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## on torture

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# Sadists on the Stand

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As a professor of German and Holocaust history, I am continually revisiting the contentious and fraught issue of comparison. For many Holocaust historians, to compare the Holocaust to any other atrocity is to relativize it; indeed, many who engage in comparisons are attempting a kind of desacralization or worse a diminishing of the event. However, I find it impossible to contemplate and teach this subject without thinking of its ethical and political implications for the present. Why, after all, do we want students to learn the lessons of history, if they are not also being asked to consider how history shapes and invades their lives and surroundings?

What then, are the most important ethical implications of Holocaust research and teaching? Every scholar of this bleak chapter in history must address this question at some point. As a scholar in the field of postwar “vergangenheitsbewältigung” – coming to terms with the past – I am preoccupied with the way that societies and governments deal with atrocity in hindsight, both legally and politically. In examining trials of wartime atrocities, I am beginning to think more and more about the nature of war itself rather than simply war crimes. Specifically, how and why are crimes of torture put on trial? I am less

interested here in whether states condone torture and whether it is actively applied policy. We know that states condone torture – from Algeria to Abu Ghraib – whether they admit it or not.

What interests me more is the way that governments – specifically democratic ones – deny and condemn their use of torture, after the fact. We have seen with the outgoing administration that torture has been denied through a careful massaging of its very definition (which much of the public finds hard to swallow); but torture has also been denied through the very public forum of the trial, which is meant both to marginalize and condemn what in fact was systematically authorized and implemented. The official, public condemnation of a few “bad apples” is the preferred mode of catharsis that governments offer to their citizens. In general, the public is ready and willing to swallow this mendacious message. But this public response is certainly not exclusive to the American context, and this is where the lesson of history returns. Post WW2 West Germany engaged in a similar endeavor, with similar results.

Here are some of the ethical questions that preoccupy me: Why do we so quickly distance ourselves from the reality of torture? Why do

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we allow ourselves to be estranged from the truth? We are all horrified by the images of torture we see splattered across the newspapers, and we demand inquiries. But we then settle for the typical explanation: it was a few sadistic people acting out their dark fantasies. And although we are aghast, we cannot look away. A liberating, breast-beating, collective “that is not us” belies a deeper, voyeuristic “of course that is us,” which we quickly, defensively, deny.

This is our modern charade: our spurious reaction to the notion of Human Rights, the Geneva Convention, the perceived societal duty to seek justice. We pretend to want to get to the bottom of torture; we stage trials which supposedly exact justice. But they do nothing of the sort.

In the wake of the Second World War, and the atrocities committed by the Germans and the Japanese, the newly formed United Nations impressed upon democratic nations the need to investigate, prosecute, and punish crimes of excessive cruelty, torture, and atrocity occurring within the framework of war. Prosecutors throughout postwar democratic West Germany undertook a massive program of investigation and legal proceedings against former Nazis suspected of committing heinous crimes.

From the outside, this appeared to be an earnest attempt to confront the past and properly condemn the unspeakable crimes of the “Final Solution.” A closer look, however, shows us that the judiciary deliberately attempted to normalize systemic Nazi crimes by focusing legal attention and public moral outrage on the crimes of a few “excess perpetrators.” The public learned to gasp at the crimes of a few sadists, while distancing

itself from the system in which so many members of this very same public had been enmeshed. Although Nazism had fallen and West Germany was on its bright new democratic path, the legal system was not so quick to embrace democratic ideals when judging its own past. Postwar judges created a legal system that suited them well and pleased the public too.

The “Trial of the Major War Criminals” at Nuremberg, conducted jointly by the Allies, and the subsequent Nuremberg Trials held by the Americans, set new and bold standards for how war crimes could be prosecuted. The introduction of the four key charges (Crimes against Peace, War Crimes, Conspiracy to commit War Crimes, and Crimes against Humanity) remains the most important development in international criminal law to this day. These charges continue to be used at the International Criminal Court and they represent the best attempt that we have to address the crimes not only of individuals but also of government systems. Control Council Law #10, however, did not sit well with the newly formed West German state, and the Ministry of Justice decided not to adopt it in their criminal code (unlike France or Israel, for example). The national humiliation brought on by the Nuremberg trials smacked of victor’s justice, used *ex post facto* laws that did not exist at the time that the crimes were committed, and forbade the Germans from pointing out Allied atrocities such as the fire-bombing of German cities and the Soviet massacre of 10,000 Polish officers at Katyn. These factors left the newly formed German justice system – not to mention much of the German population – with a bad taste in its mouth. So trials of Nazis would be conducted according to the regular German penal code

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after 1949. Nazis would be charged and tried for murder or manslaughter, as principle agents or accomplices. There were debates within judicial circles regarding the definition of perpetration of murder, and ultimately more conservative scholars, and in turn the German High Court of Appeals, adopted an entirely subjective definition, which determined perpetration entirely by the presence of will, regardless of whether the defendant physically committed the act – thus allowing for the possibility that the person who committed the act not be guilty of murder. The distinction between perpetrator and accomplice in the penal code specified that the primary perpetrator must show individual initiative and knowledge of the illegality of the act; defendants *could* use the excuse that they did not know they were committing a crime. The more a defendant claimed that he believed in and identified with the Nazi world view, the less likely he was to be convicted – despite the fact that the orders of the Nazi state had been deemed illegal already at Nuremberg. The prosecution had to prove beyond doubt that each defendant had acted individually and with personal initiative in order to be convicted of murder.

The West Germans brought some 6500 former Nazis to trial between 1949 and the present, for their participation in the “Final Solution to the Jewish Question,” as camp guards, members of killing squads, and “desk killers.” State attorneys’ offices had high hopes for these trials: prosecutors intended to put the whole camp system on trial, to condemn the bureaucrats in charge of the Holocaust, whose pen strokes and signatures sanctioned the murder of millions. And yet, the trials changed course. In the case of the Auschwitz Trial, the majority of defendants received mild

sentences because they did not show individual initiative. The investigation of the RSHA fell apart after jurists introduced an amendment into the penal code which prevented prosecutors from trying suspects whose base motives – such as racial hatred – could not be proven. The real crime – the methodical murder of innocent men, women, and children in the gas chambers and by the killing commandos – receded into the background, while the full force of the law came down only on the “monsters” on the stand who had created their own instruments of torture, lived out their evil fantasies, and committed crimes so heinous that even the Nazis had investigated them for their excesses. The vast majority of participants in the Nazi racial program came out of the courtroom looking like reluctant, decent people who had gotten confusedly caught up in a madness over which they had no control. The Nazi system ultimately escaped censure when prosecutors had to use as evidence actual Nazi investigations of excessive brutality or corruption in order to get a conviction of perpetrating murder. And this has created a most unhealthy and confused relationship to guilt in Germany, leaving many to “forget” – selective remembering might be a better term – that the Nazi system was in fact just that – a system which required the collaboration and participation of hundreds of thousands of people: not just a handful of horrific sadists and Hitler and Himmler, but judges, lawyers, doctors, professors, architects, engineers, politicians, journalists; and those who were closer to the killing, at the camps and in the *einsatzgruppen*, who might not have been cruel or wanton killers, but who were there and participated none the less because they preferred to serve in the Final Solution than risk their lives on the front.

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What are the ethical implications of this? What relevance does this have for current discussions of torture and war crimes? For me, this is a hugely important discussion and a pivotal moment where we as a society can change how we perceive war crimes. When we take as our example the prison guards at Abu Ghraib, we are of course not dealing with soldiers within a genocidal dictatorship, volunteers working at death camps designed especially for extermination. But the soldiers who engaged in the tortuous crimes at that prison have been demonized, held up as monstrous animals whom we condemn for their brutality and inhumanity. The US military publicly prosecutes them as examples of exactly what it does *not* want among its ranks. They will be punished, justice will be served, and the good war can go on. And yet these soldiers did not appear out of nowhere; they are fighters in an ideological battle against “evil.” There is a lesson to be learned here about the tendency, in democratic societies, to condemn only the most extreme perpetrators of violence and torture and to turn a blind eye to the system that created them. Perhaps the problem lies with our inability to accept our own responsibility for bringing into office people capable of ordering such barbarities. In that sense, postwar democratic West Germany is not so different from the United States today, except that the West German judiciary was implicated in crimes that took place twenty years beforehand, not just twenty weeks beforehand.

We desperately want to believe that the laws of our country are being defined, applied, and upheld in a humane and moral way – after all, the laws of a democratic society are supposed

to and generally do reflect the will of the people – and we show this through our tacit acceptance of the decisions and pronouncements of our lawmakers. But we need to recognize that when we place such unquestioned trust in the legal system, in the motives of our governments, we allow them to define for us what is “normal” and “abnormal” and a vacuum is created in which the public loses its ability to see that justice is not served. Perhaps the scandalous use of torture *does* ultimately delegitimize government; scholarly probing *does* lead to wider public criticism, no matter how much a government and its courts feign abhorrence of this crime. There is an ever growing suspicion of US governmental policy in its “detention centres” and with its “enhanced interrogation methods.” Many Americans now view the scandalous treatment of “enemy combatants” in Afghanistan and Guantanamo, and prisoners of war in Abu Ghraib, critically. Surely this month’s election results are in part a response to the disdain a majority of Americans have for the system that was behind the few bad apples of Abu Ghraib. Perhaps these trials need to be unsuccessful, need to be failures so that the pendulum can swing the other way. We certainly see this in Germany after 1968, when students in West Germany mounted increasing opposition to the conservatism and obfuscations of their parents’ generation, insisting that society’s institutions be dismantled and built up again without the taint of lingering Nazism. And yet the gravity of torture, the uneasiness that it brings out in all of us, could be precisely what allows many Americans who supported the idea of war – those who are now not so sure – to erase from their memories their own gullibility, culpability, and responsibility for the

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actions of their government.<sup>1</sup> In Germany, the controversy surrounding Günter Grass is a perfect example of how this happens; it took Grass 60 years to admit that he had been a supporter of the Nazis and the German war, a member of the *Waffen SS*. This after dedicating his entire literary life to finger pointing and harsh condemnation of the Nazi system. Surely Grass is not alone; and surely his recent admission does not take away from his important literary, political, and historical contributions.

The solution is elusive; it requires *immediate* recognition of guilt, responsibility, complicity, and commitment to change not only the effects of atrocious policies but the causes. The decision to support war will always, ultimately, be a decision to support war crimes. It makes no sense to imagine that torture is only the provenance of a few “bad apples” – it is a fundamental element of war in which “we” attempt to understand, undermine, and eradicate “them.” To relegate torture to the margins, to the exceptional, and to the crime of a few sadists is to willfully ignore the nature of war. What a depressing development it is that the Americans, so determined and so successful in putting the masterminds of aggressive war and war crimes on trial at Nuremberg, now refuse to be held to the same legal standards. Robert Jackson, chief prosecutor at the first Nuremberg trial, proudly declared in his opening statement that subjecting the architects of crimes against peace to the rule of law was “one of the most significant tributes that Power ever has paid to Reason.” Although it might be too optimistic, perhaps the changes we are about to see in the

form of the newly elected administration will usher in a new era of reason.

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<sup>1</sup> See McCoy, *A Question of Torture*, 6-7.

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