Water Torture and the United States:
Comparing Debates from the Philippine-American War with the War on Terror

Erin Murphy
University of Illinois
murphymc@illinois.edu

> *"Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."*
> *--William Pitt, Speech in the House of Commons 1783.*

When President Obama authorized the release of memos to the public regarding waterboarding on April 16, 2009, the front pages of newspapers became permeated with pieces on the water torture debate. With few attempts to conceal indignation over the practice, these articles and editorials compared waterboarding to practices used during the Spanish Inquisition, by Pol Pot in Vietnam, and by Japanese soldiers in World War II (for which the U.S. convicted Japanese soldiers of war crimes in the Tokyo Trials).[1] Covering the U.S.'s own history with waterboarding in these debates, journalists Scott Shane and Mark Mazzetti of the *New York Times* traced the history of waterboarding to a training program employed by the C.I.A. to prepare operatives to withstand torture (see also McCoy 2006). Their investigation traced waterboarding back to the C.I.A.'s response to experiences of U.S. captives of the Chinese during the Korean War implementing a program to prepare them for the treatment. Then, they report the C.I.A. later flipped this training from a defensive strategy to an implemented offensive strategy for prisoners designated as "detainees" or "enemy combatants."[2]

These comparisons cast a net over the history of water torture and recent U.S. history that is simultaneously too short in the historical scope of the U.S. and too wide in national context to illuminate how these practices were legitimated in the U.S. context.[3] However, they are right to look to historical comparisons. Not only have public debates

[1] Frank Rich. April 25, 2009 "The Banality of the Bush White House Evil." *New York Times.*
[2] Scott Shane and Mark Mazzetti. "In Adopting Harsh Tactics, No Inquiry into Past Use," *New York Times.* April 22, 2009.
[3] However, the French case of "waterpiping" during the War of Algiers might also be a useful comparison case because of the racialized colonial relationships involved.

over torture in the U.S. happened before, they happened in the context of an indeterminate war with ambiguously classified enemies during the Philippine-American War with fighting that lasted from 1899-1913.

The indeterminate character of the Philippine-American War has been thoroughly documented and argued in Paul Kramer's (2006) *The Blood of Government: Race, Empire, the United States, & the Philippines*. His work details how U.S. colonial officials and politicians argued for self-rule in the Philippines to be based on an unknown timeframe (sometime in the future), based on whatever time it would take to "properly" educate Filipinos on the ways of freedom and democracy. It was an argument of "necessity." Colonial officials and U.S. politicians held the power to determine this necessity.

These arguments were based on racialized conceptions, often ambiguous and contradictory, of nonwhite people rooted in social Darwinist theories of race and notions of the march of "civilization" (e.g. "the White Man's Burden"). These ideas were pervasive at the turn of the 20th century (Hofstadter 1992). During the war for occupation of the Philippines, Filipino resisters were often called "injuns" or "indians" by military officers and "niggers," and/or "googoos" by soldiers (Slotkin 1992).[4] More officially, Filipino fighters were labeled "insurgents," "insurrectos," or "ladrones" (meaning bandits) by the military, politicians, and journalists (Miller 1982). The U.S. government refused to recognize Filipino sovereignty.[5] The choice of this language reflected this refusal, putting Filipino rights as prisoners in question.[6]

The lack of knowledge about the first U.S. debates over water torture is surprising given the contemporary moment. Apparently, even C.I.A. officials teaching waterboarding and other techniques of "harsh interrogations" or "torture" were unaware of the C.I.A. history of involvement with torture, as victims of the Chinese during the

[4] *Soldier's Letters: Being Materials for the History of a War of Criminal Aggression.* Box 1. Anti-Imperialist League Papers. Swarthmore Peace Collection, Swarthmore College.
[5] This was the case even though they established a republic, briefly, with Emilio Aguinaldo as President, and Apolinario Mabini as Prime Minister.
[6] Obtaining the right to habeas corpus and due process for Filipino prisoners was one of the issues taken up by U.S. anti-imperialists, many of them lawyers, and eventually denied by the U.S. Supreme Court, arguing that the U.S. courts had no jurisdiction over the colonial Philippines.

Korean War.[7] This lack of awareness on the part of C.I.A. officials parallels a lack of awareness on the part of the U.S. public and points to an historical denial of U.S. Empire (Mann 2008). On the issue of remembering, McCoy (2006) states regarding the current scandals "[…] ironically, the gravity of the scandal has discouraged television coverage, defied close analysis, and may ultimately drive Abu Ghraib from America's collective memory" (p. 7). The outcomes of contemporary debates are yet to be determined. However, if a comparative analysis can make a small contribution to the project of remembering, then I hope to do that with this paper.

A comparative analysis juxtaposing past and present debates that have obvious and substantive similarities is not necessarily the best method for understanding the present or past cases. Each case has its own historical contingencies and peculiarities that tend to defy ahistorical classifications of "stages" or teleogical explanations, for example (Sewell 2005). Further complicating this analysis, the cases I propose to compare have genealogical relations in addition to the important differences of historicity.

With this in mind, I employ a comparative analysis that is primarily a work of historical sociology taking care to note historical contingencies and peculiarities of each case. Using archival, government, and newspaper primary sources, I argue that each of these cases are important because of the light they shed on the process of limiting rights, theoretically interesting because of their curious reliance on racial and legal ambiguity, and methodologically unique given their inescapable genealogical relations and (to reiterate, equally as important) their historical contingencies. I focus on the broader issue of U.S. debates over torture and violence against racialized subjects with ambiguous rights, the Philippine "insurrectos," "insurgents," and/or "ladrones" during the indeterminate U.S. colonization of the Philippines and Muslim "detainees" and/or "illegal enemy combatants" in the U.S.'s indeterminate War against Terror.

Both scandals constitute historical "events" (Sewell 2005) that awakened the nationalist impulses of much of the U.S. public. Although it incited a firestorm of debate, albeit a brief one, the history of the water cure has been forgotten. This amnesia enabled the "moral shock" (Jasper 1998) over "waterboarding"--as if this is the first time these

[7] Scott Shane and Mark Mazzetti. April 22, 2009. "In Adopting Harsh Tactics, No Inquiry Into Past Use." *New York Times.*

practices have been employed by the U.S.--rather than a more sober recognition of historical reverberations. In both instances, many U.S. citizens presented a vocal opposition to using these practices, either as practices to elicit information from prisoners or as punishment to prisoners, invoking the U.S. Constitution, the Geneva Conventions, and the U.S. military codes of conduct and rules of war. During the Philippine-American War, these efforts were spearheaded by the Anti-Imperialist League (AIL) and the broader anti-imperialist movement. During the War Against Terror, similar efforts have been spearheaded by the American Civil Liberties Union (ACLU), the Center for Constitutional Rights, and the broader peace movement. But, as one peculiarity, the more recent war has also had internal dissent over implementing policies for torture by those in the Bush administration with expertise in international law, some in the upper echelons of the military brass, and the Federal Bureau of Investigations (Mayer 2008; McCoy 2006).

Nevertheless, making this comparison highlights an analogous process of developing groups of people through their political treatment and through their relation to U.S. law. Given the century in between the two cases, the manifest changes in racialization are clear, although the latent changes are less clear. The changes over the same century in the self-conscious use of law are stark. How racial and legal ambiguities were deployed, for both cases, depended on what was defined as "necessary" as well as who defined "necessary" (Agamben 2005).

Inherently hierarchical categorizations of "race" were a hallmark of the social sciences and the state during the Progressive Era (the zenith of "civilization" discourse). Jung and Almaguer (2004) show how the state has produced racial categories by acting as an "equilibrator" of societal ambiguities through establishing racial categories as "common sense," even if historically contingent. However, they state, "[o]f course, common sense is never natural or permanent but only appears to be so, projecting the present normatively onto the past and future" (Jung and Almaguer 2004: 10). Something not clearly categorized is more easily forgotten especially if it goes against the "common sense" of official knowledge—there is nothing to "stick to," so to speak.

However, in this era the state also produced a categorically ambiguous relationship between racialized subjects and rights of citizenship. For example, while Filipinas/os were included within the control of U.S. sovereignty, they were excluded

from the guaranteed of rights of citizenship. This relationship, of no consistent state rights guaranteed or recognized formally and/or informally, is exemplified in the suspension of the writ of habeas corpus and the insular cases with regard to the Philippine-American War (Murphy 2009).

Today, in contrast, we live in an era of "colorblind" racism (Bonilla-Silva 2006), where race is much less often mentioned, and certainly clear accusations of racist treatment are self-consciously avoided by government officials. Legal language defined for the War on Terror reflects these changes. Paralleling the Philippine case, the two-pronged approach of legal designation of "illegal enemy combatants" and/or "detainees" as well as confining them specifically off of U.S. soil and in Guantanamo Bay created an exceptional space for the denial of habeas corpus, due process, and physical protections.

In the case of the Philippine-American War, categorical ambiguity contributed to conditions that enabled forgetting and produced a diffuse opposition able to act only when clear grievances, such as the "water cure," were presented. These grievances were brought to the public in early 1902 during the Senate Investigation on Affairs in the Philippines (SIAP). However, these grievances were only briefly in the public debate and only as a result of anti-imperialists' persistent agitation. The brevity of the debates was a pro-imperialist success, with the Roosevelt administration ending the senate investigations into the Philippines earlier than anti-imperialists had planned. Then, Roosevelt followed up by officially declaring the war in the Philippines over on July 4, 1902, although fighting continued in some parts of the Philippines through 1913.

Only touched on so far, the ambiguous legal status of contemporary "enemies of the state" presents an analogous case to the debates on torture in the U.S. Like the case of the Philippine-American War, current attempts to make this debate brief have been evident with the Obama administration stating C.I.A. officials cannot be prosecuted who were involved during the Bush era. Although Obama has stated that he wants to look to the future, not the past, the question as to whether there will be investigations into CIA officials' involvement with torture is not over.[8] Similarly, the question of whether the writers of the law can be prosecuted or potentially disbarred is still under debate.

[8] "Obama Faces a New Push to Look Back" by Scott Shane. *The New York Times.* July 12, 2009.

Whether high-ranking officials will be made accountable, remains to be seen. If high-ranking officials are investigated and prosecuted, this would be a stark difference between the forgotten torture debates of the Philippine-American War and the lingering torture debates of the War on Terror.

Water Torture's Historical Reverberations

Waterboarding is not the only means of torture challenged in contemporary debates. Detainees being shackled to walls, put in stress positions, and confined in a box with a loose insect have been included in the list. Pictures of mistreatment of prisoners at Abu Ghraib in 2003 and 2004 first shocked the U.S. public, who were increasingly losing confidence in the War in Iraq. Waterboarding captured the media's attention, in particular, even though official pictures of the practice have not been released.[9]

On the wider torture controversy, Alfred McCoy (2006) states, "[…] at the dawn of the twenty-first century, America's century, the United States had a crisis worthy of its grandeur as a global power, one revealing of the most profound ambiguities of our age—the tensions between security and freedom, morality and expediency, sovereignty and internationalism, the rule of law and the imperatives of covert operations, democracy at home and dominion abroad" (p. 7).

At the dawn of the twentieth century, the U.S. public's attention was also captured by the water cure despite the use of the garrote (a vice around a prisoners neck used to strangle him) and reports of hanging men by their thumbs as well as what anti-imperialists called other "atrocities." Political cartoons played a significant role in the visual culture of the period. Additionally, camera technology became available to amateurs. Therefore, some of the first personal photography of the practices of war and its aftermath produced pictures of dead bodies in trenches, the water cure, and the garrote. However, these pictures were not summarily determined as evidence of U.S.

[9] President Obama's promise to release pictures of the mistreatment and torture of prisoners, an outcome of an ACLU case, has angered many who support the resort to torture. These proponents believe the release of pictures would pose a threat to national security and elicit more anti-American sympathies. Their critics, in turn, point out it is not the pictures themselves, but what is depicted in the pictures, that present the problem. As of July 9, 2009, Obama has since decided not to release more photographs.

savagery, but rather depending on the viewers, were often interpreted as racist evidence of survival of the fittest.[10]

To make a comparative analysis of these two cases of water torture,[11] I present a summary of the important points of contemporary debates over waterboarding including the use (and absence) of historical references as well as the pertinent history of the U.S. with the water cure. Since 2002, the debate has been centered on whether waterboarding is torture and whether the outcome was worth the reprehensible nature of the practice—the distastefulness has gone without question. The question of torture, also known as "enhanced interrogation methods," is one of necessity for proponents, basing their arguments in terms of national security. Opponents of waterboarding range from political conservatives to political progressives. Opposition often stems from contradictory reasons based in patriotism, guarantees of human rights, and, again, interests of national security.

As mentioned, the War in Iraq produced the infamous personal pictures of soldiers showing Lynndie England and Charles Graner in Abu Ghraib prison. Pictures of waterboarding in Guantánamo, headed by the CIA rather than the military, have not yet surfaced. In fact, there is an ongoing special investigation over destroyed videotapes that recorded CIA waterboarding prisoners.[12] It was the previous cases of waterboarding such as during the Vietnam War that made the mention of the practice a public image that strobed across websites, spurred on skits on late night comedy shows, and proliferated protests simulating the procedure. These images have also evidenced the influence of the CIA in developing the tactic through the imposition of sensory deprivation (hooding the prisoner) and physical stress that induces a "survival reflex" (McCoy 2006).

[10] One example would be when pictures of lynching were used as trading cards.
[11] I use the term torture as it is has been legally determined by the current Attorney General Eric Holder.
[12] "Probe of Alleged Torture Weighed." *Washington Post.* July 12, 2009. Carrie Johnson

Demonstrator Maboud Ebrahimzadeh is held down during a simulation of waterboarding outside the Justice Department in Washington November 5, 2007. The assertion by the White House that waterboarding is a legal tactic stunned critics and revives debate over the widely condemned interrogation technique. (REUTERS/Kevin Lamarque)

Image 1. This photo depicts a mock waterboarding incident made in protest in 2007.

During the Vietnam War, a picture circulated in the U.S. in early 1968 showing U.S. soldiers administering water torture on a prisoner. This picture was published on the front page of the *Washington Post*. Accompanying the picture was an article entitled, "Interrogation" that described the experience of simulated drowning, which elicited one page of letters to the editor. However, this instance was a comparatively limited response in light of numerically larger "atrocities" being opposed by the anti-war movement, like using Agent Orange. At the same time, Pol Pot was vilified for the use of these tactics on U.S. soldiers. Again, during the Korean War, U.S. prisoners were "waterboarded" by their Chinese captors, which is when the Central Intelligence Agency began to develop the training for operatives in case they were tortured. And earlier, after World War II,

Japanese soldiers had been sentenced in the Tokyo Trials for conducting these practices on their captives.[13]

Image 2. Soldiers in Vietnam use the waterboarding technique on an uncooperative enemy suspect near Da Nang in 1968 to try to obtain information from him. Original photo was printed in the *Washington Post* on the front page January 21, 1968 along with the article "Interrogation" in which it states, "those who practice it say it has the advantage of being unpleasant enough to make people talk while still not causing permanent injury."
Photo Credit: United Press International Photo

However, it was during the Philippine-American War that the U.S. took its first foray into employing water torture techniques. Soon thereafter, debates ensued over the legality and the morality of the U.S. military's use of the water cure. These debates peaked briefly during the Senate Investigation on Affairs in the Philippines, which began in early 1902.

[13] Robert McNamara also stated that if WWII had gone the other way, many in the U.S. leadership could also have been tried as war criminals.

The first public account[14] of this history that I have seen came from historian Paul Kramer's February 28, 2008 article in *The New Yorker*.[15] Kramer also included this piece in a March 4, 2008 article in the online journal *The Asia-Pacific Journal* with a new introduction in which he states: "When, during Michael Mukasey's confirmation hearings in the fall of 2007, the status of 'water-boarding' was widely discussed, I felt an eerie sense of familiarity. The following essay, which was prompted by those exchanges, does not attempt to argue that recent events are identical to those of the early 20th century, or that the history described here led to the present crisis. Rather, my effort was to haunt the present with this particular, largely unknown past" (Kramer 2008). Kramer notes some key differences in the added introduction between the present debate and that of the past, including the fact that it did not appear that high-ranking officials organized the use of the water cure.

To water cure a prisoner, U.S. soldiers or Macabebe Scouts commissioned by the U.S. military would hold down a Filipino and fill him with water until he was bloated, push the water back out of him by pressing on his stomach, and then repeat the procedure until he would talk, or die. When anti-imperialists learned of these practices, they concentrated their resources on informing the public about these "atrocities." They wrote petitions, lengthy position papers called "broadsides," and wrote to newspapers and their representatives in Congress. In short, they created a public debate, which gave way to the SIAP.[16] The committee in charge of the investigation, also known as the "Lodge Committee," included Henry Cabot Lodge, a pro-imperialist and conservative Republican Senator from Massachusetts, the other pro-imperialist members of the committee were Senators William Allison, Eugene Hale, Redfield Proctor, Albert Beveridge, Julius Burrows, Charles Dietrich, Joseph Rawlins, with the anti-imperialist members including Charles Culberson, Fred Dubois, Edward Carmack, Thomas Patterson, and George Hoar.

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[14] Editorialist William Safire mentioned the opposition to the "water cure" citing anti-imperialist Mark Twain in his editorial, "Waterboarding" March 9, 2008. *The New York Times* and covers the historical changes in terming versions of water torture in the U.S. across the eras.

[15] Paul A. Kramer. "The Water Cure. Debating torture and counter-insurgency—a century ago." *The New Yorker.* February, 2008.

[16] Evidence from this investigation comes from the committee's official report that is over 3,000 pages long.

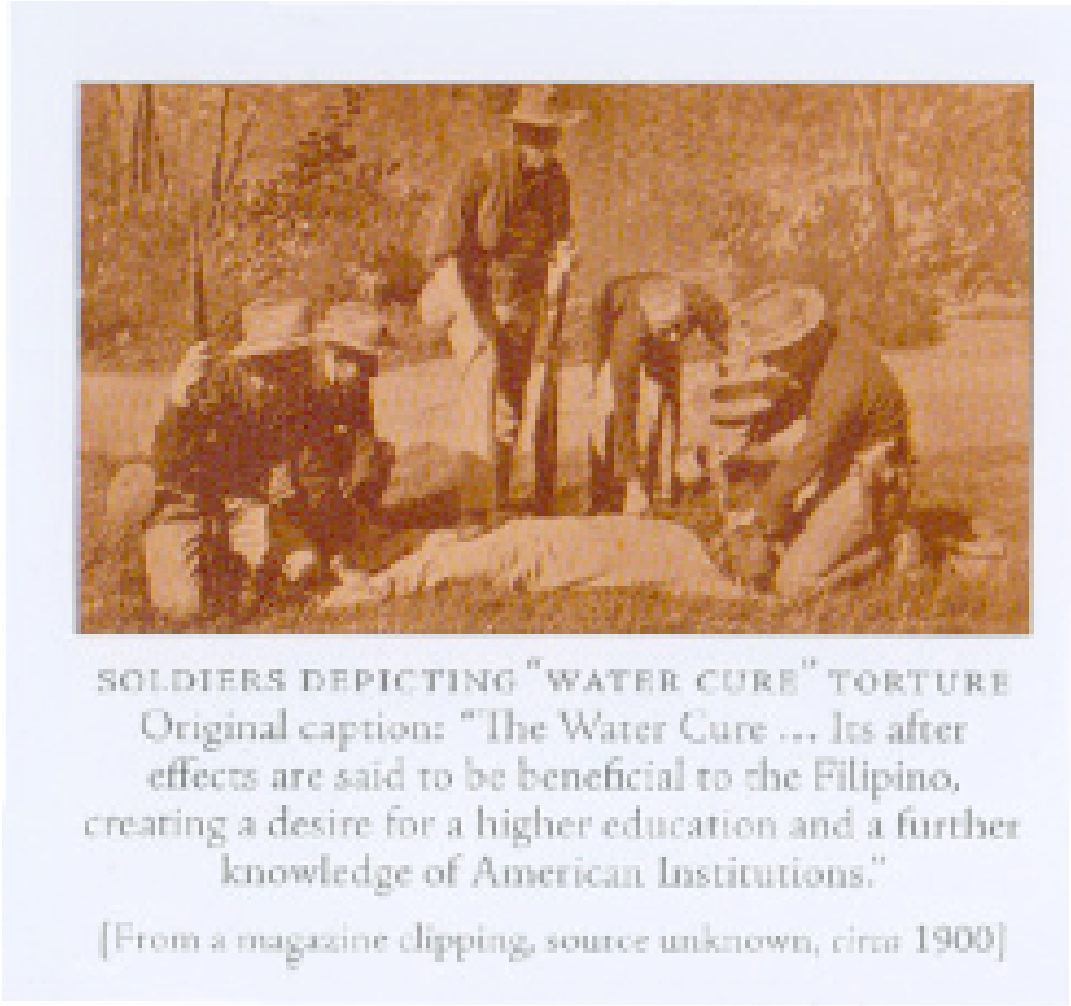

Image 3. "Soldiers Depicting the 'water cure' Torture." Anti-imperialists used images to strengthen their position as evidence of the atrocities in the Philippines. Source: *The Forbidden Book.* (2004). Ed. Ignacio, et al.

The "Water Cure" and the Philippine-American War

The fact of historical reverberations coupled with the ignorance of their existence requires an historical account of the water cure. The water cure was used in the Philippine-American War by U.S. soldiers and their contractors (or mercenaries), Macabebe Scouts. The "water cure," as it was called, was used to extract information, usually about the location of cache of guns.[17] Leon Wolff (1961) described the water cure

[17] One soldier, Sgt. Januarius Manning, also testified that his company employed the "water cure" to obtain confessions for the murder of a Private O'Hearn as well. p. 2255.

as "A blend (in the words of an observer) of Castilian cruelty and American ingenuity, it consisted of forcing four or five gallons of water down the throat of the captive, whose 'body becomes an object frightful to contemplate,' and then squeezing it out by kneeling on his stomach. The process was repeated until the *amigo* talked or died" (p. 253).

Anti-imperialists first learned of the water cure in letters soldiers wrote home to friends and family, similar to how U.S. citizens first learned of the mistreatment of prisoners at Abu Ghraib. Anti-imperialist Herbert Welsh painstakingly collected these letters by soldiers published in small town newspapers, collecting them as evidence that was not reported by journalists, who were largely censored by the military in the Philippines. Basing their investigations on reports of soldiers, anti-imperialists began contacting soldiers to see if they would testify to witnessing the practice for congressional inquiry. In this way, anti-imperialists lined up a significant number of soldiers to testify.

However, the soldiers that were chosen to testify by Lodge were thought to be loyal to the government, skipping the soldiers gathered by anti-imperialists. No matter their political allegiances, the soldiers testified to what they saw. The narrative of soldiers was that the water cure was learned from the Macabebe Scouts (aka Gordon Scouts) under Lieutenant Conger and Captain Glenn. Glenn was later court-martialed for his part in the scandal. It was said that Filipinos used the method on the Macabebes and that it was originally learned from the Spanish. From there, U.S. soldiers learned the method from other companies, and so the practice for obtaining information spread.[18] Seiward J. Morton testified in front of the SIAP describing his experience in conducting the water cure:

> I was on guard and acting corporal of the scouts. A man named Bender, who belonged to Company I, I think, of the Eighteenth Infantry came up and told me he wanted me to help 'water cure' this native. I told him that I had no particular objection. [...] We were directed there to throw the native or take him down, and we picked the native up and laid him down. He was a small man, and he didn't make much resistance. One man had hold of his leg, and I had hold of his leg, and another man had hold of a leg, and we laid him on his back. Another man had

[18] Ibid. e.g. testimony of Januarius Manning.

> hold of an arm, each arm. Then Bender took the water with a cup, dipped it out of a pail, and first they took a stick about 2 inches wide and placed it between the native's teeth like this [indicating]. The stick was probably about a quarter of an inch thick. When they did that they twisted the stick around so that it forced the native's mouth open the width of the stick. Then Bender dipped the water from the pail and poured it in the native's mouth, and finally the native stiffened; that is, he appeared--I thought he was going to die then. I had never seen it done before then. I refused to have anything more to do with it, and Bender and I had a slight altercation there; I don't remember the exact nature of it, but I told him I would have nothing more to do with it. My connection with the affair ended there.[19]

News of the water cure inspired Chicago anti-imperialist poet Bertrand Shadwell to write "Death of a Filipino Under Torture," which he gave to anti-imperialist leader Herbert Welsh for publication "free of charge."[20] Shadwell also wrote "Imperialism in the Philippines" regarding killing guides who refused to lead the U.S. military to "insurrectos."[21] However, Paul Kramer (2006) documents the practice also inspired Albert Gardner, in Troop B of the First U.S. Cavalry, to author a comic in 1902 satirizing the torture as a cure for a disease called "insurrectos" as well as a song titled "The Water Cure in the P.I." inviting soldiers to

> "Get the good old syringe boys and fill it to the brim
> We've caught another nigger and we'll operate on him
> Let someone take the handle who can work it with a vim
> Shouting the battle cry of freedom" (p. 141).

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[19] Ibid pp. 2897-2898. Other soldiers testified that they saw the "water cure" administered, but often by the Macabebe mercenaries. Macabebes scouts were treated as a Filipino ethnic group with antagonism toward the Filipino's responsible for the revolution, mainly Tagalog and mestizo Filipinos.

[20] "Death of a Filipino Under Torture," by Bertrand Shadwell, J.R. Hayden Papers, Bentley Historical Society, University of Michigan, Ann Arbor; Bertrand Shadwell also authored the poem "Aguinaldo," written after Emilio Aguinaldo surrendered to the U.S. forces in the Philippines.

[21] "Imperialism in the Philippines," by Bertrand Shadwell, Herbert Welsh Papers, Hatcher Graduate Library, University of Michigan, Ann Arbor.

Before any soldiers were called to testify, Governor Taft gave his assessment of the situation. When Senator Patterson asked Taft about the "so-called water cure," Senator Beveridge, of Indiana, interrupted and asked him to address the issue of "irreconcilables" sent to Guam, such as revolutionary and Filipino national hero Apolinario Mabini.[22] Taft recalled 25 were sent to Guam to quiet the insurgency in the Philippines.[23] Following Taft, General Robert Hughes testified. When asked about the water cure, he flatly denied having ever heard of it, but then also asserted that the water cure could mean many different things. All in all, he admitted to having heard of it used once by American police and that they would not use it again.[24]

The equivocations of officials over admitting to understanding what the "water cure" was and over admitting to military personnel's administration of it in the Philippines evidences a chasm between racial structures buttressing "civilization." On the one hand, believing in whites' racial and, therefore moral, superiority should have granted U.S. military officers the justification to implement whatever practices they deemed necessary, especially if Macabebes were the persons directly implementing the torture. On the other hand, as the race at the highest point of civilization, whites were to be above barbarism and savagery, and perform force only under the most just circumstances. The fact that General Rules 100[25] prohibited the use of violence to extract information also presented a potential legal predicament for these structures of white dominion that inclined toward "white is right" and social Darwinism that inclined toward "white is moral."

Along this line, General Funston denied charges of any white men resorting to the use of the water cure claiming soldiers reporting such events were trying to get

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[22] Mabini had been the first Prime Minister of the Filipino government, while Emilio Aguinaldo had been the first President. He was sent to Guam in 1901, under the U.S. accusations that he was inciting insurgency. Mabini wrote some of the foundational texts of the government. During and after the Filipino revolution, he suffered from paraplegia having survived a disease with the lasting effects of paralysis. Therefore, the threat he posed to the U.S. empire was from his pen.

[23] SIAP.

[24] Ibid, pp. 654-655.

[25] General Rules 100 were the guidelines for the military in the field regarding rules of war. They were implemented by President Lincoln.

attention and were examples of "braggadacio."[26] Granting Funston that some men may have written home stories of the water cure and other violent practices to flaunt, it raises the issue as to what they were proving about themselves. Whatever self-conscious ideas they had about what their behavior said about them as U.S. soldiers, these letters convey the necessary racialized symbolic violence that legitimates physical violence (Jung 2004). It shows the "racial grammar" (Knowles 2003), or inundated racial practices, that simultaneously constituted the "racial project" (Omi and Winant 1994) of incorporating the Philippines into the racial U.S. state.[27]

Sgt. Charles Riley from Northampton, Massachusetts testified that he had witnessed the "water cure" performed on the mayor of Igbaras twice and that it was facilitated and witnessed by officers in the regular army. Private William Lewis Smith testified to the same incident. Macabebes were also there aiding the American forces against insurgent forces under the command of Leuitenant Conger and the aid of a Dr. Lyons, contracted by the military. Riley testified that this incident was witnessed by about 80 soldiers, many of whom stated they had seen many more instances of the "treatment."[28] Senator Beveridge disputed this point on hearsay, invoking the procedure of law as a resource to prevent the admission of evidence that contradicted his agenda.

Officers frequently argued that the Filipino insurgents did not participate in civilized warfare nor adhere to the rules of war as stated in General Rule 100. These comments were made to demonstrate the uncivilized ways of Filipinos and justify the slips into uncivilized warfare of U.S. troops. Senator Culberson and Senator Burrows questioned officers and soldiers to ascertain whether those who were victims of the water cure were the same insurgents committing treacherous acts of war, such as raising white flags only to surprise attack American forces. The answer was consistently "no" that the water cure was not revenge against particular Filipinos for egregious acts of violence. Rather, the purpose of using the water cure on Filipinos was specifically to extract information. This argument was also to justify the practice of burning villages.

[26] SIAP, p. 951.
[27] I am purposefully redundant here.
[28] SIAP, pp. 1527-1531.

These testimonies, and others, led to the court-martial trials of Lieut. Arthur L. Conger and Major Edwin F. Glenn, then Captain Glenn, as well as Capt. and Asst. Surg. Palmer Lyon, then a contract surgeon--all of who were in charge of the Macabebe Scouts. Macabebe Scouts were officially deemed the main administrators of the "water cure."[29]

Court-martials performed and "rearticulated" (Sewell 1992) the racial supremacy of whites by re-establishing their place at the highest level of "civilization." Court-martials provided a degree of separation between the Macabebes, who were uncivilized to begin with, and the U.S. military by extension of the federal government. They also emphasized the *individual* white military personnel, who descended into the uncivilized practices of nonwhites, rather than the system or policies these practices sprang from. The debates on the water cure show how an imperialist racial state rooted in "schemas" (Sewell 1992), or sets of cultural meanings, of white moral superiority and exceptional rationality maintained claims to higher civilization while also utilizing what it deemed as "savagery."

As to whether soldiers conducted the water cure on their own volition, rather than at the request of their commanding officers, Seiward J. Morton, whose description of the water cure opened this section, stated "I do not know of any instance where a native was 'water cured,' under the orders of a soldier alone, and I do not think a soldier would assume that responsibility. Whenever an act is executed by a soldier and an officer is present the inference can safely be drawn that that officer gave the order and that the soldier was obeying it." Senator Beveridge responded, "you should do as the Senator from Texas suggests, simply give the facts, and the committee is competent to draw inferences."[30] One such officer, Captain Fred McDonald, testified that he did not know of any officer that gave orders for the water cure. Rather, he said, officers simply acquiesced in it happening.[31]

A few court-martials did come from these investigations. In this way, the water cure was blamed on a few "bad apples," individuals whose behavior tainted the otherwise respectable behavior of other U.S. soldiers. Anti-imperialists viewed this outcome as a

[29] General Smith was also put on trial for court-martial for his directive to kill everyone over 10 in his "kill and burn" orders.
[30] Ibid, pp. 2898-2899.
[31] Ibid, p. 2784.

dismal failure. They believed the officers at the top knew these practices were being used, but were denying its existence at home, while allowing it to occur in the Philippines. Anti-imperialists wanted higher officers to be held responsible. To diffuse the bad publicity, President Roosevelt declared the war in the Philippines over on July 4, 1902.

Waterboarding and the War on Terror

Every administration, including those of George W. Bush, Theodore Roosevelt, and William McKinley, has denied the U.S. engages in torture. The U.S. played a significant role in codifying the Geneva Conventions after World War II, where the rules regarding prisoners of war were expanded to include "unlawful" combatants (Mayer 2008). The more recent torture debate has centered on two main points: (1) whether or not "enhanced interrogation tactics," like waterboarding, were actually torture, and (2) whether or not these measures were justifiable if they obtained timely and "actionable" information to protect U.S. security interests. Waterboarding in particular has become symbolic of the torture of "enhanced interrogation tactics."

Legal definitions were central to the justifications of the Bush administration in these debates (Dayan 2007). The Bush administration lawyers argued for the use "enhanced interrogation tactics," rather than "torture," hinging on the legal definition of torture. For example, Dayan (2007) notes a memo authored by Daniel Levin, from the Justice Department's office of legal counsel, minced words to a point of no meaning until,

> "What remains is the over-definition that defines nothing at all: adding the word 'extreme' to clarify the meaning of the word 'severe' in contexts that aim to distinguish 'torture' from 'other acts of cruel, inhuman or degrading treatment.' Under 'The meaning of "severe,"' repeating the dictionary definitions of the previous memos and making equivocal distinctions between gradations of pain, the memo regards torture, following UNCAT [United Nations Council Against Torture], as an 'extreme form of "cruel, inhuman or degrading treatment."' What follows is a list of some of the kinds of 'extreme conduct' that, according to the Levin memorandum, fall 'within the statutory definition' of torture: 'severe beatings to the genitals, head, and other parts of the body with metal pipes, brass knuckles, batons, a baseball bat…removal of teeth with pliers…cutting

off…fingers, pulling out…fingernails.' But these excesses lie at the outer limits of the barbarous. Any lesser atrocity is permitted" (pp. 83-84).

Another line of argument claimed that "enhanced interrogation tactics" were not only legal, but also justifiable in that they were more likely to produce timely and actionable information. These claims have been widely attributed to Vice President Richard Cheney, who maintains that two memos would provide proof, but they remain classified because of an ongoing investigation. Cheney is one of the most vocal proponents of having "enhanced interrogation tactics" as a legal option. In *The Dark Side* (2008)--taking the title from a quote of Cheney's regarding the U.S. fighting the War on Terror on "the dark side" of things through intelligence and secret operations--investigative reporter Jane Mayer outlines the role of Cheney, his legal advisor David Addington, and John Yoo from the Office of Legal Counsel, in breaking down the Bush administration's reliance on the established law laid out in the Geneva Conventions. They focused on rewriting laws with regard to the treatment of "terrorists" by creating the legal category "illegal enemy combatants."

In a series of memos, Addington argued for extraordinary measures to be granted to the office of the President, given the state of emergency after September 11, 2001. Yoo's memos argued that Afghanistan was a "failed state" and, therefore, "illegal enemy combatants" in the Taliban or Al Qaeda did not fall under the protections of the Geneva Conventions. Attorney General Alberto Gonzales followed up with a brief supporting Yoo's argument that the conflict with Al Qaeda did not fall under the purview of the Geneva Conventions (McCoy 2006). By late January 2002, Assistant Attorney General Jay S. Bybee authored a memo detailing how to use "enhanced interrogation tactics" without legal problems (McCoy 2006). In a February 4, 2002 memo, high-level Bush lawyers argued the CIA would be allowed "ten 'enhanced' interrogation methods, including 'waterboarding' designed by 'agency psychologists'" (McCoy 2006: 115). Therefore, "enhanced interrogation tactics" such as waterboarding were given particular parameters of acceptability by Bush's legal advisors, which he approved. However, lawyers in the State Department, including William H. Taft IV whose great-grandfather

had been Governor General of the U.S. colonial government in the Philippines, and lawyers at the Pentagon issued contrary opinions to those found in these memos.[32]

When the CIA asked for clarification on the use of specific techniques, Gonzales chaired meetings to determine legal limits (McCoy 2006). Gonzales was given a fifty-page memo authored by Bybee, Yoo, and Addington legalizing harsh, coercive methods.

> "By carefully interpreting key words in the UN antitorture convention and its parallel congressional legislation, USC §§ 2340-2340A, Bybee concluded that federal law limited the crime of torture to 'acts inflicting, and …specifically intended to inflict, severe pain or suffering, whether mental or physical.' To constitute torture under U.S. statue, the physical pain must, he said, 'be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'" (McCoy 2006: 121).

Harold Hongju Koh, Dean of Yale Law School, and only recently the confirmed legal adviser for the State Department under the Obama Administration, stated of Bybee's logic, "If the president has commander-in-chief power to commit torture, he has the power to commit genocide, to sanction slavery, to promote apartheid, to license summary execution" (as quoted in McCoy 2006: 122).

Recently, the possibility has been raised for investigations of CIA interrogators who went beyond the parameters established in the memos. A *Washington Post* article on July 12, 2009, states:

> "Among the unauthorized techniques allegedly used, as described in the report and Red Cross accounts, were shackling, punching and beating of suspects, as well as the waterboarding of at least two detainees using more liquid and for longer periods than the Justice Department had approved. That conduct could violate ordinary criminal laws, as well as the U.N. Convention Against Torture, which the United States signed more than a decade ago."[33]

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[32] Taft's opinion was sent to the Office of the President two days after it was already approved (Mayer 2006). Mayer (2006) suggests this is because of the secrecy around the Office of Vice President, from where these opinions were originating.

[33] "Probe of Alleged Torture Weighed," by Carrie Johnson. *Washington Post.* July 12, 2009.

In approving these memos the Bush administration moved arguments into practice by establishing an ad hoc military tribunal system. This system was purposely outside of the bounds of U.S. criminal law or the military rules of war, creating a category of legalized exceptions. Designated "detainees" were specifically not prisoners of war nor were they treated as criminal suspects. And following, they were not granted the rights to any due process guaranteed to accused of criminal acts or prisoners of war.

At his confirmation hearings in 2007, President Bush's next Attorney General Michael Mukasey reiterated statements that the U.S. does not torture. However, he would not state unequivocally that the waterboarding was torture. In contrast, Obama's Attorney General, Eric Holder, stated in his confirmation hearings that waterboarding is torture and illegal.

Following this course, the Obama administration released what are now known as the "torture memos," which were requested by the ACLU under the Freedom of Information Act.[34] The memos confirmed what the public already knew: waterboarding was used after September 11, 2001 and before 2005. However, it confirmed a surprising frequency and creativity in implementing the Bush administration's "enhanced interrogation tactics" that became part of "standard operating procedure."

With the Obama administration occupying the White House, the debate is no longer whether waterboarding is torture. Today the debate is whether high-ranking legal advisors to the Bush administration who authored "the torture memos" should be investigated and prosecuted for their role in facilitating the debacle. The current suggestions include possible disbarment.[35] Such lawyers include Federal Judge Jay Bybee, University of California Berkeley Law Professor and columnist John Yoo, as well as Attorney Steven Bradbury. While all these lawyers had respected pedigrees, none of them were experts in international law (Mayer 2006). Since April 2009, a trend has emerged that suggests the Congress will stay out of making recriminations, while the

[34] The Obama administration released the memos after the request resulted in a lawsuit over their release.

[35] If they are to be investigated, the question that follows is how they should be investigated, such as whether there should be a special prosecutor or a special commission.

courts have taken a more active role in reversing the Bush administration's legal doctrines.[36]

Categorical Ambiguity

Through these events, we can compare the role of categorical ambiguity, a pattern of unambiguously ambiguous practices which enable something determined necessary by those in political power. Ambiguity enables exceptional practice that yields "states of exception" (Agamben 2005) to the most basic of material relationships, the relationship to one's own body for example, in the suspension or denial of the writ of habeas corpus. I agree with Agamben (2005) when he states, "The essential task of a theory of the state exception is not simply to clarify whether it has a juridical nature or not, *but to define the meaning, place, and modes of its relation to the law*" (p. 51, my emphasis). Ambiguous practices enable exceptions to what are, purportedly, rules, usually of law but, perhaps more importantly, also of societal order.

Kramer (2008) notes the similarities in the use of "exceptional" language to argue justifications for using torture and, most disturbingly, the fact that "Where Americans actively defend torture, or sanction it through their silence, it is their willingness to assimilate the pain of others into their senses of safety, prosperity and power that stretches the darkest thread between past and present." Many question remain as this debate continues: Will this case of torture again be explained away as a brief exception to the rule? Will the prosecution and/or court-martials of low-ranking "bad apples" again mark the end of the events? Or, will high-ranking officials, law-writers, be made accountable for using the law as a tool to legalize a "categorical ambiguity"—and make a distinct departure from the past?

I propose ambiguity that lends itself to creating a racial state of exception is characterized by a set of notable semantics and practices that include: (1) Obvious omissions (e.g. denial of practices in the face of evidence, based on semantics), (2) Sanitized rhetoric (e.g. "tutelage" or "enhanced interrogation tactics"), (3) Legalese, or employing purposefully confusing and garbled legal rationale (e.g. creating a third space

[36] These events are still unfolding as I write this paper. Therefore, I am refraining from drawing any definitive conclusions.

outside the bounds of existing law, such as colonial courts or military commissions), 4) Intermediaries used to conduct the practice (e.g. Macabebe Scouts or contractors, often of intelligence from other countries), 5) Scapegoats in the form of low-ranking individuals for the sake of expediency (e.g. court-martials during Philippine-American War and the War on Terror), 6) Invocations of a transcendent that justifies the practice in question (e.g. "civilization" or "national security" in order to preserve or advance "our way of life") and that puts distance from any personal responsibility. These practices are unwieldy and hard to relate to each other, as they unfold from various parts of the state apparatus. And together, they serve to conceal practices of violence from the sovereign public, or "the people."

I agree with Agamben (2005) where he states, "Only if the veil covering this ambiguous zone is lifted will we be able to approach an understanding of the stakes involved in the difference--or the supposed difference--between the political and the juridical, and between law and the living being" (p. 2). The question of the exception is less about the law and more about *who defines the necessity* of making an exception, in short, who has the power of the sovereign, which in a democracy is purportedly "the people." The necessity of a situation is determined based on what interests are to be supreme. Therefore, "[n]ecessity is not the source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm..." (Agamben 2005: 25). Ambiguity as a means is, perhaps, neutral. It is rather the intentional propagation of ambiguity for particular ends that are value-laden.

The onset of the Philippine-American War in 1899 presented a transformative event (Sewell 2005)[37] in U.S. history in that it was a significant rupture from previous territorial expansions (Sparrow 2006). This break led to a transformation in the way the U.S. government used law based on a democratic system and a societal order of white supremacy. What followed the conjunction of events was a "racial state of exception" characterized by significant ambiguity and indifference to the law as it pertained to Filipino prisoners and subjects from thenceforward. It changed the way the bio-political issues, like violence on nonwhite and sometimes non-Christian (read uncivilized) bodies,

[37] See Sewell (2005) for a theoretical discussion of what constitutes transformative events.

came to be legitimated in U.S. law through necessity determined by "civilized" white leaders.

In the case of the War on Terror, we can also theorize it has been a transformative event, however, the ruptures are still in the process of rupturing, making precise theorizations a questionable endeavor. However, we can see a racial state of exception at play, again characterized by ambiguity and an indifference to established law as it pertained to "detainees." Innovative categorizations changed the way the bio-political issues of violence on nonwhite, non-Christian bodies came to be legitimated through definitions of necessity. "Illegal enemy combatants" were referred to in common parlance as "Islamic terrorists," markedly different from U.S. Americans with their high value on freedom. Arguments on Islamic culture's (note the singularity) treatment of women was also invoked to demonstrate their backward, savage ways. Through speeches and marked silences of the Bush administration, terrorists were significantly "othered." The administration consistently denied accusations of racial profiling in rounding up terrorists. However, interrogators augmented their "enhanced interrogation tactics" by utilizing cultural sensitivities attributed to Arab males such as fear of dogs, sexual taboos, and female interrogators. This was the case even though the CIA studies showed their tactics for breaking prisoners, including sensory deprivation, sensory overload, sleep deprivation, and stress positions, were sufficient for that purpose (McCoy 2006). The addition of cultural exploitations was, therefore, superfluous and racial.

Ambiguity characterized racialized cultural practices in the progressive era and developed alongside practices of producing expert knowledge through categorizations, often of nonwhite people. At the turn of the twentieth century, ambiguity was designed in schemas of "civilization" that simultaneously justified white supremacy *and* democracy as political systems. For instance, William Graham Sumner, a sociologist at Yale and a liberal anti-imperialist, said of civilization discourse,

> "If we arrive at some correct idea of what society is and what civilization is, we shall regard all such speculations as more absurd than witch-craft or astrology. We are the children of the society in which we were born. It makes us. We are products of the civilization of our generation. Only a handful of men can react upon the society and the age in which they live so as to modify it at all. They are

the very *élite* of the human race, and after all what they can do is only infinitesimal. Civilization means the art of living on this earth."[38]

Not committing to, and in fact preventing, clear categorizations followed the flexibility of expert justifications as demonstrated in the government use of anthropologists in advising colonial officials (Steinmetz 2007; Stoler 2006). This can also be seen in the contemporary arguments over what constitutes the best interests of U.S. "national security," whether it be adherence to the ideals and values espoused in the constitution, such as the eighth amendment, and the Bill of Rights, or in the preemptive doctrines of the Bush administration. Sewell (2005) suggests, "when confronted with the need for action, people might well act ambiguously, trying out more than one form of semantic reference at once, hoping to be guided further by the future behavior of the anomalous phenomenon itself" (Sewell 2005: 213). If this is the case, and I think it is, then attention to details of historical cases, especially as to *who defines what is necessary*, is a methodological key.

Sanitizing language and obvious omissions in the water cure debates in the U.S., translated into the denial of using the water cure to the U.S. public coupled with the simultaneous complacency over using it in the Philippines. Nevertheless, anti-imperialists used the water cure as a point to enrage the public with rather than the more mundane, but more common, extraordinary number of Filipinos killed.

Similarly, waterboarding merely touches on the practices of "enhanced interrogation tactics" used under the Bush administration on "illegal enemy combatants." Torture was denied and new language inserted in its place that simultaneously sanitized and omitted information. With the constraints of the Geneva Conventions rationalized and defined out of the way, new practices and laws were implemented that enabled a "racial state of exception" for terrorists.

"The modern state of exception is […] an attempt to include the exception itself within the juridical order by creating a *zone of indistinction* in which fact and law coincide" (Agamben 2005: 26, my emphasis). In the case of the Philippine-American War, Kramer (2006) argues forcefully with ample supporting documentation, that the

[38] *Selected Essays of William Graham Sumner* (1924) edited by Albert Galloway Keller and Maurice Rea Davie, Yale University Press, New Haven.

U.S. achieved an inclusionary exclusion of Filipinos through acts of "derecognition" and that Filipino politicians, therefore, navigated a "politics of recognition" in dealing with U.S. leaders and colonial officials. Today, military tribunals exemplify a "zone of indistinction" in which the rights of prisoners and "national security" have yet to be reconciled or decided.[39] This battle is largely being fought in federal courts by legal "rights" organizations, while the public remains largely in the dark and silent.

The differences between these two cases are important. However, most important is that the George W. Bush Administration had the resources of history to draw from for understanding the implications of creating their state of exception. U.S. soldiers in the Philippines learned the water cure from Macabebe Scouts, and some were court-martialed for their part in the activity, as were some officers. In the War on Terror, many high-ranking military officials, including Secretary of State Powell, were concerned with following the military rules of war. Therefore, the role of the military in advancing the tactics is more complicated. In the Philippines, the tactics came from the field and spread from there. Military questions over abiding by rules of war were explained away by purporting that "civilized" war was only for "civilized" people. Filipinas/os were racialized through the prism of civilization schemas. Already familiar with and actually having refined such tactics as waterboarding, in the War on Terror the rationalization to use them came from lawyers in the administration, advancing a political agenda for more executive power and autonomy. Arguments for harsh tactics racialized muslim detainees through the prism of "national security" schemas. In both cases, the subjects of such treatment were racialized and denied rights under U.S. law and the Geneva Conventions based on arguments of "necessity."

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[39] "Undoing the Damage," *The New York Times*, July 11, 2009.

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