

**Torture as *Raison D'État***, by Anthony D Amato, 10 Criminal Justice Ethics, 40 (1991)

Code A91c. Some small changes have been made; for example, the footnotes are at the foot of the page, rather than at the end.

We normally assume, with some justification, that law enforcement officers are motivated by a desire to serve the public and to vindicate the interests of victims of crime. Of course, psychologists can find other motives in individual cases (desire for advancement, better salary, power-lust, sadism). But in addition to all of these, I want to suggest a somewhat different motivation that is hard to pinpoint or describe: the feeling of a need to vindicate the interests of the state. If there is such a motivation, it may help to throw some light on the legal creature called the "state," to which we blithely entrust the making and the implementation of all the laws that restrict our individual freedoms.

While we can understand a motivation to vindicate the interests of victims, it is harder to understand what it would be like to vindicate the interests of the state. I would be called mentally unstable if I proclaimed I was acting to vindicate the interests of my apartment or my piece of farm land. Our normal notion of the state is that it is an abstraction—the residual totality of things, the entity that represents the public in a legal but not a corporeal sense. How could vindicating the state's interests be any different from vindicating the interests of any other nonliving or abstract thing?

Consider an observation made by Lawrence Weschler in a recent book about torture in Brazil and Uruguay.<sup>1</sup> In a brief discussion of a Brazilian security agent who was taking sexual advantage of the female relative of a prisoner under torture, Weschler tells us that the agent led her to believe that he would intercede in some fashion on the prisoner's behalf. And *that*, Weschler reports, "horrified" the other torturers:

It's very strange. Rape as a part of torture was perfectly OK: that was an effective method of investigation, a way of sparking fear which would provoke confession and elicit information—all very professional. But rape for pleasure—the very thought that the torturer could be doing anything for his own pleasure—that really shook them up.<sup>2</sup>

Thus the torturer, in the eyes of his colleagues, cannot give the appearance of acting for his own pleasure. The fact that he was acting for his own pleasure and not, as it were, at the pleasure of the state, "shook up" the other torturers perhaps because for a moment it unmasked certain pleasurable emotions that they dimly recognized in their own psychologies but were actively sublimating.

Let us look more closely at the emotions of these other torturers (we can leave the rapist now—*his* emotions are those of your ordinary generic rapist). The "horrified" Brazilian security agents may possibly be categorized under either an "entailment" thesis or a "deviationist" thesis.

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<sup>1</sup> Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (New York: 1990) [*hereinafter* Weschler].

<sup>2</sup> Weschler, *supra* note 1, at 67.

The deviationist thesis would view torture as pathologically pleasurable — an act of sadism on the part of the torturers. Under this view, torture would not be a necessary part of a state's security apparatus but rather a dark corridor within the apparatus of state officialdom that some states use and other states avoid. Perhaps the states that condone torture are impelled by the particular sort of people who are drawn into security work in that state at a given time. Those people might start out as confirmed sadists; once they attain official status, they find victims and invent statist rationalizations to torture them. To be sure, they often elicit useful information (the word security agents love is "intelligence"),<sup>3</sup> and they may also play an important role for the state in intimidating political opposition movements. But the deviationist thesis, I would argue, finds most of the alleged utility of torturing to be a rationalization. Perhaps the most cynical view of the deviationist thesis is that in any army, police force, guerrilla band, and so on, there are some useful fighters and colleagues who happen to be sadists. Once the organization attains power in the state, the energy of these people has to be siphoned off somehow so that they don't turn on their colleagues. Channeling their energies becomes transmuted into a practice of torture that is rationalized as necessary to national security.

The entailment thesis, on the contrary, would view torture not as a pleasurable act but as work that is a necessity from the state's point of view. There is no rationalization about it. It is simply dirty work in a dirty world. Under this view, we would expect to find that all states at one time or another order or permit varying degrees of torture, and indeed anecdotal history seems to corroborate this position.

Between the two theories, if we judge from popular motion pictures, the deviationist thesis has more Hollywood value. The sadist is the "bad guy" whom you can comfortably hate during the movie, after which you leave the theatre with a good feeling that torture is a chance event — a contingent occurrence that is containable and not a functional part of your own state's apparatus but rather something that happens only in other countries or in the movies. The torturers are "sick" people. Nietzsche tells us that everyone was once "sick" in this way, and our implicit question should be whether human nature has changed:

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*Cruelty* constituted the great festival pleasure of more primitive men and was indeed an ingredient of almost every one of their pleasures. . . . [I]t is not long since princely weddings and public festivals of the more magnificent kind were unthinkable without executions, torturings, or perhaps an auto-da-fe. . . . To see others suffer does one good, to make others suffer even more: this is a hard

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<sup>3</sup> Yet one may doubt how useful all the so-called intelligence really is. Stalin in 1940 got superb intelligence from Switzerland that Hitler was going to betray their alliance and attack the Soviet Union. Stalin simply refused to believe the report, and hence was taken by surprise. I am sure that in the week or two before August 2, 1990, the United States government received intelligence that Saddam Hussein was going to attack Kuwait. The problem, again, was that this evidence was disbelieved (or improperly processed, which amounts to the same thing). The Walker spy case in the United States showed that for about a decade all US top-secret codes for all our naval maneuvers were leaked by Walker to the Soviet Union. Did it make any discernible difference?

saying but an ancient, mighty, human, all-too-human principle to which even the apes might subscribe; for it has been said that in devising bizarre cruelties they anticipate man and are, as it were, his "prelude." Without cruelty there is no festival; thus the longest and most ancient part of human history teaches and in punishment there is so much that is *festive*.<sup>4</sup>

As far as overt acceptance of torture is concerned, we have indeed come a long way from the "princely weddings and public festivals" thus spoken about. Torture today is universally condemned as a criminal act.<sup>5</sup> But is it only our culture that has changed? Have we merely driven the "festival" underground? Are the "pleasures" now reserved for a select group of torturers operating in the dimly lit basements of government buildings? Thus speaks the deviationist thesis.

In contrast, the entailment thesis holds that the torturer is a mere agent with an unpleasant job. It may be dirty business, but what is important is that it is the state's business. If a particular torturer does not take his job seriously if he appears to enjoy it then he is personalizing what should be an abstract act of state. He is implicitly attacking the justificatory foundations of his colleagues. They will regard *him* as a deviationist because it is essential to their own world-view that *they* are professionals.<sup>6</sup>

Even if the torturer secretly enjoys what he is doing, the statist entailment thesis requires that he not appear to be enjoying it. This requirement was recognized explicitly in 1486 by the notorious church-promulgated *Malleus Mali-ficarum*, a manual of *legal* instructions for dealing with witchcraft.<sup>7</sup> Stating that witches should not be condemned unless convicted by their own confessions, the book in chilling terms tells a judge what to do if a woman accused of being a witch refuses to confess: "[O]rder the officers to bind her with cords, and apply her to some engine of torture; and then let them obey at once but not joyfully, rather appearing to be disturbed by their duty."<sup>8</sup>

The entailment thesis is supported by what is perhaps the most revealing point about torture in Weschler's book: the meticulous *records* kept by the military courts in Brazil. All cases began with a written confession of guilt signed by the defendant. Twenty-five percent of the cases in the files of the Supreme Military Court contained open-court denunciations by the

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<sup>4</sup> Friedrich Nietzsche, *On the Genealogy of Morals* 66-67.

<sup>5</sup> *See Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*. New York, Dec. 10, 1984 (*entered into force* June 26, 1987). The United States ratified this treaty late in 1990, as have over 40 other states.

<sup>6</sup> Is there a parallel here to our childhood? Recall a serious parent getting ready to punish you and saying, "This is going to hurt me more than it hurts you," and your being frightened and at the same time incredulous. Somehow your disbelief about the veracity of your parent's statement *adds* to your sense of dread.

<sup>7</sup> *The Malleus Maleficarum* of H. Kraemer and J. Sprenger (Summers trans. 1971). This reference, and the earlier one to Nietzsche, are not part of Weschler's book.

<sup>8</sup> *Id.* at 222, 23.

defendant or his attorney of the torture that was used in extracting the defendant's confession. Weschler writes:

I asked the lawyers I talked to, and other observers, why the judges had allowed the denunciations of torture to be entered in the record and then allowed the records to be preserved. . . . Alfred Stepan . . . suggested that "Record keeping like that is part of a long Iberian tradition of thoroughly recording acts of state, which, as acts of state, could not by definition be viewed as suspect or illegal. . .

"They never dreamed that any of this would be used against them," Jaime Wright commented. "They never imagined they'd ever lose power." . . .

"The judges no doubt assumed," one of the lawyers told me, "that the same thing would happen this time that happened in 1945 the records would all be burned, and they themselves, of course, would be immune."<sup>9</sup>

Weschler's associate Jaime Wright added:

It's amazing, when you think about the risks involved after all, these prisoners could expect to be given back over to their jailers following the trial that anybody ever chose to make such a denunciation. But, from what we've been able to ascertain, about 25 percent of the prisoners did. Anyway, in such cases the judge would dutifully listen as the defendants described their tortures; the judges would then summarize these accounts and order the court reporters to enter the summaries into the record. Everything was done by the book. And then the tribunals would hand down their decisions. Once in a while admittedly, very rarely they'd actually find the defendant innocent. But it didn't really matter, because either way the losing side would appeal the case to the Supreme Military Court in Brasilia, which would almost invariably find the defendant guilty after all."<sup>10</sup>

Remarkably, all the files of these cases were smuggled out of the Supreme Military Court building, photocopied (there were over one million pages), microfilmed, compiled, and released as a book that turned into a best-seller, *Brasil: Nunca Mais* (1985) ("Brazil: Never Again").<sup>11</sup> The story of how this feat was accomplished is well told by Weschler, but that is not my topic here. What *is* of primary concern is what the people of Brazil and Uruguay did after the torture regimes were deposed and exposed. The public in elections and referenda approved wholesale amnesty for the torturers. Many individual cases were not prosecuted or their cases were

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<sup>9</sup> Weschler, *supra* note 1, at 47-49.

<sup>10</sup> *Id.* at 15-16.

<sup>11</sup> Published in the United States as Joan Dassin (ed.), *Torture in Brazil* (Jaime Wright tr. 1986).

dismissed. The few individual trials that took place got caught up in endless litigation delays and ultimately led either to acquittals or to executive pardons.

Many South American liberals anguished about the future of their countries in light of the popular willingness to forgive and forget the tortures. Author Weschler does not hide his personal belief that the failure to punish the torturers betokens a failure of societal rehabilitation:

[O]ne has to return to the scream welling out of the torture chamber. An old man, a teenage boy, a young woman five months pregnant, is screaming in agony. And what is the torturer saying? As Marcelo Vignar has pointed out, he is saying "Go ahead, scream, scream all you like, scream your lungs out nobody can hear you, nobody would dare to hear you, nobody cares about you, no one will ever know." That is the primordial moment which has desperately to be addressed and as desperately by the torture society as by the torture victim: Who was there? Who was screaming? Who were those people standing by the screamer's side? Who, even now, will dare to hear? Who will care to know? Who will be held accountable? And who will hold them to account?<sup>12</sup>

Aryeh Neier told Weschler:

"The human capacity to look backward is frail enough. The human capacity to look forward is frailer yet. Rather, punishment is the absolute duty of society to honor and redeem the suffering of the individual victim. In a society of law, we say it is not up to the individual victims to exercise vengeance, but rather up to society to demonstrate respect for the victim, for the one who suffered, by rendering the victimizer accountable."<sup>13</sup>

But why, in light of all this, does Weschler conclude as follows?

When the torturer assures his victim, "No one will ever know," he is at once trying to break the victim's spirit and to bolster his own. He needs to be certain that no one will ever know; otherwise the entire premise of his own participation in the encounter would quickly come into question."<sup>14</sup>

I can understand that Weschler might *want* to reach this facile conclusion after all, his book is *about* the importance of exposing torturers. But in light of his own evidence, I fear that Weschler is engaged in wishful thinking. To recapitulate the main evidentiary points:

- (1) The judges kept elaborate records of the tortures.
- (2) The records were discovered and published.

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<sup>12</sup> Weschler, *supra* note 1, at 242.

<sup>13</sup> *Id.* at 244.

<sup>14</sup> *Id.* at 246.

(3) The torturers were given amnesty by popular vote.

These points suggest that exposing torturers is not so democratically significant after all.

I submit that the entailment thesis goes a lot deeper than liberal observers are willing or able to admit. The people of Brazil and Uruguay may have perceived that the torturers were doing what needed to be done at the time, and that they were acting selflessly and in the interests of the state, at least insofar as they sincerely perceived those interests. The torturers were doing the state's business, not their own. Hence they did not deserve to be held personally accountable for their acts.

Even though the "subversives" during the torture regimes later turned out to be the vanguard of the new democratic regimes, the public apparently was ungrateful to them. Perhaps the public felt that there was something "illegal" about what the subversives did *even though* what they did was to fight dictatorship, cruelty, and oppression.

Law is, of course, the ideological clothing of the state. The popular attitude toward law is very close to, almost indistinguishable from, its attitude toward the state. Although law seems highly specific in its rules, statutes, and precedents, it also seems less tangible than the state. Earlier I said that Weschler's book opened for me a view of the state as a player in the field. If I still cannot quite visualize the state as an actual player, its legal clothing to a large extent gives it form and substance, much like the clothes and facial bandages worn by the invisible man in the 1933 film of that name.

A huge mistake that liberals make is to assume that laws are mutable, changeable, the artifacts of a particular legislature trapped by shifting lobbies, the whims of a particular ruling elite. H.L.A. Hart, a leading positivist, was able to justify his rather dictatorial view of law as the command of a sovereign (in his classic book *The Concept of Law* [1961]) by another book he published at roughly the same time where he said that *whenever* a law conflicts with morality, a person should do what is moral and disobey the law.<sup>15</sup> This austere British view of "law" underdetermines the impact law itself has upon public morality.<sup>16</sup> The South American public may have been genuinely impressed by the notion that what the torturers were doing was legal and therefore right and that their victims's actions must have been contrary to the interests of the state, illegal, and therefore wrong.

How can we unpack the psychological denial, the cognitive dissonance embedded in this popular conviction of the citizens of Brazil and Uruguay? One possibility is that there is a curious mixture in South American jurisprudence of the idea of natural law (stemming from the Church and suggesting the affinity between moral law and positive law) and Kelsenian positivism (the view that *whatever officials do* is what the law is).<sup>17</sup> Under an extension of

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<sup>15</sup> H.L.A. Hart, *Law, Liberty, and Morality* (1962).

<sup>16</sup> For general discussion of this point, see Anthony D'Amato, "The Moral Dilemma of Positivism," 20 *Valparaiso L. Rev.* 43 (1985).

<sup>17</sup> Hans Kelsen, a German legal theorist who came to the United States as a refugee from the Nazis, is perhaps the leading theorist of law in Latin America, judging from the widespread use of his texts in Latin American law schools and the countless references in Latin American legal literature to his authoritative writings. Kelsen's unbridled positivism was early welcomed as a

Kelsen's perspective,<sup>18</sup> as long as the torturers sincerely acted in their role as state officials, then what they did *constituted* the law. At this moment natural law chimes in to say that if what these state officials did was legal, then it was right.

If torture is *not* supposed to be pleasurable, if it is just a difficult job that must be done, then perhaps it is *entailed by statism* rather than a pathological deviation from statism. This is the more frightening alternative. If it is correct, we cannot dismiss torture as a deviation that occurs from time to time; rather, we have to try to understand and analyze it as one of the things that states do because they are states.

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counterfoil to the entrenched natural law views of the legal establishment in these countries. Over the years, however, a curious blending of his views and the natural law school seems to have penetrated the Latin American legal psyche.

<sup>18</sup> See Hans Kelsen, *The Pure Theory of Law* (M. Knight trans. 1967). Kelsen viewed pure law as the commands issued to officials. This law is discoverable by the public either by getting hold of a copy of those commands or by inferring them from the actions of officials. For example, there is no law against murder in Kelsen's jurisprudence; rather, there is a command to state officials that asserts: "If a citizen unjustifiably kills another person, then you shall arrest the citizen, try him, and if he is found guilty, imprison him." If a Nazi secret law directs the Gestapo to arrest a citizen if the citizen does X, then in Kelsen's jurisprudence that is a valid law — it is simply up to the citizenry, at their peril, to infer what X is. If Kelsen were alive today and we confronted him with the outrageousness of his theory, I imagine he would reply: "But every law is like that. Every law is more or less secret. Do you know what's in the Internal Revenue Code? Even if you manage to look it up and read it, can you possibly understand it?"