



PHILOSOPHY & RELIGION | RESEARCH ARTICLE

Bentham, torture, modernity

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Abstract: In this essay, I examine the relatively little-known and commented-upon writings of Jeremy Bentham regarding the potentially beneficial uses of torture in a utilitarian frame. If, following Michel Foucault's extraordinarily influential work on Bentham's panopticism, the motifs of governmental surveillance, practical intervention into mass behaviours, and institutional diagrams have become some of the crucial themes of sociological and historical studies of the nineteenth and twentieth centuries, these themes do not quite touch—for a number of reasons discussed below—the new sense that Bentham gives to torture. Moreover, Bentham does so precisely because his reasoning regarding the development of the panopticon reveals a certain limit to that *dispositif*, a limit at which its own logic is threatened; Bentham, accordingly, retreats that limit according to an ingenious reapplication of his utilitarian logic. In reconstructing Bentham's singular dialectic of panopticism/torture, this essay proposes that it has further fundamental historical effects, necessarily complicating received aspects of “modernity”, embedding the discussion of Bentham in our own post-9/11 context.

Subjects: Political History; Philosophy; Cultural Studies

Keywords: torture; democracy; Jeremy Bentham; Michel Foucault; panopticon; modernity

“Some men ... are slaves by nature.”—Aristotle

“Torture is all potentiality, endless possibility.”—Kate Millet

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Justin Clemens is an associate professor in the School of Culture and Communication at The University of Melbourne. He has published on continental philosophy, psychoanalysis and poetry, including *Psychoanalysis is an Antiphilosophy* (Edinburgh UP 2013) and, with A. J. Bartlett and Jon Roffe, *Lacan Deleuze Badiou* (Edinburgh UP 2014). He recently edited *The Afterlives of Georges Perec* (Edinburgh UP 2017) with Rowan Wilken, and *What is Education?* (Edinburgh UP 2017) with A. J. Bartlett. His current research includes the Australian Research Council projects “Australian Poetry Today”, and, with Tom Apperley, “Avatars and Identity”, looking at the consequences of online interfaces for identity. His article in *Cogent OA* derives from the first of these projects: the establishment of the penal colony of New South Wales was a factor in Bentham's development of the panopticon, as it was also the site of the first books of poetry published in Australia.

PUBLIC INTEREST STATEMENT

One of the many notable geopolitical developments since the events of 11 September 2001, has been the public return of the fact, act, and extent of torture as a public tool of democratic statecraft. This article re-examines the origins of the “ticking time bomb” justification for torture in the work of Jeremy Bentham, providing a new interpretation of its significance.

1. Torture as the technique that resolves a panoptical problem

In this essay, I examine the relatively little-known and commented-upon writings of Jeremy Bentham regarding the potentially beneficial uses of torture in a utilitarian frame. If, following Michel Foucault's extraordinarily influential work on Bentham's panopticism, the motifs of governmental surveillance, practical intervention into mass behaviours, and institutional diagrams have become some of the crucial themes of sociological and historical studies of the nineteenth and twentieth centuries, these themes do not quite touch—for a number of reasons discussed below—the new sense that Bentham gives to torture. Moreover, Bentham does so precisely because his reasoning regarding the development of the panopticon reveals a certain limit to that *dispositif*, a limit at which its own logic is threatened; Bentham, accordingly, retreats that limit according to an ingenious reapplication of his utilitarian logic. In reconstructing Bentham's singular dialectic of panopticism/torture, this essay proposes that it has further fundamental historical effects, necessarily complicating received aspects of “modernity”, embedding the discussion of Bentham in our own post-9/11 context.

2. The return of torture as a tool of democratic statecraft after 9/11

One of the many notable geopolitical developments, since the events of September 11, 2001, has been the public return of the fact, act, and extent of torture as a public tool of democratic statecraft. In this regard, we could not only invoke the notorious media “revelations” of the US torture site at Abu Ghraib in 2004, but an astonishing range and volume of justificatory material, from the public statements of major political figures such as Donald Rumsfeld and Dick Cheney, through the legalistic casuistry of such supporters as John Yoo and Alan Dershowitz and professional philosophers such as Michael Levin and Fritz Allhof, all the way to a globally disseminated popular culture, in TV shows such as *24*. For details of the US torture program itself, we still have only the 528 page “executive summary” of the redacted US Senate Select Committee on Intelligence Report into the CIA's detention and interrogation Program (DIP), the full 6700-page document remaining unreleased. What is perhaps most confronting about this concerted ideological barrage is how rapidly and decisively it has enabled the return of a phenomenon—torture—that for many centuries had been considered not only morally abhorrent, but the very emblem of the inherent abusiveness of tyrannical power.

As one might expect, an enormous amount of academic and journalistic material has been produced regarding this return of torture. This dossier comprises documents pro and contra, analytic and partisan, ranging from “scientific” studies of the practice, through philosophy, law, and politics, to cultural studies and beyond (for varied discussions of the status of torture in a global contemporary frame, see Bernstein, 2015; Danner, 2004; Farrell, 2013; Ginbar, 2008; Greenberg, 2006; Greenberg & Dratel, 2005; Grey, 2006; Harbury, 2005; Head, 2005; Levinson, 2004; Matthews, 2008; Neroni, 2015; Reddy, 2005; Roth, Worden, & Bernstein, 2005).

Despite this post-9/11 flood of opinion regarding torture, there has (naturally?) always been a continuous stream of technical writings discussing the topic. Here, it seems symptomatic that these have precisely not been as front-and-centre in public discussion due to their dealing with what prior to that event could seem predominantly either a mere historical or specialist inquiry or, just as pertinently, a matter of foreign, “backward” countries, such as the “rogue states” of Latin America—although the politically compromised disavowals of this state of affairs were often noted by commentators themselves (see Crelinsten & Schmid, 1995; Derrida, 1991; Heath, 1982; Langbein, 1977; Merback, 1999; Millet, 1994; Peters, 1978, 1996; Scarry, 1985). And despite the extraordinary responses by those seeking to maintain the absolute ban on the use of torture—from personal testimonies through journalism to various academic fields through the US Senate Select Committee on Intelligence—part of the effects of the so-called torture debate has been to bring back into the government, media, and other public institutions “arguments” that, by their very presence and circulation, served to render the topic of torture a matter for public discussion *just like any other*.

Indeed, anti-torture analysts and activists immediately recognized how such discourses were deliberately being deployed to play into the liberal fantasy: after all, who would be against having an

open debate about torture except for anti-democrats? But the “debate” was not merely about the re-legitimizing of a discussion that seemed—at least in North America and Europe—to have been conclusively and constitutionally decided for literally hundreds of years, but was thereby also directed at legitimizing the very acts which were purportedly only being spoken about. Why, after all, would one have such a strenuous public discussion if its topic wasn’t a real matter for possible action? Hence, “the torture debate” proved instrumental in raising a fundamental question, ubiquitous today: How can one combat a discourse which expressly courts, elicits, public discussion precisely in order to legitimize the obscene acts that that discussion is supposedly only raising as a topic for discussion? Even to respond to such provocations—which one has of course to do in order to prevent one’s enemies from dominating the polemic and, thereby, winning by default—serves in itself to legitimize the potential validity of what one seeks to combat (see, e.g., Alvarez, 2006; Waldron, 2005; Žižek, 2013). I will return to this question, often billed as that of “freedom of speech”, below, as it is in fact historically, politically, and conceptually essentially articulated with the problematic of torture.

Before anything else, it is worth noting the decisive shift that this re-becoming-public of practices and discourses of state torture designates. After all, the modern history of European politics is testament to the long, difficult—one might even say “world historical”—struggle against the use of torture as a tool of state. Indeed, one could even point to a slew of evidence regarding the centrality of the political struggles against torture in what is commonly designated “modernity”, to the point that these phenomena might begin to appear essentially codependent. Among these manifold indications, we could list the following sequence, in each case directly linked to extreme political upheaval: the English Revolution of 1641 saw the immediate dropping of official torture (the first ever state in Europe to do so), precisely because its use was dependent on the situation upon the exceptional power of the monarch, the “kingly prerogative”, to try subjects at whim in courts such as the Star Chamber; the radical Enlightenment assault against torture, including by such luminaries as Cesare Beccaria and Voltaire; the abolition of torture in France with the Revolution; in the discussions leading up to the *Universal Declaration of Human Rights* immediately following World War II, the strictures on torture were accepted by all parties without dissent; the 1966 *International Covenant on Civil and Political Rights* also interdicts torture absolutely; there is even an extraterritorial obligation of states who are signatories to the *Convention against Torture* adopted by the UN General Assembly on 10 December 1984 and ratified 26 June 1987, to pursue infractions beyond their own territorial boundaries.

If “modernity” has a sense—however difficult, derisive, or even delusory that this moniker has become—it is one in which its actors identified and named their own project in express contradiction to the barbarisms of the past. It has to be underlined that, whatever the complexities and complicities—not least colonial—of this operation, “torture” was almost universally considered an emblematic barbarism of that past, one which had to be combatted and expunged as a matter of urgency, even emergency.

I am therefore convinced that the public return of torture in the twenty-first century is not just one symptom among others of a decisive political shift in local, national and geopolitical governance, but a key index of what is perhaps too easily called “the end of modernity”. To put this another way, torture was, *strictu sensu*, the repressed political element of modern (democratic) states. As “repressed”, this did not mean, of course, that it was not still practiced; on the contrary, it nonetheless became necessary that when it was practiced at all, it would have to be *practiced as a publicly prohibited abomination* (see Einolf, 2007; Lokaneeta, 2011; Rejali, 2007). The prohibition upon the public use of torture by modern states was such that it forced torture into the shadows, as an abominable anti-democratic technique. Yet it simultaneously thereby became one of the key techniques of secret or shadowy state agencies, and for these almost a quilting point of identification—as we see more and more today given the evidence of the return of state-sanctioned torture in polities that had previously led the charge against its use. To give only a single example here: Glenn Greenwald reported in *The Intercept* of 3 February 2017, that “The CIA’s New Deputy Director Ran a Black Site for Torture” (Greenwald, 2017). The world’s oldest continuous modern democracy, the most

powerful and paradigmatic, which constitutionally repressed torture from its repertoire of acceptable and available state techniques, is now explicitly sponsoring known torturers at the highest levels of government.

3. Methodological considerations

It is however vital to be careful here regarding the “sense and reference” of such a loaded word: “torture” is a word that, if it popularly conjures up images of dungeons and bunkers, hot irons, knives, waterboards, and drugs, in fact covers literally a multitude of sins. The term ranges confusedly and confusingly over the exigencies of spectacular glorification, financial redress, immunological prudence, affect redistribution, ritual order, population decimation, and festive celebration—as Friedrich Nietzsche notoriously suggests in *The Genealogy of Morals*—but, perhaps most fundamentally, in its establishment of the conditions of what can count as a legitimate speech act in and for a polity at all (Nietzsche, 1956). The origins of “free speech” are directly linked to the banning of forced confessions as a tool of law and state: not to be able to “say anything”, but “to not to have to say anything”. I consider this aspect paradigmatic of the import of torture as “the originary landscape of the political” (See Clemens, 2010, 2012, 2013, 2015; Clemens & Grigg, 2006).

As Michel de Certeau phrases, this in a superb essay entitled “The Institution of Rot”: “The goal of torture, in effect, is to produce acceptance of a State discourse, through the confession of putrescence. What the torturer in the end wants to extort from the victim he tortures is to reduce him to being no more than that [ça], rottenness” (Certeau, 1986, p. 46). Eric Santner glosses de Certeau’s point as follows:

Torture is the way an institution simultaneously confesses and represses its deepest secret: that its consistency, its enjoyment of recognition as a really existing social fact, ultimately depends on the magic of performative utterances, on the force of their own immanent process of enunciation. The abjection produced in the torture victim, his betrayal of everything that matters and is dear to him, his confession of his own putrescence, is, as it were, the “substance” that stands in for the lack of substantial foundations to which the institution might appeal for final and ultimate legitimation. (Santner, 1997, pp. 42–43)

In other words, torture is, historically, pragmatically and in principle, *the* technique that functions to establish, effect and sustain the transition *between* a living body *and* the languages of the community. The speech of an ancient Athenian slave could, for instance, only have a legal bearing if it had been extracted through torture (Dubois, 1991, 2003). As Dubois remarks, “Torture performs at least two functions in the Athenian state. As an instrument of demarcation, it delineates the boundary between slave and free, between the untouchable bodies of free citizens and torturable bodies of slaves ... [and also as] a search for the truth” (Dubois, 1991, pp. 62–63). Despite the work of Dubois and many other classicists—for whom the links between slavery and torture are necessarily multiple and manifest—this link is consistently missed in a disproportion of commentaries that examine the rhetoric of slavery in a non-classical context (see, e.g., recent work by Nyquist, 2013, which has no index listing for torture).

Torture, in this optic, is not *simply* to do with the violent imposition of strange and unusual pain upon a victim, for one or another reasons ranging from psychopathic sadism to political expediency, but a foundational institutional technology directed towards the reflexive extraction of discourse from a reticent body. In this regard, torture is *always* operative at the pragmatic boundaries that essay to divide who can say what and when in what way to whom and with what effects. Why has its abolition proved particularly necessary for modern democratic states? Precisely because “free speech” has never simply meant “say anything at all”, but rather means: coerced confessions must be unavailable as public evidence; “free speech” is more precisely the “right”, the capacity *to not to have to speak* (see Clemens & Grigg, 2006).

Yet torture also establishes the orders of speech under the heading of one or another form of *questioning*, whether evidentiary or informational, testimonial or confessional. Indeed, the most reputable historians of torture tend to exclude the sorts of macabre scenarios in which Nietzsche delights as catachrestic, inappropriately and misleadingly denominated by this term. As John Langbein puts it, “No punishment, no matter how gruesome, should be called torture” (Langbein, 1977, p. 3; also Peter, 1996). For these scholars, “torture” is only properly used to nominate a specific area of criminal procedure, directed towards the gathering of evidence in strict and limited circumstances. Certainly, there are all sorts of variations of interest to legal scholars, for example, the French *torture préalable*, which enabled criminals to be tortured to reveal information about other crimes and criminals, and was not abolished until 1788.

Yet “judicial torture” is, across all its variations, its geography and history, directed towards those forms of interrogation and information-gathering through physical compulsion that once fell under the general heading of “questioning”. As Jody Enders notes: “During the Middle Ages, even as it connoted torture, *quaestio* continued to denote such intellectual activities as scholastic debate, legal question, and legal investigation, all of which retained their potentially punitive connotations while they were dramatized in medieval courtrooms, classrooms, and theatres” (Enders, 2002, p. 42). *To be or not to be* may well be the question, to invoke the words of a well-known fictional Scandinavian serial killer, but *the question concerning the grounds of the form of the question itself* had long been resolved by the politics of Mediaeval and Renaissance Europe: it was torture, judicial torture.

The early modern struggles against the use of judicial torture lead us back to the practical problems facing the organization of a legal process before any judgement can be made, particularly regarding the status of admissible evidence. Crucially, those who fought for the abolition of torture were usually not against penal torture per se, that is, what we would now straightforwardly consider “cruel and unusual punishments” such as breaking on the wheel (it is noteworthy in this context that Voltaire wasn’t offended by the horrific torture of Damians the regicide), but against:

- (a) the fact that a punishment preceded any judgement, in a temporal inversion of legality;
- (b) the constitutive unreliability of the evidence, e.g. people will say anything for the torture to stop;
- (c) the variability of techniques and bodies, e.g. the strong can hold out;
- (d) the collapse of the differences between process and punishment.

Moreover, one of the noteworthy aspects of these arguments against torture is how ancient and how invariant they are. As Aristotle himself puts it in the *Rhetoric*:

Torture is a kind of evidence, which appears trustworthy, because a sort of compulsion is attached to it. Nor is it difficult to see what may be said concerning it, and by what arguments, if it is in our favour, we can exaggerate its importance by asserting that it is the only true kind of evidence; but if it is against us and in favour of our opponent, we can destroy its value by telling the truth about all kinds of torture generally; for those under compulsion are as likely to give false evidence as true, some being ready to endure everything rather than tell the truth, while others are equally ready to make false charges against others, in the hope of being sooner released from torture. It is also necessary to be able to quote actual examples of the kind with which the judges are acquainted. It may also be said that evidence given under torture is not true; for many thick-witted and thick-skinned persons, and those who are stout-hearted heroically hold out under sufferings, while the cowardly and cautious, before they see the sufferings before them, are bold enough; wherefore evidence from torture may be considered utterly untrustworthy. (Aristotle, 1926, p. 163)

Given the perhaps surprising invariance of the arguments for and against torture, it is perhaps just as surprising how unpersuasive the opposing views seem to those on the other side—a fact that Aristotle himself underlines. If you're for it, it's incontrovertible; if you're against it, it's essentially unreliable. Yet, the hard kernel of torture—that it is the very paradigm of despotic power—has never seriously been disputed by any of its reputable commentators. Except, as we shall shortly see, by one surprising thinker.

4. Jeremy Bentham invents a new justification for torture

Michel Foucault—despite the inordinate impact of his analyses of public torture on recent scholarship—never attends to the differences between “penal” and “judicial” torture in any extended fashion, despite the significant, immediately apparent implications of this distinction for his own researches into the mutations of the category of law, punishment, surveillance, bodies, confession and truth. (Significantly enough, neither do most of his critics, some of whom I cite below). His own attention is clearly on the former category: “torture” as spectacular punishment. In addition to the notorious invocation of Damiens’ execution that opens *Discipline and Punish*, one could advert to the lecture series at the Collège de France from 1974 to 1975, now published under the title of *Abnormal* (Foucault, 2003; see also Foucault, 1996). In this series, Foucault traces the shift in legal practices, whereby what was once monstrous becomes abnormal, or rather how monstrosity as the manifestation of unnaturality became the basis of all kinds of criminality. Hence, Foucault wishes to pose the question: How did the difference between lawful and unlawful acts become integrally linked to the problem of the differences between normal and abnormal individuals? The answer, of course, is the development of new techniques, capacities, to exercise power continuously rather than punctually, through monitorial institutions and not simply violent rejoinders. In the new dispensation, torture as spectacle becomes otiose.

In the Seminar of 29 January 1975, Foucault again places the emphasis firmly on the corporeal object of early modern punitive power. Here, his example is the assassination of William the Silent in 1584, following which the assailant was appallingly tortured for eighteen days. One could almost agree with Maurice Blanchot when he remarks that “one suspects somehow that Foucault would prefer the openly barbarous times when torture hid nothing of its horror” (Blanchot & Foucault, 1987, p. 86). But the major motivation for Foucault’s emphasis on penal torture is clearly to exacerbate and justify Foucault’s strong distinction between the epoch of sovereign power and that of what he will call in this context “discipline”. Why? Because the public dismemberment of the guilty in the regime of sovereign power suggests that: “There is no mechanics of crime that could be the object of a possible knowledge; there is only a strategy of power that deploys its force around and with regard to the crime” (Foucault, 2003, p. 85). Whereas sovereign power destroyed the bodies of individual transgressors according to violent custom, disciplinary power sought to induce mass populations to interiorize its strictures through the intrusive and incessant questioning of knowledge experts. What had begun as a process interested in the truth of an act turned into a continuously sustained form of attentiveness to the supple and secretive nature of criminality itself.

Jeremy Bentham’s Panopticon has of course become the great emblem of this shift from torture to discipline, physical distress to interiorized practice, sovereignty to biopolitics. Foucault even nominates Bentham’s imaginary projective architecture a “diagram” of power, deploying a term that would later be further extended by Gilles Deleuze (1988). And if Foucault also notes that torture continues to be practised in Europe following the installation of the new paradigm, it is as a marginal, residual or supplementary operation. In his own words, “There remains, therefore, a trace of ‘torture’ in the modern mechanisms of criminal justice—a trace that has not been entirely overcome, but which is enveloped, increasingly, by the non-corporeal nature of the penal system” (Foucault, 1979, p. 16). Yet if torture was necessarily corporeal in its operations, the point of such physical incursions could have many different justifications and ends.

Unlike penal torture, judicial torture was not at all public; on the contrary, it was an extremely technical and often highly secretive element of the court process. Unlike the extreme instances of

early modern public punishment deployed by Foucault, judicial torture took place quietly, unobtrusively, in the great dungeons of Law. It was not so much punitive as evidentiary, bound explicitly to the acquisition of knowledge about the circumstances of the crime and its perpetrators; to that extent, judicial torture already partakes of several of the characteristics Foucault will assign to the power-knowledge reorganizations of disciplinary investigation.

There has of course been an extraordinary response to Foucault's work on "panopticism". As the recent work of Anne Brunon-Ernst shows, Foucault had not read that much Bentham, and indeed misrepresents him on certain key points (Brunon-Ernst, 2012). If Foucault's academic ambition was to confront, on the one hand, Marxist analyses of the primacy of a critique of political economy, it was, on the other, to affront liberal ethical sensibilities regarding the alleged superiority of modern European polities in their emphasis on freedom, equality and fraternity. In emphasizing the penal aspects of the Panopticon, then, Foucault also emphasizes Bentham's drive to incarcerate nature itself. As Janet Semple reminds us, Bentham "also devised a panopticon for hens, the *ptenotrophium*, which has many of the features of the modern battery and gives to Bentham the dubious distinction of being a precursor of factory farming" (Semple, 1993, p. 283). But one can certainly also emphasize the genuinely emancipatory aspects of the panopticon too.

As Frances Ferguson argues in *Pornography, The Theory*, subtitled *What Utilitarianism Did to Action*, modern pornography is one of the key zones of cultural production which have significantly benefited egalitarianism in a number of forms, not least feminism. In interpreting pornography as offering a continually modulated presentation of a genre of literally obscene acts for forms of social evaluation, whether positive or negative, Ferguson sees a drive to remove bodies from inheritance in order to deliver them to new kinds of differential performance. Performative processes concerning the variability of acts, not the reiteration of social substances; self-transformation, not social status; co-veillance, not asymmetrical inspection: pornography unveils the possibility of radical behavioural modifications in the regime of sexuality through non-intrusive observation of experimental representations. By undermining the allegedly naturalness of acts, as well as reopening social questions as to the nature of such acts, pornography undermines established evaluations of the differences concerning sexuality (Ferguson, 2004), moreover encouraging a dynamism of constant new evaluations from varying positions.

Finally, even entrepreneurial entertainment emporia could draw usefully from Bentham: one could take the great Romantic panoramas and the Panopticon Tavern as exemplary here (see Otto, 2011), not to mention the ongoing reorganization of holiday resorts and old people's homes. As Jacques Lacan, with characteristic acumen, announced on returning from a skiing holiday on 27 February 1963, that "winter sports ... seem to me an obvious incarnation, a very vivid materialization—the contemporary problem of the function of the concentration camp" (Lacan, 2004, p. 173). Whatever one's evaluation of Bentham's achievement, everybody agrees that re-education camps would be one of his abiding contributions to what we might term reactionary revolutionary Romanticism.

Yet there is more, determining in the present context. It is a well-known fact that Bentham hated Australia. Or, more precisely, he hated the British settlement that was the colony of New South Wales. In fact, Bentham hated NSW so much that he strenuously and recurrently challenged its very grounds of existence. Relying heavily on *An Account of the English Colony in New South Wales, from its first settlement in January 1788, to August 1801* by Lieutenant-Colonel David Collins (Collins, 1804), several years judge-advocate and secretary of the aforementioned colony—as well as one of the founders of Hobart Town, the first Lieutenant Governor of Van Diemen's Land and the man after which Melbourne's Collins Street is named—Bentham invoked antipodean scenes of degradation and despair. Indeed, he returned to Collins's book again and again, later remarking, "The general impression left by a perusal of this work, is one of sadness and disgust: it is a history of human nature in its most degraded and depraved state—an unmixed detail of crimes and punishments" (Bentham, 1843, p. 335).

In 1802, Bentham composed the *Panopticon versus New South Wales*, in which he sees the Panopticon triumphing over transportation on every one of the five counts of the objects of penal justice: for example, reformation, incapacitation, compensation and economy. Bentham followed up this broadside almost immediately with an 1803 pamphlet, whose very title immediately gives a sense of its contents: *A Plea for the Constitution: shewing the Enormities Committed to the oppression of British Subjects, innocent as well as Guilty, in breach of Magna Charta, The Petition of Right, The Habeas Corpus Act, and the Bill of Rights; as likewise of the several Transportation Acts; in and by the Design, foundation and Government of the Penal Colony of New South Wales*. Despite his strenuous efforts—including sending a copy of the pamphlet to Collins himself—Bentham’s challenges failed to stop the transports.

In the afore-cited *The Rationale of Punishment* (Bentham, 1830), still incensed at governmental foolishness despite the supposed mitigation of the illegality, he went at it again, attacking the entire system of transportation to the colonies. This time, his assault was even more specific, in that Bentham compared transportation to Australia with its precursor forms in North America. Australian transportation put the convicts out of sight, and thus out of mind, of the British people; the Australian convicts were not placed among the lawful population; and the entire affair was a creature of state power, not private enterprise. As Bentham writes, “Among the advantages which the North Americans have derived from their independence, there is one which cannot fail to strike every man who has any feeling of national pride; it has saved them from the humiliating obligation of receiving every year an importation of the refuse of the British population, of serving as an outlet for the prisons of the mother country, whereby the morals of their rising people were exposed to injury, by a mixture with all possible kinds of depravity”. If, as John Gascoigne has put it, “What offended Bentham above all was that the British Government persisted in a recourse to the messy, uncertain and expensive device of transportation when he was offering it the order, clarity and social utility of the Panopticon” (Gascoigne, 2002, p. 126), it is necessary to add that what is essential to the “order, clarity and utility” spoken of here is precisely the Benthamite trinity of the proximity of bodies, the reciprocity of the gaze, and the constant re-evaluation of fictitious differences, in the name of *the reclamation of unnecessary waste for improved use*.

As one of the most brilliant of technocratic Enlightenment gentlemen, Bentham had not so much failed to understand the actions and motivations of the expansionist imperial enterprise, as he abominated its principles, which he would accordingly term the operation of “sinister interests”. *Contra* Bentham’s own expressed opinions, however, the British mandarins weren’t simply throwing away the convicts as waste materials, but themselves engaged in extraordinary calculations regarding a global military and economic strategy. Furthermore, Bentham seems to have resisted admitting just how close their vision was to his own. The paradox here is that it seems that it was transportation itself that had educated the eighteenth-century British ruling classes as to the benefits of a more graduated system of major punishments, rather than the brutal catchall remedy of the death sentence for what tend to appear to us today as minor infractions.

To this extent, the system of transportation and the Panopticon shared a ground-orientation to punishment: that the process of grading or correlation in sentencing could be undergirded by a principle of proportion. Where Bentham and the British Empire’s administrators diverged was a conviction as to the means and ends of such a calculus. On the one hand, we have “the greatest happiness of the greatest number” as directing the application of technical innovations; on the other, we have a principle of unlimited military-economic expansion as guiding action. Bentham didn’t like human bondage because he was convinced that it frustrated the maximization of utility, which is in part why he had formalized the Panopticon in the first place. But government required it—not least for cheap labour and territorial occupation—which is why they kept up the transportations for as long as they did, despite its manifest and manifold infractions of legality.

Yet, if “panopticism” in Foucault’s terms could function as a new diagram or paradigm of power (education, entertainment, prisons, hospitals, factories, barracks and farms), with all the new kinds

of differences and uniformities it made possible, what then becomes of those random acts whose motivation, occurrence and consequences were incalculable? What is the status of genuinely revolutionary acts? As we know, these were also abhorrent to Bentham. In a text originally titled *Anarchical Fallacies*, first published in French in 1816 but probably composed in late 1795, Bentham notoriously asserts that the content of the *Declaration* is “execrable trash” and that the very idea of “the natural and imprescriptible rights of Man” is “nonsense upon stilts” (Bentham, 1843). The word “nonsense” recurs with an extraordinary frequency in this text, undoubtedly a symptom of Bentham’s fury (see Bedau, 2000; Schofield, 2003).

Yet even before the Terror, Bentham had been livid about rights. As he had recognized in 1789, anticipating the horrors that he saw as inevitably attendant upon such metaphysical confusions, such a declaration of rights has serious problems. First, it is *contradictory*, i.e. its alleged universality conflicts with the particulars a constitution demands. Second, it is *false*, i.e. its claims are clearly not supported by reality. Third, it is *disruptive*, i.e. its real-world applications compound and exacerbate disorder. To keep changing particular laws in line with the supposedly universal nature of rights is to immediately contravene one’s own principles and foment reactions. For Bentham, the *Declaration* was not just one metaphysical fallacy among others, but the ultimate expression of metaphysics disastrously injected into reality by revolutionary politics. According to Bentham, the content of the *Declaration* comprised, at best, a set of non-binding moral precepts, but because it presented itself as speaking of “the natural, inalienable and sacred” rights of man, it was utterly compromised. Yet, the Revolution proposed to Bentham a genuine philosophico-practical problem, precisely at the same time as the first Panopticon writings in the 1790s. The problem for Bentham is that some things, revolutions for instance, are almost impossible to plan for: they are the avatars of chance in the system.

If chance events for sovereign powers are par for the course and therefore to be met with an overwhelming show of force-as-glory, chance events for complex regulatory systems threaten to menace the integrity of the system as such. This is surely one reason why Bentham comes to reconsider torture in an unprecedented fashion. Well aware of the ferocious Enlightenment polemics against the use of judicial torture by state powers, most directly through Cesare Beccaria who he considered “the father of *Censorial Jurisprudence*”, Bentham was, as ever, committed to rethinking every and any legal and political practice he knew of according to the principle of utility. Whereas Beccaria reinvigorated very ancient arguments against judicial torture in considering the practice at once unjust and inefficient, as well as vitiating the deterrence-power of punishment itself, Bentham re-lected the question through the principle introduced to him through Beccaria’s English translator: “the greatest happiness of the greatest number” (see Beccaria, 1995, esp. pp. 39–42). Yet Bentham’s writings on torture remained unknown and unpublished until at least 1973, when W. L. Twining and P. E. Twining, who were the first to have investigated these writings in any detail, published two (Twining & Twining, 1973).

As Jeremy Davies has more recently observed, we find Bentham first working out a doctrine of torture of the time of *Introduction to the Principles of Morals and Legislation* (1780), “Of compulsive operations and herein of Torture” and “Of torture” (draft) which date from approximately 1777 or so, before adjusting this doctrine in another set of notes “Of Torture” and the more substantial draft “Means of extraction for extraordinary occasions” in 1804 (Bentham Papers, n.d., b46, pp. 56b–62; b46, pp. 63–70; b74b, pp. 405–406; b74b, pp. 428–433; Davies, 2012, 2014). Note that this temporal gap coincides with, on the one hand, the French Revolution and its aftermath, and, on the other, with Bentham’s own enthusiastic development of the Panopticon. One can see how torture cannot be excluded a priori by a consistent utilitarian position, even if whatever potential applications it might have will have to be severely circumscribed.

Philip Schofield usefully summarizes Bentham’s arguments in six steps: first, the purpose of the torture must be clear; second, the action required of the prisoner must be in the latter’s power; third, the action must be in the public interest; fourth, there must be regulations concerning the kind and

quality of torture able to be applied; fifth, such torture must only be applied when any delay in acquiring the information would be intolerable; sixth, there must be compensation available for anybody who is submitted to undue torture, and a concomitant punishment for the inflictor of such (Schofield, 2009; for a dissenting view, see Morgan, 2000). Torture cannot be used for confession or simple interrogation: it can only be used, as Bentham's own draft titles have it, *for compulsive operations and extraordinary occasions*. Schofield, however, does not fully develop the links between the panopticon and torture; nor does he seek to tease out some of the difficulties in Bentham's position.

For if Bentham is already cogitating the uses of torture in the 1770s, he further refines his theses in the second set of torture writings regarding the potential utility of torture in the apprehension not only of known criminals, but of potential future acts of terror. In doing so, he is likely the first attested thinker to have committed to paper what is now widely known as the "ticking bomb" scenario. Even if Denis Diderot may have in some senses anticipated Bentham here, the context and argumentation are different enough to warrant Bentham's priority. J.-P. Cléro (2012, pp. 93–94) cites Diderot's declaration in *Traité des délits et des peines par Beccaria, traduit de l'italien par André Morellet: nouvelle édition corrigée; précédée d'une Correspondance de l'Auteur avec le Traducteur; accompagnée de notes de Diderot, et suivie d'une Théorie des Lois Pénales, par Jérémie Bentham, traduite de l'anglais par Saint-Aubin* that "think how a few minutes of torturing a villain may save the lives of a hundred innocents whose throats his accomplices are going to cut, and you will consider that the question is an act of clemency", but Diderot did not share Bentham's presumption of innocence and, moreover, proclaims the need for torture of criminals in order to find accomplices and evidence to convict: that is, Diderot is essentially reprising more ancient legalistic verities.

As Bentham, in contrast, writes: "For the purpose of rescuing from torture these hundred innocents, should any scruple be made of applying equal or superior torture, to extract the requisite information from the mouth of one criminal, who having it in his power to make known the place where at this time the enormity was practicing or about to be practiced, should refuse to do so?" On the one hand, Bentham's genius is to present a justification of torture that breaks with the prior practices and theories of both judicial and penal torture in its emphasis on the prevention of possible *future* acts; on the other, his account thereby revivifies ancient philosophical doctrines regarding the coupling of technology and contingency.

It is surely pertinent in this context that almost every single published justification *for* torture that I could find in the twenty-first century relies integrally upon a version of the "ticking bomb" argument; even if, as Costas Douzinas (2008, p. 111) put it regarding a sophisticated version of the ticking-bomb proffered by Niklas Luhmann in his Heidelberg University lecture of 1992, "The trick is that we have to say yes or no to an unreal situation that never happens", this "unreal situation" is nonetheless enthusiastically promulgated by almost all its adherents as "the only realism".

It seems no surprise that Foucault and his commentators missed the bond between torture and the panopticon. Most obviously, the materials were unavailable: as I have already noted, all of Bentham's writings on torture went unpublished until 1973, at exactly the time that Foucault was pursuing his new researches into power-relations. It is no doubt symptomatic that at least two of Bentham's torture papers remain unpublished, just as do many of his papers on sexuality (see Bentham, 2014). But I believe that Foucault would have had to miss their import in any case, precisely because he not only never *properly* investigates the relationship between penal and judicial torture—a distinction that would immediately undo any too-strenuous distinctions between the modalities of sovereign power and biopower, not to mention a possible modification of the theory of governmentality itself—but also because Foucault's genuine discoveries are phrased in a way that gives unquestionable priority to the utterly groundless plasticity of the human body as well as its discourses.

Yet if we return to Bentham's writings on torture we find something extremely strange. First of all, it is noteworthy that both of Bentham's later essays on torture are dated around 1804, and are conceptually and temporally linked to a barrage of anathemas against the colony of New South Wales. If Foucault himself wanted to speak of *spaces* of punishment, as in some senses preceding the dialectics of *time*, with Bentham, torture becomes for the first time essentially a technology of time, in time, against time. Bentham's Panopticon and his theory of torture are compatible in a number of peculiar ways, not least because they are both founded on the attempt to avoid insofar as it is possible any form of excessive corporal punishment.

The apparent irony of the return of torture, then, is due to the revelation of the limits of modalities of observable exteriorization: the Panopticon's inhabitants no longer have anything to confess that is not already known; but the possibility of a sudden breach from the outside means that something that is unseen is not only unknown for a Panoptical culture, but *an ever-present unknowable risk that threatens the stability of the system itself*. Torture is Bentham's method of dealing with the Real that his own thinking has revealed at its limit. (Donald Rumsfeld's famous utterance about "unknown unknowns" is surely also pertinent here.)

Certainly, Foucault knew that "Bentham used probabilities, in a way which no longer had anything to do with the search for some hidden truth to be extracted from the culprit. He showed that the aim of a society of surveillance was not to link the crime and the criminal to some event that belonged in the past ... but rather to prevent such excesses from occurring again in the future" (Cléro, 2012, p. 81). For Bentham separates action and speech from language in favour of information. His notion of the *calculus* is to be taken utterly literally—if it were not for the fact that such calculations are logically prior to the distinction between letters and numbers. Above all, the key to his work is its combination of futurity and use-maximization. What emerges at the centre of his work is Bentham as a theorist of information technology as events management, i.e. of accelerated urgency in information-extraction. With Bentham, torture becomes the paradigm of technology as information extracted from resistant matter under time-pressure created by the threat of perceived impending catastrophe.

5. Conclusion: The shock (doctrine) of the (old) new

What then, if anything, does the contemporary shift in the official discursive operations regarding torture imply? I have tried to suggest that Jeremy Bentham, that good-willed and good-natured father of utilitarianism, purveyor of maximal happiness and scourge of "sinister interests", bequeathed the (our) future monstrous twins. On the one side, the Panopticon, and all that we now know has been derived from its diagram of power. On the other side, a new justification for torture, one which was birthed quietly yet decisively in the heart of the very Enlightenment that had rejected torture so absolutely as an abhorrent moral and political practice. Bentham knew it too, for, as he writes in his earlier *Of Torture*:

That it should enter into the heart of an Englishman to harbour a single word in favour of a practice abolished within a few years in several of the most absolute governments in Europe, may of all things seem singularly strange and unexpected. But in the course of a scrupulous examination a man learns to render himself proof against the delusive power of words, and to correct the first impressions of sentiment by the dictates of reason and utility. (Bentham, n.d., b46, p. 63)

Against sentiment's misleading first impressions, then, Bentham justifies the necessity of the application of torture as guarantee against the threat of a panoptical outside.

In doing so, he offers at least two propositions about torture determining in the present context: torture is not and should not be considered a practice that in itself necessarily bespeaks the exercise of unjust powers, nor, precisely because of this, can it thereby function as an emblem of the old

tyrannies that justified modernity's self-description as the avant-garde of world political life; second, torture is not to be used to discriminate between classes of persons (e.g. slave and freeman), nor for confessional or interrogational means (i.e. as ritual exigency or fishing-expedition), but is to be situationally applied according to the sense of an impending catastrophe that might be warded off only with the right information.

Bentham modernizes torture, thereby undermining modernity; or, more precisely, one crucial theme by which modernity thought of itself as modern, that is, by leveraging the abolition of torture as a paradigm of the overcoming of the political iniquities of the past. Yet, in doing so, Bentham paradoxically remains, as Simon During has recently argued, "within the framework of Latin Christianity ... Its notion of human felicity is finally tinged by soteriology" (During, 2017, p. 163). A soteriology that—both like and unlike Latin Christianity—doesn't recoil from the use of torture in the name of universalism.

Let me conclude with a brief remark to return us to the beginning of this essay. For Hannah Arendt:

No government exclusively based on the means of violence has ever existed. Even the totalitarian ruler, whose chief instrument of rule is torture, needs a power base—the secret police and its net of informers. Only the development of robot soldiers, which ... would eliminate the human factor completely and, conceivably, permit one man with a push button to destroy whomever he pleased, could change this fundamental ascendancy of power over violence. Even the most despotic domination we know of, the rule of masters, who always outnumbered him, did not rest on superior means of coercion as such, but on a superior organization of power—that is, on the organized solidarity of the masters. (Arendt, 1969, p. 50)

One of the remarkable things about this remarkable diagnosis is that the very dystopia with which it flirts—robot soldiers—has now not only been realized and normalized in the form of drone warfare, but has also resulted in an eventuality which even Arendt seems not to have seriously considered: the robotization of torture. For the Internet is itself essentially a net, not of information, but of automated secret informers. The surveillance powers of the new communicational technologies cannot be seriously considered under the rubric of more traditional technologies of disciplinary power, for instance, the Panopticon—although the Panopticon remains precisely the central reference for surveillance studies today. On the contrary, these technologies constitute instead a qualitative transformation in the relation of power to violence.

The formula that I would like to give as the political correlate of these new technologies is: *the final expropriation of the human symbolic capacity as such, that is, a continually-operating modality of Benthamite torture in its strict definition*. That contemporary communication technologies are not regularly experienced as such—indeed, are barely even considered as such—is itself part of the novelty of the present situation. For they precisely seek to close the gap between panoptical observation and extraction of information in extraordinary circumstances—while once again unleashing torture as an unconstrained and atavistic tool of state.

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