

# THE ERASURE OF TORTURE IN AMERICA

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## I. INTRODUCTION

Soon after the terrorist attacks of September 11, 2001, the Bush Administration implemented a torture program involving the use of so-called “enhanced interrogation techniques” (including waterboarding) against terrorism suspects held at CIA black sites, prisons in Afghanistan and Iraq, and Guantánamo Bay.<sup>1</sup> Additionally, many prisoners were “rendered” by the CIA to prisons in countries with poor human rights records, such as Iran, where they were tortured.<sup>2</sup> The existence of this torture program became public knowledge in 2004 with the release of photos depicting the horrific abuse of prisoners by U.S. Army reservists at Abu Ghraib prison.<sup>3</sup> Since then, the full scope of the torture program has been documented by journalists,<sup>4</sup> in the 2014 Senate Committee Report,<sup>5</sup> and by human rights organizations such as Human Rights Watch.<sup>6</sup>

When I began teaching a section on torture in my Current Moral Problems course to freshman students at West Virginia University in 2009, most of my students were familiar with the name “Abu Ghraib,” if not with the details of what occurred there. By Fall 2011, this was no longer true: many students had never heard of Abu Ghraib and had no idea that the U.S. government had instigated (and

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<sup>1</sup> HUM. RTS. WATCH, GETTING AWAY WITH TORTURE: THE BUSH ADMINISTRATION AND MISTREATMENT OF DETAINEES 3 (2011).

<sup>2</sup> *See id.* at 33.

<sup>3</sup> *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 5, 2021, 5:55 PM), <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html> [<https://perma.cc/KQD3-GXEL>].

<sup>4</sup> *See generally* SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2005); ALFRED W. MCCOY, TORTURE AND IMPUNITY: THE U.S. DOCTRINE OF COERCIVE INTERROGATION (2012) (tracing the history and scope of the U.S. torture program).

<sup>5</sup> S. REP. NO. 113-288 (2014).

<sup>6</sup> HUM. RTS. WATCH, NO MORE EXCUSES: A ROADMAP TO JUSTICE FOR CIA TORTURE (2015).

publicly defended) a torture program. Today, over twenty years after the 9/11 attacks, public ignorance of the U.S. torture program is, I suspect, the norm. Yet, at the same time, the torture program dominates the legal case against the five prisoners charged with orchestrating the 9/11 attacks, who are still incarcerated at Guantánamo Bay, where the case against them is mired in delays because some of their testimony was gained under torture.<sup>7</sup>

This widespread erasure of the U.S. torture program from public and political awareness is remarkable. This erasure is assisted by the lack of accountability for the instigators of the torture program. None of the primary architects of the program—including the CIA and Bush Administration officials who designed and implemented the program and the psychologists who developed the “enhanced interrogation techniques”—have faced legal charges or even any serious professional repercussions for their actions.<sup>8</sup> Instead, before he took office, Barack Obama “announced his belief that ‘we need to look forward as opposed to looking backwards’ on torture.”<sup>9</sup> The Obama Administration then blocked any kind of accountability for those involved in the torture program:

Even a proposal for a South African-style “truth and reconciliation” commission was rejected. All avenues for any form of accountability for torture—criminal, civil, even professional—were blocked by Obama-era officials. Even an episode in which the CIA spied on Senate staff in an effort to stonewall an inquiry that ultimately found CIA

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<sup>7</sup> Lisa Hajjar, *Torture Is the Nasty Center of the 9/11 Case at Guantánamo*, MARKAZ REV. (Mar. 14, 2021), <https://themarkaz.org/magazine/torture-is-the-nasty-center-of-the-911-case-at-guantanamo> [<https://perma.cc/MLK8-QLZ7>]. Knowledge of this fact remains largely hidden because “since 2017 the prosecutors in the 9/11 case have refused to speak to the media. This blackout tactic is a means of avoiding any obligation to give quotable answers to questions about the role of torture in the perpetual delays in the case.” *Id.* Yet, despite the erasure of torture from the public consciousness, “[i]nside the military commission . . . torture is a constant topic as adversaries argue over the discovery of classified information, judicial rulings, protective orders that govern the defense teams, and conditions of confinement for the five men on trial. At a hearing on March 1, 2018, defense attorney Alka Pradhan summed up the situation: ‘Torture is . . . the nasty center of this case whether we like it or not, and we have to deal with it.’” *Id.*

<sup>8</sup> David Brennan, *Torture of Guantánamo Detainees with the Complicity of Medical Health Personnel: The Case for Accountability and Providing a Forum for Redress for These International Wrongs*, 45 U.S.F. L. REV. 1005, 1040 (2011).

<sup>9</sup> Adam Serwer, *Obama’s Legacy of Impunity for Torture*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/politics/archive/2018/03/obamas-legacy-of-impunity-for-torture/555578/> [<https://perma.cc/5Y LX-NBMY>].

torture ineffective, and then lied about having done so, ended with little more than an apology.<sup>10</sup>

Given that the Trump Administration openly supported the use of torture,<sup>11</sup> and the Biden Administration has made no moves to instigate legal proceedings against those involved in the torture program,<sup>12</sup> the erasure of the U.S. torture program from public awareness will continue.

Many scholars have rightly criticized the failure of the Obama, Trump, and Biden Administrations to hold the perpetrators and architects of the torture program accountable.<sup>13</sup> While I share these criticisms, my aim in this article is to situate the erasure of the post-9/11 torture program within the history of torture in America (which is, as will become clear, almost exclusively a history of the torture of nonwhite peoples) and explore what *forms* this erasure takes, *what* purposes it serves, and *whose* purposes it serves. As several scholars have argued,<sup>14</sup> far from being antithetical to American values, the torture of nonwhite peoples has long been a method through which the United States has enforced (at home and abroad) a conception of what I will call “white moral citizenship” and sustained what Joanne Esch refers to as the myth of *Civilization v. Barbarism*.<sup>15</sup> What is missing from this literature, however, is an exploration of the role that the erasure of torture, and the political and public narratives that are used to justify torture, plays in this function.

As I will demonstrate in this article, the erasure of American torture takes at least three different but mutually reinforcing forms:

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<sup>10</sup> *Id.*

<sup>11</sup> Lisa Hajjar, *The Afterlives of Torture: The Global Implications of Reactionary US Politics*, 8 STATE CRIME J. 164, 164 (2019) (“Immediately after Trump won the election, he listed resurrecting waterboarding as one of his top five priorities.”).

<sup>12</sup> *Biden Administration Fights to Keep Details of CIA Torture of Detainee Secret*, GUARDIAN (Oct. 6, 2021, 10:30 AM), <https://www.theguardian.com/us-news/2021/oct/06/cia-torture-secret-biden-administration-guantanamo-bay-supreme-court> [<https://perma.cc/WE5N-D7VJ>].

<sup>13</sup> See, e.g., Fionnuala Ní Aoláin, *What Is the Remedy for American Torture?*, JUST SEC. (Nov. 25, 2014), <https://www.justsecurity.org/17720/remedy-american-torture/> [<https://perma.cc/VLL7-5NNH>]; LISA MAGARRELL & LORNA PETERSON, AFTER TORTURE: U.S. ACCOUNTABILITY AND THE RIGHT TO REDRESS 13 (2010); Stephen Vladeck, *The Torture Report and the Accountability Gap*, GEO. J. INT’L AFFS., 174–82 (2015); HUM. RTS. WATCH, *supra* note 6.

<sup>14</sup> See, e.g., W. FITZHUGH BRUNDAGE, CIVILIZING TORTURE: AN AMERICAN TRADITION (2018). See also DARIUS REJALI, TORTURE AND DEMOCRACY (2007); Dorothy Roberts, *Torture and the Biopolitics of Race*, 62 U. MIA. L. REV. 229 (2008).

<sup>15</sup> Joanne Esch, *Legitimizing the “War on Terror”: Political Myth in Official-Level Rhetoric*, 31 POL. PSYCH. 357, 358 (2010).

erasure of the *fact* of torture, erasure of the *experience* of torture, and erasure of the *victims* of torture. Erasure of the *fact* of torture occurs when lack of education and public discussion creates widespread ignorance about the history of torture in America. Erasure of the *experience* of torture occurs when victims' experiences of extreme suffering, and practices or institutions that inflict extreme suffering (such as solitary confinement), are not acknowledged as forms of torture. Erasure of the *victims* of torture occurs when victims are treated with indifference and even contempt, even when what they suffered is acknowledged to be torture, and their perspectives and experiences are dismissed, minimized, or ignored.

The boundaries between these forms of erasure are porous, and they are mutually reinforcing. Erasure of the victims of torture contributes to erasure of the fact of torture and the experience of torture, because when victims of torture are denied moral standing and credibility (and perpetrators are not held accountable), their experiences of suffering are ignored or minimized and there is little public or political willingness to acknowledge that torture occurred. Thus, the victims' perspective, and the use of torture, disappears from (or is misrepresented in) public, political, and educational forums. This erasure of the fact of torture then further compounds public and political indifference to the (past and present) victims of torture and contributes to the continuing lack of accountability for torture perpetrators.

For example, despite his role in instigating the post-9/11 torture program and the wars in Afghanistan and Iraq, George W. Bush's approval rating "has soared since he left office in 2009 and he has been praised by his Democratic successor, Barack Obama."<sup>16</sup> One explanation for Bush's high approval rating could be that many people don't know that he instigated a torture program (erasure of the *fact* of torture), and would disapprove of him if they were made aware. But another explanation for his high approval rating is that many Bush supporters *are* aware of his role in the post-9/11 torture program but believe that the victims deserved to be tortured because, for example, they were dangerous terrorists (erasure of the *victims* of torture) or that what they experienced did not amount to torture but was simply "enhanced interrogation" (erasure of the *experience* of torture). As a result of these forms of erasure, what is erased is not (only) the *fact* that torture occurred, but the *scale* of the torture program and the perspectives and suffering of those who were subjected to it.

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<sup>16</sup> David Smith, *George W. Bush Is Back—but Not All Appreciate His New Progressive Image*, GUARDIAN (Apr. 19, 2021, 2:00 PM), <https://www.theguardian.com/us-news/2021/apr/18/george-w-bush-book-tour-us-president> [https://perma.cc/A64S-TPGJ].

In this article I show how these forms of erasure are created and sustained by repeating patterns of social and political narratives that (1) depict torture victims as deserving of torture because of their “uncivilized” or “barbaric” nature which, in the American context, is constructed via a racialized identity, (2) minimize or deny the use of torture and/or frame the use of torture as *necessary* and *justified*, and (3) thereby justify a lack of *accountability* for the perpetrators of torture.

As I shall argue, both the use of the torture *and* the forms of erasure described above are essential components in the ongoing enforcement of the normative boundaries of American white moral citizenship and the myth of American exceptionalism and civilization. The repeating pattern of the use and erasure of torture leads to the ongoing toleration of practices that constitute torture and that overwhelmingly impact people of color. Until this pattern of justification and erasure is recognized and confronted, torture will continue to be embedded within American culture and institutions.

In Part II, I define torture and explain how torture functions as a “moral marker,” as well as what Darius Rejali calls a “civic marker,”<sup>17</sup> that violently delineates the boundaries of moral citizenship by separating those deemed torturable from those who are protected. By “moral citizenship,” I mean citizenship in the community of those whose interests and welfare are viewed as warranting respect and equal consideration. So defined, moral citizenship does not refer to (and may not track) political or legal citizenship.

In Part III, drawing on the work of W. Fitzhugh Brundage<sup>18</sup> and Dorothy Roberts,<sup>19</sup> I use the case studies of torture against indigenous Americans, the torture of enslaved people, and the use of torture by U.S. troops during the war in the Philippines in the early twentieth century to demonstrate how American torture has, from the earliest days of the North American continent’s colonization, functioned as a mechanism for the enforcement of white moral citizenship.<sup>20</sup>

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<sup>17</sup> Darius Rejali, *Modern Torture as a Civic Marker: Solving a Global Anxiety with a New Political Technology*, 2 J. HUM. RTS. 153, 153 (2003). Rejali argues that “modern torture renders behavior of different classes of citizens predictable. It sets apart those who do and do not belong in a particular neighborhood or region . . . . [T]orture helps to create differences, even insurmountable barriers, between different groups.” *Id.* at 159–60.

<sup>18</sup> BRUNDAGE, *supra* note 14.

<sup>19</sup> Roberts, *supra* note 14.

<sup>20</sup> The function of torture in enforcing racialized boundaries is not unique to the United States, but is characteristic of other colonizing States, including the United Kingdom. See IAN COBAIN, *CRUEL BRITANNIA: A SECRET HISTORY OF TORTURE* 81–83 (2013). See also Roberts, *supra* note 14, at 243.

Part IV draws out the social and political narratives that are common to the cases of torture discussed in Part III, and that minimize or justify the use of torture, demean the victims of torture, and support the lack of accountability for perpetrators, creating the conditions for the erasure of the victims of torture, the experience of torture, and the fact of torture. In Part V, I show how these narratives are replicated in the political, media, and academic discourses that emerged during and after the post-9/11 torture program, and which have played a crucial role in the erasure of public concern about, and knowledge of, the post-9/11 torture program and the suffering of its many victims. This analysis demonstrates that the meaning and function of the post-9/11 torture program is a continuation of the longstanding use of torture as a mechanism for the enforcement of white moral citizenship. Lastly, in Part VI, I show how the forms of erasure of torture from public and political consciousness not only serve to promote the myth of essential American (white) goodness; but also permit the continued use (and denial) of torture against people of color in domestic contexts, such as the prison system, in ways that are not even regarded *as* forms of torture.

## II. THE DEFINITION AND FUNCTION OF TORTURE

### A. *The Definition of Torture*

Standard legal definitions of torture do not refer to the idea of torture as a “moral marker.” For example, the Convention Against Torture (“CAT”) defines torture as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>21</sup>

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<sup>21</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S 85.

Legal definitions are necessary to identify cases of torture for the purposes of legal prosecution. However, such definitions do not capture (and are not intended to capture) what it is about torture that makes it *morally* distinctive. Because I am focusing in this article on the how torture serves as a means for delineating and enforcing the boundaries of moral citizenship, I use what I have elsewhere called an *experiential definition of torture*: Torture is the experience of complete vulnerability to extreme suffering in a context of domination, where the experience of vulnerability reinforces and expresses the torture victim’s moral exclusion from equal moral consideration.<sup>22</sup>

This is a victim-centered definition of torture that distills the characteristic experience of torture from research on torture<sup>23</sup> and the testimony of torture victims.<sup>24</sup> Such testimony reveals that the experience of torture is characterized by complete vulnerability to domination and extreme physical and psychological suffering—an experience that can lead to the destruction of a victim’s sense of self, and a radical loss of their trust in the world and in their own emotions, judgments, and perceptions.<sup>25</sup> This definition also captures how torture communicates to the victim that they no longer matter, morally speaking: the torture victim is forced to recognize their treatment as expressing a total rejection of their moral standing by the torturer, and this recognition is often a significant part of the trauma of torture. For this reason, the philosopher J. M. Bernstein argues that torture is a *moral* injury (and not just an extreme form of physical injury): it is “the cancellation of one’s mattering, and thus one’s standing as human.”<sup>26</sup> Law professor David Luban makes a similar point: torture is the “assertion of unlimited power over absolute helplessness, communicated through the infliction of severe pain or suffering on the victim that the victim is meant to understand as the display of the torturer’s limitless power and the victim’s absolute helplessness.”<sup>27</sup>

## B. *The Function of Torture*

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<sup>22</sup> I defend this definition of torture in Jessica Wolfendale, *Prison as a Torturous Institution*, 97 RES PHILOSOPHICA 297, 303 (2020).

<sup>23</sup> See, e.g., Thiemo Breyer, *Violence as Violation of Experiential Structures*, 16 PHENOMENOLOGY & COGNITIVE SCIS. 737, 741 (2017); Metin Başoğlu, Maria Livanou & Cvetana Crnobarić, *Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?*, 64 ARCHIVES GEN. PSYCHIATRY 277 (2007).

<sup>24</sup> JEAN AMÉRY, AT THE MIND’S LIMITS: CONTEMPLATIONS BY A SURVIVOR OF AUSCHWITZ AND ITS REALITIES (1980).

<sup>25</sup> Wolfendale, *supra* note 22, at 299–303.

<sup>26</sup> J. M. BERNSTEIN, TORTURE AND DIGNITY: AN ESSAY ON MORAL INJURY 103 (2015).

<sup>27</sup> DAVID LUBAN, TORTURE, POWER, AND LAW 128 (2014).

The above definition of torture highlights how torture communicates to the victim their loss of moral standing. Thus, it is far from surprising that, historically, the use of torture by states has functioned to violently enforce and inscribe (literally, on the bodies of torture victims) the boundaries of moral and, sometimes, political citizenship.<sup>28</sup> This is because, for a person to be viewed as a member of a “torturable class,”<sup>29</sup> they must *already* be judged to lack the moral standing and dignity that would make torturing them impermissible, because the decision to torture a person involves a refusal to see the victim’s status *as a person* as setting any limits on what may be done to them. As Dorothy Roberts explains, a policy of torture “depends on the classification of certain people as undeserving of dignity, rights, and justice and therefore morally subject to pain and humiliation.”<sup>30</sup>

The history of torture reveals that those who were classified as “torturable” were *already* viewed as having lesser moral standing. It was permissible to torture them not because of what they had done or any information they possessed, but because of *who they were*. For example, in ancient Greece and Rome, initially only slaves could be tortured.<sup>31</sup> Eventually, the class of those who could be tortured widened to include “lower-end citizens, the *humiliores*, and in time, the emperors did not care about anyone’s civic immunity.”<sup>32</sup> A similar pattern occurred in Italy in the late Middle Ages, when the Italian republics introduced torture into the criminal justice system.<sup>33</sup> At first, torture was only permitted against noncitizens and slaves—“[c]itizens had dignity and were thus inviolable”—but eventually citizens also could be tortured if they were of bad moral reputation.<sup>34</sup>

The fact that, historically, torture was restricted, at least initially, to those who were judged to lack moral standing reveals how torture functions (and has always functioned) as a *moral marker* that enforces and reinforces conceptions of moral citizenship – the boundaries between those who are viewed as having rights and

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<sup>28</sup> Roberts, *supra* note 14, at 230–31; David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC’Y REV. 793, 809 (2005).

<sup>29</sup> Roberts, *supra* note 14, at 231.

<sup>30</sup> *Id.* at 239.

<sup>31</sup> LISA HAJJAR, TORTURE: A SOCIOLOGY OF VIOLENCE AND HUMAN RIGHTS 15 (2013).

<sup>32</sup> REJALI, *supra* note 14, at 526.

<sup>33</sup> *Id.* at 50–51; Marvin E. Wolfgang, *Crime and Punishment in Renaissance Florence*, 81 J. CRIM. L. & CRIMINOLOGY 567, 576 (1990).

<sup>34</sup> REJALI, *supra* note 14, at 50. This history also reveals how the class of those deemed “torturable” almost always expands beyond initial boundaries. I discuss these patterns in State torture in more detail in Jessica Wolfendale, *The Making of a Torturer*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF PERPETRATOR STUDIES 84 (Suzanne C. Knittel & Zachary J. Goldberg eds., 2019).

dignity, and those who are viewed as less than full moral persons and thus torturable. Below, I show how the history of torture in America reflects this pattern.

### III. THE FUNCTION OF TORTURE IN AMERICAN HISTORY

Contrary to President Bush's claim after the revelations of the abuse at Abu Ghraib that "we do not torture,"<sup>35</sup> and President Biden's assertion that torture "goes against everything we stand for as a nation,"<sup>36</sup> the use of torture in America began in the earliest days of colonization,<sup>37</sup> continued through the institution of slavery,<sup>38</sup> extended to the use of solitary confinement as punishment in the nineteenth century (that continues to this day<sup>39</sup>), and occurred during the war in the Philippines at the turn of the twentieth century,<sup>40</sup> the Vietnam War,<sup>41</sup> the Cold War,<sup>42</sup> and the War on Terror.<sup>43</sup>

Below, I use the case studies of torture during colonization, slavery, and in the war in the Philippines to illustrate the function of torture in America in creating and reinscribing white moral citizenship and the myth of American goodness and civilization. I show how social and political narratives that demean torture victims, justify (and minimize) the use of torture, and support the lack of accountability for torture perpetrators play a crucial role in enabling this function, which is then sustained and reinforced via the forms of erasure described in the introduction. As I demonstrate in Part V,

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<sup>35</sup> Deb Riechmann, *Bush Declares: 'We Do Not Torture'*, WASH. POST (Nov. 7, 2005, 11:39 PM), [https://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700521\\_pf.html](https://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700521_pf.html) [https://perma.cc/H47Z-ZN6L].

<sup>36</sup> *Statement by President Joseph R. Biden, Jr. on International Day in Support of Victims of Torture*, WHITE HOUSE (June 26, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/26/statement-by-president-joseph-r-biden-jr-on-international-day-in-support-of-victims-of-torture/> [https://perma.cc/XW3P-KNQH] [hereinafter *Biden Statement*].

<sup>37</sup> BRUNDAGE, *supra* note 14, at 3–4.

<sup>38</sup> Roberts, *supra* note 14, at 237.

<sup>39</sup> LISA GUENTHER, *SOLITARY CONFINEMENT: SOCIAL DEATH AND ITS AFTERLIVES* xi–xiii (2013).

<sup>40</sup> Richard E. Welch, Jr., *American Atrocities in the Philippines: The Indictment and the Response*, 43 PAC. HIST. REV. 233, 233 (1974).

<sup>41</sup> John T. Parry, *Torture Nation, Torture Law*, 97 GEO. L.J. 1001, 1011–12 (2009).

<sup>42</sup> The history of U.S. support for military dictatorships in Latin and South America during the 1970s and 1980s, which extended to providing training in torture methods to those countries, also demonstrates America's active engagement with torture. *See generally* MCCOY, *supra* note 4; *see also* Roberts, *supra* note 14, at 242.

<sup>43</sup> *See generally* BRUNDAGE, *supra* note 14; REJALI, *supra* note 14; MCCOY, *supra* note 4; ALFRED MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR* (2006).

these narratives and forms of erasure are repeated in the post-9/11 torture program.

*A. Torture as a “Defense of Civilization”*

One of the most persistent narratives surrounding the use of torture in America is that torture is a necessary defense against a barbaric and savage enemy.<sup>44</sup> As historian W. Fitzhugh Brundage explains, during the early days of colonization torture was rarely used by English settlers and militia against white colonists but was often utilized against indigenous peoples, as well as against people of African descent: “While the laws regulating the use of torture were recorded in the statute books of all the European colonies, in practice authorities only rarely applied them to Europeans in the New World . . . . In New Netherlands, the harshest torments were applied exclusively to Indian and African residents.”<sup>45</sup> The torture of indigenous peoples was often justified as a “defense of civilization” against savage barbarism<sup>46</sup> because, it was claimed, the use of extreme violence was necessary against “a people ‘of vicious and ferocious habits who know no law but force.’”<sup>47</sup> For example, English colonists in Virginia who survived a 1622 uprising by indigenous peoples, said that “[t]heir hands, ‘which before were tied with gentleness and faire usage,’ were ‘now set at liberty by the treacherous violence of the Savages, not untying the Knot, but cutting it.’”<sup>48</sup> Thus, the use of torture was depicted as a necessary evil, forced upon good people by the enemy’s savage nature, and inflicted not out of malice or cruelty but out of necessity.

This characterization of torture as a necessary response to dealing with a “savage” or “barbaric” people is echoed in the justifications offered for the torture of enslaved persons. Torture was necessary to enforce discipline among slaves, it was said, because people of African descent had naturally “dulled sensibilities.” Additionally, an enslaved person’s suffering from torture was not as severe as that of a white person because, it was claimed, people of African descent had naturally higher pain tolerance thresholds than white people.<sup>49</sup> As one popular medical text from the eighteenth century argued, “[w]hat would be the cause of insupportable pain to a white man a Negro would almost disregard.”<sup>50</sup> The construction of racial identity was thus a crucial element in the justification of the

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<sup>44</sup> See, e.g., Norman K. Swazo, *Exemption from the Torture Ban? A Moral Critique of the Bush Administration’s Policy*, 21 PUB. AFFS. Q. 61, 67 (2007).

<sup>45</sup> See BRUNDAGE, *supra* note 14, at 30.

<sup>46</sup> *Id.* at 51.

<sup>47</sup> *Id.* at 41.

<sup>48</sup> *Id.* at 45.

<sup>49</sup> See *id.* at 107–08.

<sup>50</sup> *Id.* at 108.

torture of enslaved people, by providing a “scientific” basis for a hierarchy of moral status in which white people represented the pinnacle of moral and civil development and in which black and brown people were less than full moral persons.<sup>51</sup> As Dorothy Roberts explains, the concept of race in America was invented to “justify enslaving human beings [and] created a new torturable class in the Americas. The classification of human beings into biological races permitted the infliction of suffering on the bodies of subordinated people who were deemed to be subhuman.”<sup>52</sup> Furthermore, the continued torture of black and brown people then further reinforced the construction of race and the status of white moral citizenship: “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.”<sup>53</sup> Because torture was reserved only for those whose barbaric or “uncivilized” nature made them appropriate targets of torture, the use of torture also reinforced the myth of *Civilization v. Barbarism*: “Torture functions . . . to mark the bodies of brown-skinned victims as savage objects undeserving of civilized legal protection and to violently impose their subjugated status.”<sup>54</sup>

Because people of African descent were portrayed as naturally brutish and uncivilized, it was claimed that slave owners *had* to resort to violence to enforce discipline, because slaves needed a firm hand to understand their place and learn obedience.<sup>55</sup> Of course, slave owners who exceeded the bounds of *reasonable* torture, such as the notorious LaLaurie family in New Orleans,<sup>56</sup> could rightly be criticized but, it was asserted, most slave owners treated their enslaved property with fairness and compassion.<sup>57</sup> As Brundage explains, “conscientious slave masters professed to strive for control over all things, including their own emotions.”<sup>58</sup> And, like the assertion that the torture of indigenous peoples was only motivated by necessity, so it was claimed that the proper (as opposed to excessive) torture of slaves did not reflect cruelty or sadism on

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<sup>51</sup> See *id.* at 92, 108, 110–11.

<sup>52</sup> Roberts, *supra* note 14, at 231.

<sup>53</sup> *Id.* at 233.

<sup>54</sup> *Id.* at 230.

<sup>55</sup> See generally Ian Beamish et al., *The Cotton Revolution*, in THE AMERICAN YAWP (Andrew Wegmann et al. eds., 2018), <http://www.americanyawp.com/text/11-the-cotton-revolution/> [<https://perma.cc/82VF-DTUK>].

<sup>56</sup> The atrocities committed by the LaLaurie family against their slaves were discovered when their property caught fire in 1834. Searchers discovered a slave chained to the floor, and other slaves who were “mutilated and emaciated.” BRUNDAGE, *supra* note 14, at 88.

<sup>57</sup> *Id.* at 111.

<sup>58</sup> *Id.* at 110.

the part of slaveowners.<sup>59</sup> Instead, “corporal punishment was a necessary and ethical component to all patriarchal authority.”<sup>60</sup> As one plantation owner explained, “My rule is to whip, or pull the ear, or twist the nose, or slap [slaves] for every offense . . . But always on the strictest rules of mercy.”<sup>61</sup> If a slave owner had to resort to torture, this was because of the infirmities inherent to the slave’s nature, and not because slavery itself was a torturous institution.<sup>62</sup> Thus, even though by the nineteenth century there were laws prohibiting the abuse of slaves, these laws were almost never enforced.<sup>63</sup> Instead, as Brundage recounts, “statutes granted slave masters the right to inflict virtually unlimited violence on their human chattel. Lawmakers there did not conceive of white violence toward slaves as criminal because they took it to be a routine and necessary feature of slavery.”<sup>64</sup> The rare convictions for cruelty or abuse of slaves that did occur were often overturned on appeal. For example, in *State v. Mann* (1829), the North Carolina Supreme Court overturned the conviction of John Mann for the assault and battery of his slave, Lydia, on the grounds that “‘inherent in the relation of master and slave’ was the fact that ‘the power of the master must be absolute to render the submission of the slave perfect.’”<sup>65</sup> The judge argued that “‘hard discipline ‘belongs to the state of slavery’” and violence “‘is inherent in the relation of master to slave.’”<sup>66</sup> In practice, then, slaveowners could (and did) inflict extreme violence against enslaved persons with almost total impunity.

The narrative of torture as a necessary defense against barbarism recurs in the early 1900s during the U.S. invasion of the Philippines, when rumors began to spread of widespread atrocities, including the use of torture (particularly waterboarding),<sup>67</sup> committed by U.S. troops against Filipino fighters and civilians.<sup>68</sup>

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 111. Brundage points out the similarities between the justifications given for a slave owner’s absolute power over his slaves, and those offered during the same time for white men’s absolute power over their wives and children: “Courts everywhere in the nation granted men wide latitude to discipline their wives, children, servants, and other dependents.” *Id.* at 109.

<sup>61</sup> *Id.* at 110.

<sup>62</sup> See Wolfendale, *supra* note 22, at 311–12.

<sup>63</sup> BRUNDAGE, *supra* note 14, at 102–03, 116.

<sup>64</sup> *Id.* at 99.

<sup>65</sup> THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW 190–91 (1996); *State v. Mann*, 13 N.C. 263, 267 (1829).

<sup>66</sup> MORRIS, *supra* note 65, at 191; *Mann*, 13 N.C. at 266.

<sup>67</sup> Paul Kramer, *The Water Cure: Debating Torture and Counterinsurgency—A Century Ago*, NEW YORKER (Feb. 17, 2008), <https://www.newyorker.com/magazine/2008/02/25/the-water-cure> [https://perma.cc/5TX8-ZTJC].

<sup>68</sup> *Id.*

These rumors culminated in a three-part feature in *Outlook* magazine that “not only criticized the military conduct of U.S. troops but provided details of the so-called ‘water cure’ torture based on information given by American officers.”<sup>69</sup> This report, in conjunction with pressure from journalists and some U.S. Senators, led to a U.S. Senate investigation in 1902 that “produced increasing evidence that torture had been an integral part of the colonial war conducted in the Philippines.”<sup>70</sup> In response to these findings, President Roosevelt defended the U.S. invasion of the Philippines, claiming that it represented “the triumph of civilization over forces which stand for the black chaos of savagery and barbarism.”<sup>71</sup> Roosevelt acknowledged that U.S. forces had committed atrocities, including torture, but stated that, for every American atrocity, “‘a very cruel and treacherous enemy’ had committed ‘a hundred acts of far greater atrocity.’”<sup>72</sup> Just as the English colonists in 1622 justified their atrocities against indigenous peoples by reference to the “treacherous violence of the savages,” members of the Roosevelt Administration also suggested that, if torture had occurred, it “might at times be justified by the frequent violations of the rules of ‘civilized warfare’ committed by a ‘barbaric and treacherous’ enemy.”<sup>73</sup> In contrast, U.S. forces were depicted as honorable and compassionate: “According to the islands’ colonial governor and later president, William Howard Taft . . . ‘never had a war been conducted in which more compassion, more restraint, and more generosity had been exhibited than in connection with the American officers in the Philippines.’”<sup>74</sup>

The Roosevelt Administration’s framing of U.S. torture as an exceptional response to a savage and “uncivilized” enemy succeeded in diffusing public and political outrage at the atrocities, and the U.S. public rapidly became indifferent to repeated reports of torture by U.S. soldiers. A 1902 editorial in the *New York World* lamented:

The American public eats its breakfast and reads in its newspapers of our doings in the Philippines. It sips its coffee and reads of its soldiers administering the “water cure” to rebels; of how water with handfuls of salt thrown in to make it efficacious, is

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<sup>69</sup> Frank Schumacher, “Marked Severities”: *The Debate over Torture During America’s Conquest of the Philippines, 1899–1902*, 51

AMERIKANSTUDIEN/AMERICAN STUDIES 475, 482 (2006).

<sup>70</sup> *Id.* at 483–84.

<sup>71</sup> Paul A. Kramer, *Race-Making and Colonial Violence in the U.S. Empire: The Philippine-American War as Race War*, 30 *DIPLOMATIC HIST.* 169, 169 (2006).

<sup>72</sup> *Id.*

<sup>73</sup> BRUNDAGE, *supra* note 14, at 45; Schumacher, *supra* note 69, at 485–86.

<sup>74</sup> Schumacher, *supra* note 69, at 485.

forced down the throats of the patients until their bodies become distended to the point of bursting; of how our soldiers then jump on the distended bodies . . . The American public takes another sip of its coffee and remarks, “how very unpleasant!” . . . But where is that vast national outburst of astounded horror which an old-fashioned America would have predicted reading such news?<sup>75</sup>

Within two years of this editorial, the scandal of U.S. torture in the Philippines had almost completely receded from public and political consciousness.<sup>76</sup> No officer or soldier accused of torture in the Philippines served any prison time,<sup>77</sup> and President Roosevelt was re-elected in a landslide in 1904.<sup>78</sup>

#### IV. THE FUNCTION OF AMERICAN TORTURE

While there are important differences between these case studies (some of which I will discuss below), all three illustrate a distinctive pattern in the social and political narratives accompanying the use of torture and their function in inscribing and reinscribing the boundaries of white moral citizenship and upholding the myth of *Civilization v. Barbarism*. Firstly, the use of torture (whether inflicted by slaveowners, military forces, or even civilians) is characterized as a necessary evil: a regrettable tactic that good people are *forced* to resort to because of the barbaric, uncivilized, or savage nature of those with whom they are dealing. In the case of torture during conflict, such as in the Philippines, the use of torture is characterized as an *aberration*—a one-off event that does not reflect on the character of American people and that is justified by the enemy’s savage behavior.<sup>79</sup> This construal of torture as a necessary tactic against a barbaric enemy reflects and reinforces the myth of *Civilization v. Barbarism*.<sup>80</sup> As Esch describes, in this myth, “a politically and culturally civilized western world is defined in opposition to a violent and barbaric eastern world.”<sup>81</sup> As Esch notes, this myth emerged in the early days of colonization “in order

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<sup>75</sup> *Id.* at 488.

<sup>76</sup> See Schumacher, *supra* note 69, at 492–93; see also Kramer, *supra* note 67.

<sup>77</sup> See, e.g., Kramer, *supra* note 67.

<sup>78</sup> Schumacher, *supra* note 69, at 485.

<sup>79</sup> See Kramer, *supra* note 71, at 169; BRUNDAGE, *supra* note 14, at 51.

<sup>80</sup> See Esch, *supra* note 15, at 358. Esch argues that this myth works in conjunction with, and mutually reinforces, the myth of *American Exceptionalism*, which “consists of three main ideas: America is a ‘chosen nation,’ America has a ‘calling’ or ‘mission,’ and, in answering that calling, America represents the forces of good against evil.” *Id.* at 366.

<sup>81</sup> *Id.* at 370.

to legitimize and justify acts of genocide against indigenous Americans,”<sup>82</sup> and found renewed purchase during the Cold War<sup>83</sup> the Vietnam War,<sup>84</sup> and, as will become clear, in America’s response to 9/11. In each case, this myth was used to justify the torture (and genocide) of nonwhite people by ascribing innate moral inferiority to them, thereby reifying and reinforcing the boundaries of moral citizenship around the concept of whiteness.

The torture of enslaved people was not framed as a one-off tactic against a barbaric enemy, but rather as treatment that was necessary in managing people who, due to the racialized identity imposed on them, were construed as inherently childlike and uncivilized, and who therefore required harsh discipline and punishment.<sup>85</sup> The suffering of enslaved people as a result of torture was then minimized by reference to their “naturally” high tolerance for pain.<sup>86</sup> Because enslaved people were constructed via a racialized identity as inherently morally inferior and thus deserving of torture, the justification for the torture of slaves follows the pattern of reinforcing white moral citizenship that we see in the other cases of U.S. torture, and similarly reinforces the racialized myth of *Civilization v. Barbarism*.

Secondly, because the torture of nonwhite persons in each of these cases is justified as a method that is required only because of the uncivilized nature of those against whom it is used, torturers are depicted as motivated by necessity, even by compassion (as in the case of slavery), and not by sadism or cruelty. In all three case studies, the character and motivations of American torturers are distinguished from the character and motivations of cruel or tyrannical torturers or those who engage in excesses, like the LaLaurie family. Such people are “bad apples,” who give good torturers a bad name. These narratives then support the view that the perpetrators of torture do not deserve to be punished, because they were only doing what was necessary.

Thus, few, if any, of those who engage in torture are held legally accountable for their actions. I have already noted how few slaveowners were held accountable for the torture of enslaved people. In the case of the use of torture in the Philippines, even those who were found guilty of war crimes faced no serious repercussions, let alone imprisonment. For example, Brigadier General Jacob Smith, who had ordered his officers to “kill and burn” saying, “[t]he more you kill and burn, the better it will please me,” was court-martialed and found guilty but “was simply reprimanded and made

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<sup>82</sup> *Id.* at 371.

<sup>83</sup> *Id.* at 371.

<sup>84</sup> Roberts, *supra* note 14, at 241–42.

<sup>85</sup> *Id.* at 241.

<sup>86</sup> See BRUNDAGE, *supra* note 14, at 108.

to retire early.”<sup>87</sup> Similarly, Captain George W. Brandle, who was court-martialed in June 1900 for torturing two Filipino prisoners by hanging them by the neck multiple times, was acquitted despite admitting that he had used these methods.<sup>88</sup> He claimed, in his defense, that his actions did not constitute torture because “his intentions had been justified and legitimate.”<sup>89</sup>

In each of the above cases, the repeating pattern of demeaning the victims of torture, justifying (and minimizing) the use of torture, and failing to hold perpetrators accountable leads to the forms of erasure described in the introduction. The *victims* of torture are erased from public and political concern because they are viewed as deserving of torture because of their inherently barbaric or uncivilized nature. The victims’ *experience* of torture is erased when their suffering is depicted (as in the case of enslaved persons) as not really torture at all. Then, the *fact* of torture recedes from public and political consciousness as reference to torture ceases to occupy news cycles and political debates. Finally, over time, the fact of torture disappears entirely from, or is grossly misrepresented in, educational materials, public monuments, and other forms of public memory that refer to the historical contexts in which torture occurred. For example, for many decades, the torture, genocide, and enslavement of indigenous peoples was forgotten or deliberately misrepresented,<sup>90</sup> as when the practice of “scalping” was attributed

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<sup>87</sup> Kramer, *supra* note 67.

<sup>88</sup> BRUNDAGE, *supra* note 14, at 157–58.

<sup>89</sup> *Id.* at 157. This defense offered by Captain Brandle (and his definition of torture) is strikingly similar to the definition of the crime of torture that was put forward in the August 1, 2002 memo on the “Standards of Conduct for Interrogation” prepared by the Office of Legal Counsel (“OLC”) for the White House. This memo defines torture as follows: “a defendant is guilty of torture only if he acts with the express purpose of inflicting severe pain or suffering on a person within his custody or physical control . . . Further, a showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits negates specific intent . . . Where a defendant acts in good faith, he acts with an honest belief that he has not engaged in the proscribed conduct.” U.S. Dep’t of Just., *Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C §§ 2340-2340A*, in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 45–46 (David Cole ed., 2009). “Thus, even if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the specific requisite intent.” *Id.* at 45.

<sup>90</sup> For example, textbooks “downplay or ignore the atrocities committed against Indigenous people by settlers and colonists in the foundation of what is currently California.” See Allison Herrera, *Indigenous Educators Fight for an Accurate History of California*, HIGH COUNTRY NEWS (Apr. 29, 2019), <https://www.hcn.org/issues/51.7/tribal-affairs-indigenous-educators-fight-for-an-accurate-history-of-california-missions> [<https://perma.cc/6LSQ-8724>].

almost exclusively to indigenous peoples despite being frequently used by white settlers and militia against indigenous peoples.<sup>91</sup>

During the time of slavery, erasure of the fact of torture was incomplete and partial. Slaveowners never used the term “torture” to describe what they argued was the necessary physical disciplining of enslaved people, but accounts of the torture of slaves were circulated in Northern states to generate support for abolition movements.<sup>92</sup> However, since the abolition of slavery, many public accounts of slavery, such as those that appear in educational materials for high school students<sup>93</sup> and in the narratives of slavery presented at former plantations<sup>94</sup> fail to address or even mention the scale and nature of the torture of enslaved persons. Instead, some textbooks for high school students promulgate a counter-narrative that presents slavery as a largely benevolent institution.<sup>95</sup> The current movement to ban the teaching of Critical Race Theory in schools<sup>96</sup> represents a further deliberate attempt to erase the history and legacy of slavery and thus contributes to the erasure of the fact of the torture of enslaved persons, and the erasure of the victims’ experiences and perspectives.

In the case of the war in the Philippines, the erasure of the fact of torture and the victims of torture from public and political consciousness began very soon after the use of torture by U.S. forces became public knowledge.<sup>97</sup> Over time, as with the case of slavery, a counter-narrative emerged that not only erased the use of torture completely but characterized the war in the Philippines as a useful case study for unconventional warfare.<sup>98</sup> This erasure of torture is so thoroughgoing that, at start of the War on Terror, military and foreign policy experts argued that the U.S. experience in the

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<sup>91</sup> See generally James Axtell & William C. Sturtevant, *The Unkindest Cut, or Who Invented Scalping?*, 37 WM. & MARY Q., 452 (1980) (discussing the historiography of scalping, in particular relying on evidence that European settlers engaged in the practice).

<sup>92</sup> BRUNDAGE, *supra* note 14, at 92–93.

<sup>93</sup> Cynthia Greenlee, *How History Textbooks Reflect America’s Refusal to Reckon with Slavery*, VOX (Aug. 26, 2019, 2:00 PM), <https://www.vox.com/identities/2019/8/26/20829771/slavery-textbooks-history> [<https://perma.cc/GP76-C6RU>].

<sup>94</sup> Perry Carter, David L. Butler & Derek H. Alderman, *The House that Story Built: The Place of Slavery in Plantation Museum Narratives*, 66 PRO. GEOGRAPHER 547, 548 (2014).

<sup>95</sup> See generally Joe Heim, *Teaching America’s Truth*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/education/2019/08/28/teaching-slavery-schools/> [<https://perma.cc/5TTX-VH9X>].

<sup>96</sup> Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Aug. 13, 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/HBV8-TSWP>].

<sup>97</sup> See Schumacher, *supra* note 69, at 492.

<sup>98</sup> *Id.* at 495.

Philippines could provide valuable lessons for fighting guerilla and insurgency forces. As Frank Schumacher explains:

The highly contested acquisition and administration of overseas colonial possessions [was] praised as evidence of successful nation-building; the architects of empire celebrated; and the military conquest of the Philippine Islands, one of the bloodiest colonial wars ever, [was] re-interpreted in light of the “war on terror” as “one of the most successful counterinsurgencies waged by a Western army in modern times.” This new interpretation of a century-old conflict fought to contain colonial resistance views the Philippine-American War as a prime example for America’s ability to successfully wage limited small wars long before the Vietnam disaster. According to publicist Max Boot, Americans should draw inspiration and self-confidence from this historical experience and: “be less apologetic, less hesitant, less humble. America should not be afraid to fight ‘the savage wars of peace’ if necessary to enlarge the ‘empire of liberty.’ It has done it before.” Journalist Robert Kaplan even included the war’s experience in his “Ten Rules for Managing the World.” The Philippine-American War and its counterinsurgency insights have also gained prominence in military circles. The renewed interest prompted historical symposia convened by the U.S. Army and the Marine Corps, inspired essay competitions at the military academies, and produced numerous analyses of the war’s tactical insights for current operations.<sup>99</sup>

Thus, the extensive use of torture by U.S. soldiers in the Philippines has not only been completely erased from public and political consciousness; it has been replaced by a narrative that depicts that conflict as an example of U.S. military innovation and bravery.

## V. THE POST-9/11 TORTURE PROGRAM

It does not take much more than a cursory examination to notice the similarities between the narratives of justification and patterns of erasure discussed in Part IV, and the public, media, and political discourse around, and subsequent erasure of, the post-9/11 torture program. The similarities with the case of torture in the

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<sup>99</sup> *Id.* at 476.

Philippines are particularly striking, due to the shared context of a foreign conflict, but are echoed in all three cases. One significant difference between the post-9/11 torture program and the cases discussed above is that the post-9/11 torture program was explicitly authorized by the Bush Administration<sup>100</sup> and publicly defended by politicians, journalists, ethicists, and lawyers.<sup>101</sup> That the existence (and the victims) of the post-9/11 torture program were *still* able to be effectively erased from public and political consciousness despite these facts represents an unprecedented shift toward the normalization of torture in America and the ongoing denial of such normalization—a point that has significant consequences for the acceptance of torture in domestic contexts, particularly in the prison system, as I will discuss in my conclusion.

A. *Torture as a Necessary Tool Against a Barbaric and Unique Enemy*

One of the key narratives that emerged after 9/11, and that played an important role in legitimizing not only the use of torture but the wars in Iraq and Afghanistan, is a version of the myth of *Civilization v. Barbarism*. As Jennifer Esch explains, within a few days of the 9/11 attacks, the Bush Administration—as well as many political and media commenters—drew a distinction between so-called “barbaric” Islamic terrorism and American civilization. The terrorists “‘hate all civilization and culture and progress’ (Bush, 24 Nov. 2001)” and “‘a group of barbarians have declared war on the American people’ (Bush, 15 Sept. 2001).”<sup>102</sup> Furthermore,

Attorney General John Ashcroft affirmed, “[T]he attacks of September 11th drew a bright line of demarcation between the civil and the savage, and our nation will never be the same. On one side of the line are freedom’s enemies, murderers of innocents in the name of a barbarous cause. On the other side are friends of freedom; citizens of every race and ethnicity, bound together in quite resolve to defend our way of life.”<sup>103</sup>

The narrative depicting al-Qaeda as a uniquely savage and barbaric enemy then played a significant role in justifying the resort

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<sup>100</sup> HUM. RTS. WATCH, *supra* note 1, at 2.

<sup>101</sup> See, e.g., Gregory Korte & David Jackson, *CIA Director Defends Agency’s Handling of Torture*, USA Today (Dec. 11, 2014, 5:51 PM), <https://www.usatoday.com/story/news/politics/2014/12/11/cia-director-brennan-torture-defense/20245991/> [<https://perma.cc/KJV5-7D8F>].

<sup>102</sup> Esch, *supra* note 15, at 382.

<sup>103</sup> *Id.*

to torture. Echoing the defenses offered by English colonists in 1622 for the torture of indigenous peoples, the Bush Administration argued that al-Qaeda fighters did not deserve and were not entitled to the legal protections of the Geneva Conventions because they were “unlawful enemy combatants.”<sup>104</sup> And, when fighting such a uniquely dangerous enemy, “there was a before 9/11 and there was an after 9/11. After 9/11 the gloves come off,” in the words of Cofer Black, Director of the CIA’s Counterterrorist Center from 1999 until May 2002.<sup>105</sup>

### *B. Torture as an Aberration*

Because al-Qaeda was depicted as a barbaric enemy that posed a uniquely deadly, even existential,<sup>106</sup> threat to the United States, torture was represented as an unprecedented tactic the use of which was only (reluctantly) contemplated out of necessity. For example, according to James Mitchell, the psychologist who helped design the CIA’s enhanced interrogation program, the CIA approached him and another psychologist for this role because “[the CIA] would have been derelict had [the CIA] not sought them out when it became clear that [the] CIA would be heading into the *uncharted territory of the program*.”<sup>107</sup> This characterization of the CIA’s use of torture as “uncharted territory” not only ignores the cases of torture in America discussed in Part III, but neatly elides the long history of CIA research into torture, use of torture, and the training of torturers in Latin and South America.<sup>108</sup>

This depiction of the post-9/11 torture program as an unprecedented response to an existential threat was reflected and reinforced through the academic and media debates about the ethics of torture that emerged soon after the post-9/11 torture program became public knowledge.<sup>109</sup> The majority of these debates began

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<sup>104</sup> Hajjar, *supra* note 11, at 165–66.

<sup>105</sup> *What Happens When the Gloves Come Off*, HUM. RTS. WATCH (Apr. 8, 2008, 8:00 PM), <https://www.hrw.org/news/2008/04/08/what-happens-when-gloves-come> [<https://perma.cc/QZP3-V84Q>].

<sup>106</sup> I discuss this depiction of the threat of terrorism in Jessica Wolfendale, *The Narrative of Terrorism as an Existential Threat*, in *THE ROUTLEDGE HANDBOOK OF CRITICAL TERRORISM STUDIES* 114 (Richard Jackson ed., 2016); *see also* RICHARD JACKSON, *WRITING THE WAR ON TERRORISM: LANGUAGE, POLITICS AND COUNTER-TERRORISM* (2005) (highlighting the juxtaposition between terrorists as “evil, barbaric and inhuman” and America and its coalition partners as “heroic, decent and peaceful”).

<sup>107</sup> JAMES MITCHELL, *ENHANCED INTERROGATION: INSIDE THE MINDS AND MOTIVES OF THE ISLAMIC TERRORISTS TRYING TO DESTROY AMERICA* 49 (2016) (emphasis added).

<sup>108</sup> *See generally* MCCOY, *supra* note 43.

<sup>109</sup> *See* Rebecca Evans, *The Ethics of Torture*, 7 *HUM. RTS. & HUM. WELFARE* 53, 54 (2007).

by presenting some version of the “ticking bomb scenario”—a hypothetical scenario in which the audience is asked whether torturing a captured terrorist to find out the location of a bomb is morally permissible.<sup>110</sup> Indeed, a version of this scenario appears in the August 1, 2002 “Standards of Conduct for Interrogation” memo prepared by the Office of Legal Counsel for the Department of Justice, in a discussion of possible legal defenses for U.S. personnel who might be charged with torture:

[A] detainee may possess information that could enable the United States to prevent attacks that potentially could equal or surpass the September 11 attacks in their magnitude. Clearly, any harm that might occur during an interrogation would pale to insignificance compared to the harm avoided by preventing such an attack.<sup>111</sup>

Thus, torture is acknowledged to be “abhorrent both to American law and values and to international norms,” as the first sentence of the December 30, 2004, Office of Legal Counsel memo states,<sup>112</sup> but the nature of the War on Terror and the supposedly uniquely dangerous nature of the enemy are claimed to justify the resort to extreme measures.

Framing the question of torture as if it were only *now* a tactic that the United States might have to (reluctantly) use to fight a barbaric enemy completely erases the history and scale of American torture and reinforces the long-standing myth of *Civilization v. Barbarism*. Additionally, by focusing on whether a single, hypothetical, act of torture might be justified, this framing of torture masks, and deflects attention away from, the fact that the post-9/11 torture program was a systematic practice affecting hundreds, if not thousands, of prisoners, that involved policies, procedures, institutional support, and the training of torturers.<sup>113</sup> By fostering the

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<sup>110</sup> See generally Alan Dershowitz, *Want to Torture? Get a Warrant*, SFGATE (Jan. 22, 2002), <https://www.sfgate.com/opinion/openforum/article/Want-to-torture-Get-a-warrant-2880547.php> [<https://perma.cc/HG39-N3CZ>]; Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC (Oct. 1, 2003), <https://www.theatlantic.com/magazine/archive/2003/10/the-dark-art-of-interrogation/302791/> [<https://perma.cc/ELJ5-K485>], for two prominent examples from the media at the time.

<sup>111</sup> U.S. Dep’t of Just., *supra* note 89, at 92.

<sup>112</sup> U.S. Dep’t of Just., *Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable Under 18 U.S.C §§ 2340-2340A*, in THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 128, 128 (David Cole ed., 2009).

<sup>113</sup> Alette Smeulers & Sander van Niekerk, *Abu Gharib and the War on Terror—a Case Against Donald Rumsfeld?*, 51 CRIME L. & SOC. CHANGE 327, 346 (2009).

assumption that it is possible to debate the use of torture from a hypothetical and objective perspective, this narrative of torture helps sustain the myth that the debate about torture is a debate about what we *might* do, and not a debate about what we *have* done, and are doing. As I have argued here, torture in the United States is not and never has been a matter of merely hypothetical debate.

This narrative also deflects attention away from the function of U.S. torture in enforcing white moral citizenship, since it frames the use of torture as dictated by solely by considerations of necessity. But, as I argued in Part II, a state's choice to use torture has always required the creation of a torturable class. The social and political narratives used to defend the torture of indigenous peoples, enslaved peoples, and Filipino soldiers and civilians, were employed again in the post-9/11 torture program.<sup>114</sup> As in these earlier cases, these narratives reinforce white moral citizenship by targeting nonwhite peoples who are classified as savage and uncivilized, and thereby serves to "acclimate the American public to the infliction of pain and degradation on nonwhite bodies."<sup>115</sup>

### C. *Torture as Motivated by Duty*

The narrative of torture as an aberration sustains the myth that the use of torture does not reflect negatively on American character or values. For example, like President Roosevelt's claim that the torture in the Philippines was "wholly exceptional,"<sup>116</sup> in the aftermath of the revelations of the torture at Abu Ghraib, President Bush asserted that "the abuse did 'not reflect the nature of the American people,' but merely the 'actions of a handful of soldiers,' and therefore it 'should not taint the tens of thousands who serve honorably in Iraq.'"<sup>117</sup> Defenders of the post-9/11 torture program drew a distinction between the "bad" torturers at Abu Ghraib, and "good" torturers, who acted professionally; a distinction reflected in the decision to refer to torture as "enhanced interrogation." For example, James Mitchell described the events at Abu Ghraib as the actions of a few rogue individuals and worried about the negative impact of the scandal on the CIA's enhanced interrogation program: "I knew the CIA's interrogation program would take a hit because of the stupid and self-indulgent criminal activities of a few bored and poorly supervised military officers."<sup>118</sup> In Mitchell's eyes, the torture at Abu Ghraib had nothing to do with the CIA interrogation

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<sup>114</sup> Roberts, *supra* note 14, at 244.

<sup>115</sup> *Id.*

<sup>116</sup> Kramer, *supra* note 71, at 1.

<sup>117</sup> Elazar Barkan, *The Worst Is Yet to Come: Abu Ghraib and the Politics of Not Apologizing*, in *TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION* 311 (Elazar Barkan & Alexander Karn eds., 2006).

<sup>118</sup> MITCHELL, *supra* note 107, at 231.

program which, in his view, was professional, lawful, and necessary. Indeed, he suggests that the professionalism of the CIA program prevented even worse abuses:

I think in retrospect that the troublesome things done later on by the few officers who did go outside approved guidelines illustrates how bad it could have been throughout the CIA's interrogation program without a carefully crafted list of techniques approved by the Department of Justice and closely monitored during implementation.<sup>119</sup>

The claim that the post-9/11 torture program was motivated by duty, necessity, and professionalism is echoed by the contributing authors to *Rebuttal: The CIA Responds to the Senate Intelligence Committee's Study of Its Detention and Interrogation Program*.<sup>120</sup> Porter J. Goss, former director of the CIA, described the Senate report as a "betrayal of those who took the risks to keep us safe while following clear, lawful guidelines under programs properly vetted and approved by lawyers, the Department of Justice, policy makers, and politicians."<sup>121</sup> General Michael Hayden, former director of the CIA and the National Security Agency "admitted that there had been abuses early on, when untrained folks had been sent into the field in emergency circumstances" but claimed that "[t]he CIA detention and interrogation program was launched out of a sense of duty, not enthusiasm."<sup>122</sup> Former CIA lawyer John Rizzo praised the "resoluteness of CIA career professionals who were convinced of its value and thus steadfastly, stoically carried it on for years in the face of shifting political winds and increasingly toxic public controversy."<sup>123</sup>

This narrative of the post-9/11 torture program as motivated by necessity, duty, and professionalism clearly echoes the distinction (noted in Part III) drawn by slaveowners between the reasonable, compassionate use of torture against enslaved persons,

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<sup>119</sup> *Id.* at 42.

<sup>120</sup> See George J. Tenet, *Introduction*, in *REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM* 3, 5 (Bill Harlow ed., 2015).

<sup>121</sup> Porter Goss, *What Must Never Happen Again?*, in *REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM* 7, 9 (Bill Harlow ed., 2015).

<sup>122</sup> Michael V. Hayden, *Analysis: Flawed, Polished . . . and Rejected*, in *REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM* 10, 11, 13 (Bill Harlow ed., 2015).

<sup>123</sup> John Rizzo, *The Legal Case for EITs*, in *REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE'S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM* 32, 33 (Bill Harlow ed., 2015).

and the excesses committed by people like the LaLauries. And just like those slaveowners, the torturers and architects of the post-9/11 torture program viewed themselves as morally good, even virtuous, in comparison to the “bad apples” who acted out of cruelty and sadism at Abu Ghraib.<sup>124</sup>

#### *D. The Erasure of the Post-9/11 Torture Program*

To sum up, as with the social and political narratives that accompanied and made possible the use of torture against indigenous peoples, enslaved people, and Filipino soldiers and civilians, the narratives accompanying the post-9/11 torture program depicted the victims of torture as deserving of torture (which was also not called “torture” but “enhanced interrogation”), framed torture as a necessary evil, and represented the perpetrators and architects of the torture program as good people motivated by duty, which thereby justified the lack of accountability for those individuals. As with the case studies discussed in Part III, these narratives have created and sustained at least three ongoing forms of the erasure of torture. Because of the narrative depicting the victims of the post-9/11 torture program as “barbaric” and simultaneously denying that they were subjected to “real” torture, the victims’ perspectives and experiences have been minimized and dismissed. Then, assisted by the continuing lack of accountability for torture perpetrators, the fact of the post-9/11 torture program has receded from public and political awareness to such an extent that many people are not aware that it existed, let alone that victims of the torture program are still incarcerated at Guantanamo Bay. Thus, as with the other cases of American torture, the erasure of the post-9/11 torture program sustains the illusion of American goodness and civilization and, by doing so, enables the ongoing toleration of the infliction of violence against nonwhite bodies.

### VI. CONCLUSION: THE ERASURE OF TORTURE AND THE TOLERATION OF TORTURE

In this article, drawing on work from W. Fitzhugh Brundage<sup>125</sup> and Dorothy Roberts,<sup>126</sup> I have demonstrated that American torture has functioned to sustain and reinforce the boundaries of white moral citizenship and the associated myth of *Civilization v. Barbarism* from the earliest days of colonization to the post-9/11 torture program. Additionally, I have shown that the

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<sup>124</sup> The distinction between good and bad (or professional and unprofessional) torturer is common to many States that have used torture. See JESSICA WOLFENDALE, *TORTURE AND THE MILITARY PROFESSION* 161–183 (2007).

<sup>125</sup> See generally BRUNDAGE, *supra* note 14.

<sup>126</sup> See generally Roberts, *supra* note 14.

political and public narratives that accompany this use of torture across American history form a repeating pattern of the justification of torture that creates and sustains at least three forms of the erasure of torture from public and political consciousness: erasure of fact of torture, erasure of the victims of torture, and erasure of the experience of torture. This pattern of justification and erasure is replicated in the post-9/11 torture program and continues to this day. Here, I want to conclude by briefly exploring the ongoing and devastating impact of the erasure of torture on people of color in America.

As I have explained, a core narrative of American torture is that torture is a *deviation* from American values and norms that is justified by the barbaric and uncivilized nature of those to be tortured. This narrative contributes to erasure of the history of U.S. torture and obscures the fact that the torture of nonwhite peoples is embedded *within* American norms, and always has been. Torture in America has always been used to effectively mark the difference between white and nonwhite, between “barbarian” and “civilized,” and between citizen and non-citizen. Thus, the narrative of torture as a deviation not only allows the American (white) public and political leadership to continue to pretend that torture is “un-American”; it facilitates the ongoing torture of nonwhite people and others who are deemed morally inferior<sup>127</sup> and, at the same time, leads to the toleration and dismissal of such torture. Thus, the forms of the erasure of torture that I have described in this article play an essential role in the continued use of torture.

The cost of the erasure of torture to people of color is incalculable. The ongoing failure of American political leaders, media, educational institutions, and the broader community to acknowledge and address the history of U.S. torture and its function in violently enforcing white moral citizenship is a grotesque and ongoing harm to the victims of torture and their descendants—both in America and abroad. The narratives of justification and patterns of erasure that I have identified in this article repeat and repeat, continually reinscribing the false narrative of *Civilization v. Barbarism*, prioritizing the voices and perspectives of torturers and those who enable torture, and erasing and silencing the voices and testimony of the victims of torture. This continuing pattern of the use and erasure of torture undermines any possibility of holding the perpetrators of torture accountable and, by doing so, inflicts further ongoing harm on the victims of torture.

Additionally, this pattern enables ongoing forms of torture to be ignored and dismissed. This is particularly evident in the

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<sup>127</sup> For example, LGBTI and mentally ill inmates are also disproportionately subject to torturous prison conditions such as solitary confinement. Wolfendale, *supra* note 22, at 319.

erasure of the torture of inmates in the U.S. prison system, who are disproportionately African American. As I have argued elsewhere,<sup>128</sup> the use of solitary confinement,<sup>129</sup> the conditions of mass incarceration, and the toleration of the sexual assault of prisoners meet the definition of torture that I proposed in Part II. Roberts makes a similar point: “Physical and sexual abuse of prisoners . . . takes place ‘with little public knowledge or concern’ . . . 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.”<sup>130</sup> Yet, this treatment of inmates is rarely, if ever, described as torture and, in the case of sexual assault, is the subject of mockery and jokes.<sup>131</sup> The treatment and incarceration of asylum seekers under the Trump Administration also meets the definition of torture,<sup>132</sup> yet is also largely tolerated and ignored. This is a perfect illustration of the devastating impact of the erasure of torture.

The erasure of American torture also has a profound effect on the lives and well-being of people of color beyond the toleration of torture in U.S. prisons. For example, one of the ongoing and lasting effects of the narrative promulgated at the time of slavery that people of African descent do not feel pain to the same degree as white people (a narrative which both justified the torture of slaves and was used to deny that such treatment was torture) is that, in medical contexts today, the self-reported pain of African American patients is treated as less severe and is more likely to be dismissed than the self-reported pain of white patients—a fact which can and does have devastating consequences for the health and wellbeing of African Americans.<sup>133</sup>

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<sup>128</sup> For example, inmates who identify as lesbian, gay, bisexual, or other encountered sexual abuse from other inmates at a rate ten times higher than inmates who identify as straight. Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, BUREAU JUST. STAT. NAT’L INMATE SURV. 6, 7 (2013); see also Jo Yurcaba, *For Survivors of Prison Rape, Saying ‘Me Too’ Isn’t an Option*, REWIRE NEWS GRP. (Jan. 8, 2018, 4:28 PM), <https://rewirenewsgroup.com/article/2018/01/08/survivors-prison-rape-saying-isnt-option/> [https://perma.cc/M3R3-VQKP].

<sup>129</sup> See GUENTHER, *supra* note 39.

<sup>130</sup> Roberts, *supra* note 14, at 237.

<sup>131</sup> Yurcaba, *supra* note 128.

<sup>132</sup> Hajar Habbach et al., “*You Will Never See Your Child Again*”: *The Persistent Psychological Effects of Family Separation*, PHYSICIANS FOR HUM. RTS. (Feb. 25, 2020), <https://phr.org/our-work/resources/you-will-never-see-your-child-again-the-persistent-psychological-effects-of-family-separation/> [https://perma.cc/G4KL-VZHG].

<sup>133</sup> See Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. NAT’L ACAD. SCI. U.S. AMERICA 4296, 4296 (2016).

In sum, the ongoing torture of people of color in the United States (and abroad) will continue unless and until there is a thoroughgoing public acknowledgment of, and reckoning with, the true history of American torture. The repeating patterns of the justification and erasure of torture that sustain and promulgate the torture of people of color mask and distort the long-standing and ongoing function of torture in America as a violent mechanism for the enforcement of moral white citizenship. Unfortunately, given President Biden’s assertion that torture “goes against everything we stand for as a nation,”<sup>134</sup> and the failure of the Biden Administration (and preceding administrations) to hold the architects and perpetrators of the post-9/11 torture program accountable, let alone offer redress to the victims of torture, we have little reason to hope that such a reckoning will occur soon.

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<sup>134</sup> *Biden Statement*, *supra* note 36.