he was accused of raping and killing the daughter of the sheriff of Paris, Texas.²² After being paraded through town on a carnival float, Smith was set on fire in front of hundreds of spectators, many arriving by special train for the event, as the local press took photographs.²³ Before dousing him with oil, the vigilantes, including the sheriff, used hot irons to sear his flesh to the bone, burned his tongue, and gouged out his eyes.²⁴ After a lynching, the corpse was commonly cut up and spectators competed for body parts or searched through the ashes for bits of bone to take home as souvenirs.²⁵

By leaving disfigured black bodies hanging like "strange fruit" from tree limbs, lynch mobs reinstated the white power structure threatened by Emancipation and Reconstruction. Spectacle lynchings proclaimed the futility of the freedmen's new civil rights, literally reinstating black bodies as the property of whites that could be chopped to pieces for their entertainment.²⁶ The tortured black body displayed for

16. DRAY, *supra* note 13, at 359–60.

17. *Id.*

18. Garland, *supra* note 7, at 796 ("[S]pectacles of torture, dismemberment, and burning are understood as 'pre-modern' phenomena, associated with absolutist monarchs, medieval sensibilities, and lawless regions.").

19. *Id.* at 805

20. *Id.*

21. *Id.* (citations omitted).

22. DRAY, *supra* note 13, at 77–79; Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, in *FROM LYNCH MOBS TO THE KILLING STATE* 21, 29–30 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

23. Kaufman-Osborn, *supra* note 22, at 29.

24. *Id.*

25. *Id.* at 29–30.

26. See Garland, *supra* note 7, at 823–24 ("[Public lynchings] made it plain, to blacks and to

public consumption affirmed the dominance of whites and exclusion of blacks from citizenship, and it served as a warning to anyone who defied this racial order.

It was not the execution itself that served this function, but specifically the torture of the victims' bodies. This ritual of torture was reserved only for black victims of lynching because it constituted a political message about race.²⁷ Torture lynchings punished crimes perceived to violate the most imperative racial codes—murdering a white employer, sheriff, or public official, or raping a white woman.²⁸ Torture marks the bodies of its victims as subservient, humiliated, and degraded. By inflicting grotesque ordeals, whites stripped blacks in the starkest way possible of their human dignity and legal rights.²⁹ As Garland points out, the hundreds of public-torture lynchings celebrated until almost 1940 contradict the scholarly narrative about the civilizing evolution of punishments in America.³⁰

Southern whites revived archaic forms of execution involving torture, burning, and mutilation to show that “regular justice” was “too dignified” for black offenders.³¹ The public torture of blacks accused of offending the racial order demonstrated whites' unlimited power and blacks' utter worthlessness. This nation's rights, liberties, and justice were meant for white people only; blacks meant nothing before the law. In short, it is not only that race produces torture; torture also produces race—by physically forcing black victims into the utmost subservient posture, inscribing their political position in the racial order.

Liz Philipose highlights the functions that public lynchings served. They not only warned against violating racial rules; public lynchings also provided visual confirmation of whites' beliefs about the criminal propensities of blacks.³² Lynched bodies were left hanging in well-traveled areas such as near railroad tracks, bridges, and community billboards to ensure that the entire community, in addition to the crowds

whites, that despite Emancipation and Reconstruction, despite the 13th and 14th Amendments, black bodies remained the property of white people and could still be exploited for profit and for pleasure.”); see also Skolnick, *supra* note 9, at 106; Kaufman-Osborn, *supra* note 22, at 30.

27. See Garland, *supra* note 7, at 804; Kaufman-Osborn, *supra* note 22, at 30.

28. See Garland, *supra* note 7, at 816.

29. Kaufman-Osborn, *supra* note 22, at 30 (“To blacks, and especially to black men, the lynched body communicated their vulnerability, their debasement, their exclusion from the community to which, by federal law, they now easily belonged.”).

30. Garland, *supra* note 7, at 797 (“[A] consideration of [public torture lynchings'] form and character would strongly contradict the received wisdom about the course of penal change and the civilizing process that accompanied it.”).

31. *Id.* at 813–14.

32. See Liz Philipose, *The Politics of Pain and the Uses of Torture*, 32 *SIGNS: J. WOMEN IN CULTURE & SOC'Y* 1047, 1053 (2007).

that gathered at the live spectacle, viewed them.³³ Torture's production of race works within a "regime of visibility" in which visual cues signal the hidden, intrinsic nature that people supposedly inherit according to their race.³⁴

Spectacle lynchings were also regularly photographed.³⁵ Whites purchased photographs of the mutilated bodies as mementos of the event and mailed gruesome picture postcards to their friends and relatives. Joe Myers sent his parents a postcard in May 1916 displaying "the charred, barely recognizable, corpse of Jesse Washington, suspended from a utility pole in Robinson, Texas."³⁶ The message read, "This is the Barbecue we had last night my picture is to the left with a cross over it" and is signed, "your son Joe."³⁷ The postcards' cheerful messages reveal that whites did not see these torture killings as "atrocious acts of savagery" but as a socially approved way of punishing blacks.³⁸

Several scholars have noted parallels between the contemporary mass circulation of photographs showing scenes of sexualized torture in the Abu Ghraib detention center and of those depicting staged lynchings of blacks decades ago.³⁹ Some poses in the Abu Ghraib photographs strikingly (and perhaps deliberately) mirror lynching iconography—the hooded detainee with a noose around his neck; the naked detainees posed in sexually humiliating positions, lacerated, shackled, and held by a dog leash; the U.S. soldiers grinning triumphantly in front of their degraded victims.⁴⁰ "By looking at the tortured bodies of detainees under the gaze of U.S. soldiers," Philipose explains, "we gain clues to a deep structure of racialized pathology abiding within the so-called Muslim terrorist."⁴¹ As spectacle lynchings validated white beliefs about black subjection and criminality, the familiar images of torture in Abu Ghraib helped to construct the racialized terrorist in the public imagination.

33. See *id.* at 1059.

34. *Id.* at 1048.

35. See generally WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA (James Allen et al. eds., 2000) (showing dozens of photographs of lynchings).

36. Garland, *supra* note 7, at 794.

37. *Id.*

38. *Id.* at 795.

39. See Philipose, *supra* note 32, at 1049; see also Hazel Carby, *A Strange and Bitter Crop: The Spectacle of Torture*, OPENDEMOCRACY.NET, Oct. 11, 2004, <http://www.opendemocracy.net/content/articles/PDF/2149.pdf>. See generally David Levi Strauss, *Breakdown in the Gray Room: Recent Turns in the Image War*, in ABU GHRAIB: THE POLITICS OF TORTURE 87, 91 (2004); Dora Apel, *Torture Culture: Lynching Photographs and the Images of Abu Ghraib*, ART J., Summer 2005, at 88.

40. See MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 217–24 (2004) (showing the photographs).

41. Philipose, *supra* note 32, at 1056.

These widely distributed torture scenes were mirrored in the chilling footage of guards at a Panama City boot camp tormenting fourteen-year-old Martin Lee Anderson to death in January 2006.⁴² A security videotape, aired on television and the Internet, captured seven guards “covering Martin’s mouth, forcing him to inhale ammonia and striking him repeatedly after he stopped running on his first day at the camp.”⁴³ The tape shows a nurse standing by and deliberately watching the entire ordeal, as if giving medical sanction to the guards’ deadly brutality.⁴⁴ This scene ties the legacy of lynching to the present day and situates it in the police station and prison cell. The jurors’ acquittal of the defendants suggests that torture of blacks by police officers and prison guards is an accepted part of the U.S. criminal-justice system that oversees staggering numbers of black men and women.⁴⁵

The roots of coercive police-interrogation techniques, known as the third degree,⁴⁶ can be traced to lynching.⁴⁷ Jerome Skolnick shows that public torture lynchings, typically carried out with the participation or sanction of the police, led directly to police whippings of black suspects to obtain a confession.⁴⁸ The U.S. Supreme Court case *Brown v. Mississippi*, decided in 1936, involved the convictions of three black tenant farmers for murdering a white planter based solely on their confessions.⁴⁹ When one of the defendants, Ellington, denied committing the crime, the deputy sheriff and his posse hanged him from a tree, and when he continued to profess his innocence, tied him to a tree and whipped him.⁵⁰ Over the course of several days, Ellington was brutally whipped until he confessed.⁵¹ A deputy dictated his statement.⁵² “The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial[,]” the Supreme Court opinion noted.⁵³

The sheriff’s deputy in *Brown v. Mississippi* saw no need to deny

42. Terry Aguayo, *Florida: Not-Guilty Pleas in Boot Camp Death*, N.Y. TIMES, Jan 19, 2007, at A17.

43. *Id.*

44. Abby Goodnough, *8 Acquitted in Death of Boy, 14*, in *Florida*, N.Y. TIMES, Oct. 13, 2007, at A8.

45. See generally PRISON NATION 216–77 (Iara Herivel & Paul Wright eds., 2003) (concerning rape, racism, and repression in the criminal justice system).

46. Skolnick, *supra* note 9, at 105. 112–13.

47. *Id.* at 105–06.

48. *Id.* at 107–08.

49. 297 U.S. 278, 281 (1936).

50. *Id.*

51. *Id.*

52. *Id.* at 282.

53. *Id.* at 281.

presiding over the torture of the black suspects.⁵⁴ Rather, he testified that the whipping was “not too much for a Negro.”⁵⁵ This might explain why the Supreme Court of Mississippi upheld the trial court’s admission of the tainted confessions into evidence: whipping was not considered an excessive interrogation technique when imposed on black people.⁵⁶ It seems preposterous that the Mississippi judge believed that the black farmers’ words were true confessions. In overturning the Supreme Court of Mississippi’s decision, Justice Hughes called the whippings “revolting to the sense of justice.”⁵⁷ Clearly the whippings the defendants endured had everything to do with enforcing white power and nothing to do with eliciting information about their alleged crime. “[A]s the content and context of the torturer’s questions make clear,” Elaine Scarry writes in *The Body in Pain*, “the fact that something is asked as if the content of the answer matters does not mean that it matters.”⁵⁸ These were “methods of repression,” not methods of interrogation.⁵⁹

Police torture of suspects continues to be a tolerated means of confirming the presumed criminality of blacks. White police officers in the Area Two Violent Crimes unit on the south side of Chicago carried on a reign of torture against black residents for two decades beginning in the 1970s.⁶⁰ Led by Lieutenant Jon Burge, officers coerced dozens of confessions by punching and kicking suspects, burning them with radiators and cigarettes, putting guns in their mouths, placing plastic bags over their heads, and delivering electric shocks to their ears, nose, fingers, and genitals.⁶¹

Complaints describing similar acts of torture were filed with administrative agencies, the mayor, the state’s attorney, and the U.S. attorney, and alleged by victims at their criminal trials.⁶² But all ignored the evidence, and the Office of Professional Standards did not investigate the complaints until 1990, following a damning Amnesty International report.⁶³ The city suppressed the Office’s report finding

54. *Id.* at 284–85.

55. *Id.* at 284.

56. Compare PIERRE VIDAL-NAQUET, *TORTURE: CANCER OF DEMOCRACY, FRANCE AND ALGERIA 1954–62* (Barty Richard trans., 1963), which explains the campaign of French torture of Algerians in similar terms. “Racial feeling has reached such a pitch that the average Frenchman is incapable of ‘putting himself in the place’ of an Algerian who was tortured, or shot after a mockery of a trial, or summarily executed.” *Id.* at 16.

57. *Brown*, 297 U.S. at 286.

58. ELAINE SCARRY, *THE BODY IN PAIN* 29 (1985).

59. VIDAL-NAQUET, *supra* note 56, at 7.

60. JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE* 21–26, 60–87 (2000).

61. *Id.*

62. Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 *BUFF. L. REV.* 1275, 1288 (1999).

63. See CONROY, *supra* note 60, at 226.

systematic torture in Area Two until 1992.⁶⁴ Burge was eventually fired in 1993; no criminal charges were ever brought against him or any other Area Two officer.⁶⁵

Physical and sexual abuse of prisoners pervades the American prison system and takes place “with little public knowledge or concern.”⁶⁶ Guards have used restraint chairs, a retraining device that locks a prisoner’s legs, arms, and torso with belts and cuffs, not only to control violent inmates but to sadistically punish those who challenge prison rules.⁶⁷ Male and female prisoners have been strapped to the chair completely naked, gagged, hooded, beaten, pepper-sprayed, and left to die from asphyxia and blood clots.⁶⁸ Inside the walls, the tool is aptly known as the “torture chair,” “slave chair,” and “devil’s chair.”⁶⁹ Recent federal legislation, including the Antiterrorism and Effective Death Penalty Act of 1996⁷⁰ and the Prison Litigation Reform Act of 1995,⁷¹ permits prison torture to continue by blocking prisoners’ access to the courts.⁷² The chain of racialized torture that spanned slavery, lynching, and police whippings remains unbroken in the brutalization of black suspects and inmates routinely carried out in today’s criminal justice system.

III. RESUSCITATING COLONIAL DEFENSES OF TORTURE

The public debate over the treatment of detainees tends to overlook torture’s political function. The legality of U.S. interrogation techniques in the War on Terror has focused largely on the precise definition of torture, or, more precisely, narrowing the definition enough to exempt U.S. officials from criminal liability under international and domestic laws.⁷³ At the outset of U.S. incursions in Afghanistan and Iraq, government lawyers embarked on a mission to set a sufficiently high standard for torture to render the military’s harsh custodial conditions and interro-

64. Bades, *supra* note 62, at 1289.

65. *Id.*

66. Fox Butterfield, *The Struggle for Iraq: Prisoners: Mistreatment of Prisoners Is Called Routine in U.S.*, N.Y. TIMES, May 8, 2004, at A11.

67. See Anne-Marie Cusac, *The Restraint Chair*, in PRISON NATION *supra* note 45, at 216–26.

68. *Id.*

69. *Id.* at 216.

70. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 21, 22, 28, 40, 42, 49 & 50 U.S.C.).

71. Pub. L. No. 104-134, tit. VII, 110 Stat. 1321, 1321–66 (codified as amended at 18 U.S.C. § 3601).

72. Matthew T. Clarke, *Barring the Federal Courthouses to Prisoners*, in PRISON NATION *supra* note 45, at 301–14.

73. Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 184 (2006).

gation methods permissible.⁷⁴ This tactical analysis of torture fits into a broader legal framework that denies detainees basic legal protections guaranteed by the U.S. Constitution, the laws of war, and international human-rights principles.⁷⁵ Far from operating extra-legally, an elite legal establishment has painstakingly defined and defended official brutality. Jose Alvarez notes that “[t]he torturer is now us—distinguished, accomplished, highly credentialed public servants and high government officials.”⁷⁶ President Bush himself set the machinery in motion on February 7, 2002, when he issued a memorandum declaring that the Geneva Conventions did not apply to detainees in Afghanistan and Guantánamo.⁷⁷

The *Torture Papers*, a collection of legal memoranda released in the wake of the Abu Ghraib scandal, show that attorneys in the Justice and Defense Departments devoted their legal skills to parsing the United Nation Convention’s distinction between impermissible torture and “merely” cruel, inhuman, and degrading treatment.⁷⁸ According to Jay Bybee, then head of the Office of Legal Counsel and now a federal judge, only physical pain “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death,” amounts to torture.⁷⁹ The lawyers’ memoranda transformed the Torture Convention from a ban on torture to a license to commit cruel, inhuman, and degrading acts on detainees.⁸⁰ Soldiers who step across this line by inflicting sadistic torture are described as “rogues” who are not following official standards.⁸¹ Five years later, during confirmation hearings before the Senate Judiciary

74. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 52–74 (Karen J. Greenberg ed., 2006).

75. See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* xviii (2003); JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2007).

76. Alvarez, *supra* note 73, at 176.

77. ELIZABETH HOLIZMAN & CYNTHIA L. COOPER, *THE IMPEACHMENT OF GEORGE W. BUSH* 125 (2006).

78. *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

79. Memorandum from the Office of Legal Counsel, Dep’t of Justice, for Alberto R. Gonzales, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS*, *supra* note 78, at 172.

80. See generally *id.* Bybee’s memorandum exempted from the definition of illegal torture acts that caused pain but were intended to elicit information. Bybee wrote, “the infliction of such pain must be the defendant’s precise objective[,]” so “even if the [interrogator] knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent.” *Id.* at 174–75. This rationale would exonerate a murderer on grounds that he killed because he intended to steal the victim’s wallet.

81. T.R. Reid, *Guard Convicted in the First Trial from Abu Ghraib*, *WASH. POST*, Jan. 15, 2005, at A01.

Committee, President Bush's nominee for attorney general, Michael B. Mukasey, continued this legal chicanery in response to senators' questions about his views on torture. He refused to state whether he considered simulated drowning, known as waterboarding, to constitute torture.⁸² Mukasey also suggested that the President's authority as commander in chief might allow him to authorize "enhanced" interrogation techniques for terrorism suspects even if they would otherwise be illegal.⁸³

By this reasoning, the government has an elaborate policy to justify the inhumane treatment of detainees while maintaining that it has no policy of torture. This preoccupation with the legal technicalities of torture deflects attention from the more fundamental question: Why is official infliction of intense suffering on certain human beings acceptable at all?

In *Torture: Cancer of Democracy*, French historian Pierre Vidal-Naquet stated that French soldiers who tortured Algerian rebels in the 1950s "had good reason to feel that they were acting within legal bounds. The fact that some of them may have gone well beyond their instructions out of sadism or a spirit of initiative, is a difference of degree, not of kind."⁸⁴ *A difference of degree, not of kind.* I think by "kind," Vidal-Naquet means the kind of policy that permits the infliction of pain and humiliation on certain human beings. This policy does not really hinge on the degree of pain and humiliation that is legal; rather, it depends on the classification of certain people as undeserving of dignity, rights, and justice and therefore morally subject to pain and humiliation.

The legal edifice currently erected to shield torture has direct antecedents in the colonial jurisprudence that justified the differential treatment of African and Asian natives by U.S. and European imperialists. Paul Gilroy argues that casting U.S. invasions overseas as "an 'ethical' force which can promote good and stability amidst the flux and chaos of the postcolonial world" mirrors nineteenth-century colonizers' description of their civilizing missions in Africa and Asia.⁸⁵ The remarks of British imperialist Joseph Chamberlain at a Royal Colonial Institute dinner in 1897, for example, bear an eerie resemblance to President Bush's moralistic defense of war as a battle to safeguard Western ideals:

You cannot have omelettes without breaking eggs; you cannot destroy the practices of barbarism, of slavery of superstition, which for centuries have desolated the interior of Africa, without the use of

82. Philip Shenon, *Senators Clash With Nominee Over Torture and Limits of Law*, N.Y. TIMES, Oct. 19, 2007, at A1.

83. *Id.*

84. VIDAL-NAQUET, *supra* note 56, at 15.

85. PAUL GILROY, *POSTCOLONIAL MELANCHOLIA* 59 (2005).

force; but if you will fairly contrast the gain to humanity with the price which we are bound to pay for it, I think you may well rejoice in the result of such expeditions as those which have recently been conducted with such signal success in Nyasaland, Ashanti, Benin, and Nupé—expeditions which may have, and indeed have, cost valuable lives, but as to which we may rest assured for one life lost a hundred will be gained, and the cause of civilization and the prosperity of the people will in the long run be eminently advanced.⁸⁶

The U.S. government imitated colonial administration when it employed “obscure paralegal categories” such as “enemy combatants” to hold detainees indefinitely without the protections accorded to criminal defendants or prisoners of war.⁸⁷ The Bush administration’s rationale for abandoning human-rights restraints on abusive treatment, though bleached of any explicitly racial language, fits a historical pattern of justifications for imperialist atrocities. Lawyers in the Justice Department took the position that the United States was engaged in a new type of war that necessitated replacing protections accorded to prisoners under the Geneva Conventions with a “*de novo* legal regime that they believed would be superior for the capture, detention, treatment and trial of enemy prisoners.”⁸⁸ Because “[i]t is not the traditional clash between nations adhering to the laws of war[,]” then Counsel to the President, Alberto Gonzales reasoned, the Convention’s strict limits on questioning enemy prisoners were rendered “obsolete” and “quaint.”⁸⁹ The terrorist is constructed as a stateless outlaw who by definition has voluntarily forfeited his claim to legal protection.⁹⁰

Colonial courts similarly ruled that legal protections accorded to citizens did not extend extraterritorially to protect colonized natives from abuse by governmental agents.⁹¹ As one British judge explained, the rule of law could be suspended in the African colonies because “a few dominant civilised men have to control a great multitude of the

86. *Id.* at 61 (quoting Joseph Chamberlain, Remarks at the Royal Colonial Institute Dinner (Mar. 1897)).

87. *Id.* at 20.

88. Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT’L L. 309, 311 (2006).

89. Memorandum from Alberto R. Gonzales, Counsel to the President, for President George W. Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda & the Taliban (Jan. 25, 2002), reprinted in THE TORTURE PAPERS, *supra* note 78, at 119.

90. Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, in AFTER IDENTITY 294, 307 (Dan Danielsen & Karen Engle eds., 1995) (“By placing himself voluntarily outside of the law, the terrorist loses his claim on the law.”).

91. James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335, 359–61 (2003).

semi-barbarous.”⁹² Thus, racial classifications that marked Africans as uncivilized savages justified the uncivilized use of torture in waging an imperialist war against them.

During the twentieth century, the United States employed torture to advance its imperialist missions on the same “savage war” grounds. When the U.S. military under President Theodore Roosevelt stamped out a nationalist insurrection in the Philippines, a war correspondent for the Philadelphia Ledger wrote that U.S. soldiers’ ruthless mass exterminations and torture of men, women, and children reflected the prevailing belief that the Filipino “was little better than a dog.”⁹³ “It is not civilized warfare, but we are not dealing with civilized people[,]” he reported.⁹⁴ “The only thing they know and fear is force, violence, and brutality, and we give it to them[,]” he stated.⁹⁵ William Howard Taft, then Governor-General of the Philippines, testified before Congress that these extreme measures were a necessary aspect of war “between superior and inferior races.”⁹⁶

During the Vietnam War, American servicemen routinely rounded up villagers suspected of sympathizing with the Viet Cong and delivered them to the South Vietnamese for brutal interrogation and execution.⁹⁷ The United States also funded, trained, and equipped the National Police who tortured political prisoners including communists, student protestors, and Buddhists, throughout the U.S. involvement in Vietnam.⁹⁸ The Saigon government adopted the symbol of French colonial terror, the Tiger Cages at the prison on Con Son Island, where starving prisoners were so cramped that many were permanently crippled by their confinement.⁹⁹

The Vietnamese interrogators borrowed the French method of torturing prisoners. In 1949, a journalist who visited a French officer’s quarters in then Indo-China recounted that the officer pointed out his “machine for making people talk.”¹⁰⁰ The officer described the machine as “[v]ery handy for interrogating prisoners.” “You attach the positive pole and the negative pole, turn the handle, and the prisoner squeals[,]” the officer said.¹⁰¹ In Vietnam, as well, the military’s racist views of the

92. *Id.* at 361 (emphasis and citation omitted).

93. Strassfeld, *supra* note 7, at 284.

94. *Id.*

95. *Id.*

96. *Id.* (internal quotation marks and citation omitted).

97. Pete Hamill, Article Excerpt, *N.Y. Post*, July 25, 1966, reprinted in *IN THE NAME OF AMERICA* 73–74 (1968) (excerpting the article without the title or page number).

98. Strassfeld, *supra* note 7, at 294–95.

99. *Id.* at 295.

100. VIDAL-NAQUET, *supra* note 56, at 24 (quoting the journalist).

101. *Id.*

enemy justified departing from civilized restraints on warfare. As General William Westmoreland, commander of U.S. forces in Vietnam, put it, “[t]he Oriental doesn’t put the same high price on life as does the Westerner. . . . [L]ife is cheap in the Orient.”¹⁰²

The government’s direct involvement in overseas torture to promote U.S. neo-colonial interests continued in subsequent decades. Jennifer Harbury, whose husband, Everado, was tortured and killed by the Guatemalan military in 1995, carefully documents the presence of U.S. intelligence agents in secret Latin American torture cells.¹⁰³ The last sighting of Everado in 1992 by a young prisoner of war who escaped from a military base bears the sickening marks of the modern torture apparatus:

He was chained to a cot, with an unidentified gas tank nearby. He was stripped naked and his entire body was extraordinarily swollen, with one arm and leg heavily bandaged, as if they had hemorrhaged. He was raving. Colonel Julio Roberto Alpirez, a graduate of the U.S. School of the Americas, was bending over him, taking careful notes. A physician stood in the doorway, on hand to prevent an accidental death.¹⁰⁴

Harbury’s desperate attempts to save Everado’s life were met with official denials of any information about the secret military prisons or her husband’s whereabouts.¹⁰⁵ It was later revealed that the CIA was not only aware of the detention of Everado and other Guatemalan political prisoners, but paid Colonel Alpirez for information extracted from them by torture.¹⁰⁶ According to Harbury, “[a]gents were not simply purchasing information from unsavory characters, they were wandering in and out of the torture cells and handing out cash.”¹⁰⁷

Vidal-Naquet connected the French authorities’ practice of torturing Algerians in the 1950s to the endemic torture in the French colonies a century earlier. “The victims are not criminals or suspects, but the entire mass of the population unwilling to submit to regimentation by the machinery of colonial government.”¹⁰⁸ In his March 2, 1955, report on an inquiry into police torture of Algerian prisoners, M. Roger Wuillaume, a civil Inspector-General, resorted to a familiar parsing of the

102. Strassfeld, *supra* note 7, at 301 (internal quotation marks and citation omitted).

103. JENNIFER K. HARBURY, *TRUTH, TORTURE, AND THE AMERICAN WAY* (2005).

104. *Id.* at XIX. The physician observing Everado’s torture is reminiscent of the nurse who stood by the fatal torture of fourteen-year-old Martin Lee by boot-camp guards. See source cited *supra* note 44.

105. Harbury, *supra* note 103, at XIX.

106. *Id.* at XX.

107. *Id.* at XXIV.

108. VIDAL-NAQUET, *supra* note 56, at 23.

legal definition of torture to give the police leeway in their interrogations:

[T]he water and electricity methods, provided they are carefully used, produce a shock which is more psychological than physical and do not therefore constitute excessive cruelty. . . . The criminal police, and only the criminal police, should be authorized . . . to use 'special methods' . . . employed only in the presence of an officer or superintendent of criminal police. This conclusion, which takes us back to a recent and painful past [a reference to the Gestapo] may appear repugnant. But since the problem is with us, we must face it.¹⁰⁹

"The gravity of M. Wuillaume's conclusions scarcely requires emphasis[.]" Vidal-Naquet wrote in 1963.¹¹⁰ He was outraged at the notion that "[a] highly placed Civil Servant, in no way connected with the police, proposed simply to legalize torture, to re-establish what in the Middle Ages was known as 'interrogation by water', adding also a more modern method, electricity."¹¹¹ Vidal-Naquet goes on to describe how the French military applied this doctrine to justify torturing Algerian detainees, who were then denied protections of French law by the French judicial system in Algeria.¹¹²

The rationale for torture grounded in the victims' savage nature and outlaw status is validated by the act of torture itself. Torture transforms its victims, rather than the perpetrators, into criminals and terrorists. Philipose observes that "[d]espite clear evidence of abuse inflicted by whites, terror becomes a racial marker reserved for blacks, dissidents, minorities, and Muslims."¹¹³ Positioning racialized captives in total subjection makes the torturer appear to be defending civilization, law, and order; the injured captive becomes the wrongdoer deserving of punishment. The act of lynching African Americans, brutalizing colonialized indigenous people, and torturing Muslim detainees thus validated whites' belief in their dangerous propensities.

IV. TORTURE AND THE RE-BIOLOGIZATION OF RACE

Direct connections between the torture of detainees by the U.S. military and torture of blacks by U.S. law-enforcement officials have already surfaced. It is likely that some of the military perpetrators, such as convicted Abu Ghraib ringleader Charles Graner, perfected their techniques as prison guards in the United States.¹¹⁴ Conversely, Area Two

109. *Id.* at 35 (quoting the report) (alteration in original).

110. *Id.*

111. *Id.*

112. *Id.* at 39–89.

113. Philipose, *supra* note 32, at 1053.

114. See Reid, *supra* note 81.

ringleader Jon Burge borrowed instruments of torture that he saw as a military policeman in Vietnam to coerce confessions from black suspects on the south side of Chicago.¹¹⁵ The black box with wires and a crank that the French colonial officer kept in his quarters to interrogate Vietnamese found its way to U.S. police stations as a device for interrogating African Americans.¹¹⁶

The nexus between the politics of race and torture implicates more than these common techniques of racialized brutality. Because of the history of U.S. racialization by torture, the tolerance of state torture abroad can reinforce the domestic racial order that torture has helped to preserve. The legal defense by the nation's highest officials of inhumane treatment in detention centers and the steady dose of torture in the media have acclimated the American public to the infliction of pain and degradation on racialized nonwhite bodies. Torture is increasingly championed by movies and television shows that depict its successful deployment by patriotic heroes to divert disaster and promote the national interest.¹¹⁷ National polls show that more than one-third of Americans reported that torture was legitimate in some cases and only one-third considered the abuses at Abu Ghraib to constitute "torture."¹¹⁸ Acts of cruelty and humiliation that might have shocked these Americans' conscience six years ago now seem the normal fare easily rationalized by familiar "ethical" arguments.¹¹⁹

The normalization of torture is occurring at the same time that scientific and commercial interest in genetic differences among the "races" resurges. After World War II, the rejection of eugenics, which had supported sterilization laws and other destructive programs in the United States,¹²⁰ generated a compelling critique of the biological basis of race. The classification of human beings into distinct biological races was invented to provide the foundation for racist ideology and inequities of power and has been propped up by deeply flawed scientific evidence.¹²¹ Social scientists' conclusion that race is a social construct was confirmed by genomic studies of human variation, including the Human

115. CONROY, *supra* note 60, at 61–62.

116. *Id.*

117. Human Rights First, Primetime Torture, http://www.humanrightsfirst.org/us_law/etw/primetime (last visited Jan. 2, 2008).

118. See James Bacchus, Essay, *The Garden*, 28 *FORDHAM INT'L L.J.* 308, 320 (2005) (citing Richard Morin & Claudia Deane, *Americans Split on How To Interrogate*, *WASH. POST*, May 28, 2004, at A20)).

119. Luban, *supra* note 74, at 35 ("American abhorrence to torture now appears to have extraordinarily shallow roots.")

120. See DANIEL J. KEVLES, *IN THE NAME OF EUGENICS* 47, 93 (1985).

121. See generally JOSEPH L. GRAVES, JR., *THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM* (2001) (concerning biological theories of race).

Genome Project, showing high levels of genetic similarity within the human species.¹²² Some scholars believed that the science of human-genetic diversity would replace race as the preeminent means of grouping people for scientific purposes.

Reports of the demise of race as biological fact were premature. Debates about the scientific validity of race have reemerged in questions about its proper use in genomic, biomedical, and biotechnology research.¹²³ Using novel genomic tools, some genetic and social scientists claim that clusters of genetic similarity correspond to antiquated racial classifications and that human racial differences are real and significant.¹²⁴ Commercial DNA diagnostic technologies offer consumers a means to determine their racial identity and genealogy.¹²⁵ Pharmacogenomics researchers, studying the genetic origins of disease and differential responses to treatment, are developing pharmaceuticals designed to treat illness in particular racial and ethnic groups.¹²⁶

In June 2005 the Food and Drug Administration (“FDA”) approved the first race-based pharmaceutical, BiDil, to treat heart failure specifically in African Americans.¹²⁷ BiDil is the combination of two generic drugs that doctors had prescribed to patients regardless of their race. The FDA permitted its maker, Nitromed, to market BiDil as a drug for black people.¹²⁸ Making BiDil race-specific also allowed Nitromed to extend its patent to the year 2020, a prerequisite for the drug to be profitable.¹²⁹ The *raison d’être* of race-specific heart medicine is the belief that black heart patients have higher mortality rates because of genetic differences among races, either in the reason for getting heart disease or

122. See Richard S. Cooper, Jay S. Kaufman & Ryk Ward, *Race and Genomics*, 348 N. ENG. J. MED. 1166, 1168–69 (2003); see also Troy Duster, *Race and Reification in Science*, 307 SCIENCE 1050, 1051 (2005).

123. See Vence L. Bonham, Esther Warshauer-Baker & Francis S. Collins, *Race and Ethnicity in the Genome Era: The Complexity of the Constructs*, 60 AM. PSYCHOLOGIST 9, 13 (2005); see also Duster, *supra* note 120, at 1050.

124. See, e.g., Neil Risch et al., *Categorization of Humans in Biomedical Research: Genes, Race and Disease*, GENOME BIOLOGY, Jul. 1, 2002, at 1, 1 (“[W]e demonstrate here that from both an objective and scientific . . . perspective there is great validity in racial/ethnic self categorizations, both from the research and public policy points of view.”).

125. See generally Mark D. Shriver & Rick A. Kittles, *Genetic Ancestry and the Search for Personalized Genetic Histories*, 5 NATURE REVIEWS GENETICS 611 (2004) (concerning an increasing demand among the “New World population” in learning about genetic ancestry).

126. See M. Gregg Bloche, *Race-Based Therapeutics*, 351 NEW ENG. J. MED. 2035, 2036 (2004).

127. Stephanie Saul, *F.D.A. Approves a Heart Drug for African-Americans*, N.Y. TIMES, June 24, 2005, at C2.

128. Jonathan Kahn, *How a Drug Becomes “Ethnic”: Law, Commerce, and the Production of Racial Categories in Medicine*, 4 YALE J. HEALTH POL’Y L. & ETHICS 1, 18 (2004).

129. *Id.* at 32.

in the reason for responding differently to heart-disease medications.¹³⁰

These technological innovations transfer new knowledge on human genetic variation from the laboratory to the marketplace and media for public consumption. Through race-based technologies and the discourses interpreting them, complex findings about the genetics of disease and human diversity are translated into new scientific confirmation of natural racial divisions. By incorporating made-up racial groupings into genetic research, scientists and entrepreneurs are producing biotechnologies that validate people's belief that race is a natural classification.

What exactly is the danger produced by this coincidence of the normalization of torture and of the biological definition of race? The easy transfer of torture technologies between foreign detention centers and U.S. prisons predicts even greater tolerance for brutality against black suspects and inmates. Scholars have noted that as racial inequality has become more institutionalized, it is less imperative to enforce white dominance through "more graphic forms of racial violence."¹³¹ Jacquelyn Hall observed that lynchings receded as legal institutions were developed to deny blacks "the opportunity to own land, the right to vote, access to education, and participation in the administration of the law."¹³² "[O]nce a new system of disenfranchisement, debt peonage, and segregation were firmly in place," she wrote, "mob violence gradually declined."¹³³

But this reduction in the need for graphic violence, such as torture, does not diminish the relationship between torture and race; it shifts the main form of state-sanctioned racial violence from mob-inflicted to institutionalized punishment. As lynchings subsided, they were replaced by the imposition of capital punishment disproportionately on blacks. Executions of blacks used to mimic lynchings as closely as possible.¹³⁴ As debt peonage disappeared, state prisons took over plantations and the racially disproportionate prison population swelled.¹³⁵ Today's imprisonment rate is five times as high as in 1972 and surpasses that of all other nations.¹³⁶ On any given day, nearly one-third of black men in

130. See *id.* at 5; Bloche, *supra* note 126, at 2035.

131. Kaufman-Osborn, *supra* note 22, at 38.

132. Jacquelyn Dowd Hall, "The Mind That Burns in Each Body": Women, Rape, and Racial Violence, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 328, 330 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983).

133. *Id.*

134. Kaufman-Osborn, *supra* note 22, at 39-40. See generally SHERRILYN A. IFFL, *ON THE COURTHOUSE LAWN* (2007) (describing the graphic and public nature of court-ordered executions).

135. ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 33, 35 (2003); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 95-112 (2006).

136. David Garland, *Introduction: The Meaning of Mass Imprisonment*, in *Mass*

their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole.¹³⁷ Racial violence remains widespread, but is cloaked in colorblind due process that is administered by state officials.

The biologization of race seems acceptable today precisely because prior forms of overt racial violence have been institutionalized and are therefore invisible to many Americans. Scientists, pundits, and entrepreneurs can disassociate their promotion of inherent racial classifications from prior explicitly racist and eugenic incarnations because racial inequality no longer relies on overt white supremacy. At the same time, a renewed belief in inherent racial differences provides an alternative explanation for persistent gross inequities in blacks' health and welfare despite the end of de jure discrimination.¹³⁸ The official sanctioning and public tolerance of torture reinforces this new biopolitics, based on biologically defined racial categories and institutionalized inequality, providing a mechanism for the re-production of white supremacy in the post-civil-rights era. The acceptance of torture of enemy combatants not only helps to normalize the abuse of incarcerated black citizens; it also threatens to support mass incarceration itself, along with other forms of institutionalized racism, and to contain organized resistance against it. Thus, the imperialist defense of torture helps to legitimate a new coercive biopolitics of race at a time when the United States claims to have progressed beyond violent enforcement of racial hierarchies.

V. CONCLUSION

Using race to classify bodies of color as inherently uncivilized permits a civilized nation like the United States to perpetrate barbaric practices such as torture, capital punishment, and mass incarceration. By marking its racialized victims as utterly subservient, torture preserves and produces a racial hierarchy that also contradicts democratic ideals. Law-enforcement officials' contemporary abuse of blacks and the military's contemporary abuse of detainees mirrors U.S. historical enforcement of white supremacy and imperialist racial order through torture. The current normalization of torture works to legitimate a new regime of racial biopolitics by making racial inequality and punitive governance seem natural.

IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1 (David Garland ed., 2001); THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: THIRTY-THREE CONSECUTIVE YEARS OF GROWTH 1, 4 (2006), <http://sentencingproject.org/pdfs/1044.pdf>.

137. MARC MAUER & TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995).

138. See, e.g., RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 317–40 (1994).