

Hiding Behind the Hypothetical: The Unjustifiability of Torture

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Abstract

In this paper I argue that interrogational torture is never morally justifiable. I highlight the many flaws inherent in using ‘ticking-bomb’ scenarios to justify the legalisation of torture in ‘exceptional’ circumstances. I argue that the damage that would be done to the ethical foundations of the state and the sanctity of the person should be sufficient to deter us from assuming that torture is ever morally permissible, or should be officially sanctioned. I further contend that the traditional scenarios used to justify arguments for the moral acceptability of torture suffer from the dual deficiency of abstraction and idealisation, and that lesser evil arguments are not sufficiently convincing when viewed in the light of the greater consequences of legalising brutality.

The *UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment* states:

The term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third party information or confession, punishing him for an act he or a third person has committed, or is suspected of committing, or intimidating or coercing him or a third person, or for a reason based on discrimination of any kind, whether such suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.¹

In the course of the following discussion it will be what I will call ‘interrogational torture’ that I will be primarily discussing. Interrogational torture differs from other types of torture in so far as its *primary* purpose is the extraction of critical information. Furthermore, it is important to note that interrogational torture is focussed on individuals who are presumed guilty (and have therefore, in some sense, brought about the state of affairs whereby they are subject to interrogation). Other

¹ UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment pt. 1, art.1 (1984), available at <http://www.un.org/documents/ga/res/39/a39ro46.htm>.

forms of torture may be indulged for the purposes of pleasure, punishment, humiliation and so forth. However, it should be noted that any form of torture may involve more than one intention.

Many of those who are agreed that torture is a morally deficient practice are, nevertheless, convinced that there may be extenuating circumstances in which an absolute prohibition is naive and morally inexcusable. This is because we can imagine circumstances in which the stakes involved appear extremely high. The paradigmatic and notorious example of this, which has been the subject of prolonged academic discussion, is the 'ticking-bomb scenario'. This is a hypothetical situation that supposes definite devastating consequences for a large number of innocent people, if nothing is done to prevent the immanent detonation of a terrorist bomb. The authorities have in their custody a detainee who is aware of the location of the explosive device, but he refuses to co-operate in the provision of information essential to its discovery and disarmament. The question is: would the authorities be morally justified in the use of torture to ensure that the catastrophic explosion is averted?

It can be insisted that, with the recent advent of terrorist activity, this is a possible state of affairs that warrants philosophical consideration. It is especially significant in that it is as a consequence of positing such hypothetical situations that a framework for debate on the modification of the prohibitions embodied in

international law has arisen.² By placing in the public consciousness the possibility of such immanent and potentially catastrophic threats, it has been possible for some governments to erode civil liberties and to introduce ‘special powers’ superficially designed to eradicate dangers to public safety, but which in practice eliminate legal dilemmas when acting in unconstitutional, undemocratic or dehumanising ways. We do not have to look too far to find instances in the popular media which serve to justify torture and amplify a public sense of insecurity and danger from terrorist elements.

Consequentialists have argued that an unexceptionally prohibitive stance on torture is untenable, both morally and practically. When one adopts such a position one does not allow that there may be mitigating circumstances in which the use of otherwise uncondonable measures is morally justifiable and practically expedient. In the ticking-bomb scenario, the degree of the threat and the time-frame in which a solution must be secured mean that, irrespective of what the authorities proceed to do, an evil will occur. It is assumed that it is certain that the bomb will explode and there will be significant civilian casualties if they do not extract the information from the terrorist. The consequentialist argues that the use of torture is a legitimate tool of interrogation in such extreme circumstances, as it is the lesser of two evils. Posner claims that ‘only the most doctrinaire civil libertarian would deny that if the stakes are high enough, torture is permissible’.³ Yet the curious thing about many

² See for example A. Dershowitz, Torture of Terrorists. In *Shouting Fire*, (Boston: Little Brown, 2002) pp. 470-77 and B. Hoffman, A Nasty Business, *The Atlantic Monthly* (Jan 2002).

³ R.A. Posner, The Best Offense, *New Republic*, 2, 2002, p.28. For similar arguments see also O. Gross, The Prohibition on Torture and the Limits of the Law. In S. Levinson (ed.), *Torture: A*

authors who support the lesser evil argument, is that they remain reluctant to go so far as to actually legalise torture.

One of the greatest difficulties in maintaining an absolute prohibition on torture is the fact that one cannot allow *any* mitigating circumstances to sway one's conviction. As Oren Gross points out:

Moral absolutists must maintain their support for the absolute ban on torture even when the outcome of abstaining from the use of torture is truly catastrophic.⁴

Thus, irrespective of the extent of potential loss of life or one's own relationship to those who may suffer, the absolutist is bound to the ramifications of his position. However, I would not argue that it would not be extremely difficult to restrain myself from torturing a suspect who, upon careful reflection, I consider most likely to have information, if it would save the life of my partner. Yet it is personalisation such as this that should not be allowed to mar one's objective assessment of a general policy on torture. Morality, and the state sanctioned laws that purport to uphold it, need objectivity if they are to have any virtue.

Alan Dershowitz has famously questioned whether the popular support of an absolute prohibition on torture is grounded in historical and aesthetic conventions,

Collection (Oxford: Oxford University Press, 2004) (note 20) p.238 and J.B. Elshstain, Reflections on the Problem of 'Dirty Hands'. In Levinson (note 20) pp.87-88.

⁴ O. Gross (2004).

rather than moral and rational considerations. Like Posner, he argues that it is only the naïve libertarian who is committed to the view that, irrespective of the circumstances, torture is always unjustifiable.⁵ He believes that we should have the honesty to admit to the fact that, irrespective of our moral scruples, it is an indubitable fact that torture is being used as an information extraction tool.⁶ He is convinced that the unaccountability that coincides with unsanctioned torture is unacceptable. Furthermore, he holds that it is irresponsible to legally prosecute those who would use it in ticking bomb cases, if we agree that it is permissible on such exceptional occasions. It would be better, he argues, to issue in advance of its occurrence juridical warrants that limit its extent and purpose.⁷ He contends that if torture will avert catastrophic human casualties then ‘a sterilised needle under the fingernails may be the option that a government should adopt’.⁸

Dershowitz believes that his legal warrants would curtail the use of illegal torture and make the whole process more transparent and accountable. The warrants would only be issued in ‘exceptional’ states of affairs, and would require the concurrence of executive officers and judges. These individuals would have to be completely satisfied that the stringent conditions under which warrants could be issued were sufficiently fulfilled. The idea is that it is better to have legal accountability when it comes to torture, than to condone its occurrence in certain circumstances and yet

⁵ Cited in R. A. Posner, *Torture, Terrorism and Interrogation*. In Levinson, 294-8.

⁶ For example, the US practices ‘rendition’ – prisoners are sent to countries that are known to use torture. See S. M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York, Harper Collins, 2004).

⁷ A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002), pp.131-163.

⁸ *Ibid.* p. 144.

allow it to remain outside the realm of legal utilisation. A legal process involving argument, evidence, records and judgement would allegedly ensure that it could be controlled and regulated, its outcomes evaluated and its utility assessed. He believes that the following argument leaves us with little choice but to sanction legal torture.

If we do not torture, we compromise the security and safety of our citizens. If we tolerate torture, but keep it off the books and below the radar screen, we compromise principles of democratic accountability.⁹

What Dershowitz and many of his advocates have failed to sufficiently consider is the consequences of allowing such particular exceptions to moral prohibitions. A lesser evil is still an evil, and it is important to note that exceptions can become precedents that normalise behaviour.¹⁰ There is something intuitively unsettling about allowing the legalisation of torture in order to prevent excess. It may be the case that the legalisation of torture will have the effect of habituation and may in fact result in an increase in the number of instances of illegal torture.¹¹ The use of torture and such degrading practices may have effect of undermining the moral principles upon which the state is founded. If the state deligitimises itself, the very practices of law and morality upon which it is founded are undermined.¹² This opens the door to subversion, deviation and excess. If we subvert the boundaries of the morally

⁹ Ibid. p. 153.).

¹⁰ A. Fiala, A Critique of Exceptions: Torture, Terrorism, and the Lesser Evil Argument. *International Journal of Applied Philosophy* (2006), 20, p. 127.

¹¹ Z. Slajov, *Welcome to the Desert of the Real* (London: Verso, 2002).

¹² R. Morgan, The Utilitarian Justification of Torture: Denial, Desert and Disinformation. *Punishment & Society* (2000), 2, 2 pp. 181-96.

acceptable in particular circumstances, it is naive to believe that this will not have a ripple effect that carries to other areas that are governed by moral prohibition.

I am convinced that there are many flaws inherent in sanctioning torture warrants, not least of which is the human propensity to only furnish information that is complimentary to one's goals. If one were applying for a torture warrant it would be in one's best interest to ensure that the case being made was most favourable. Are we to believe that the public official would invariably resist the temptation to strengthen his case by revealing only partial (supporting) information? It appears that the subjective beliefs and convictions of the public official would most likely play a significant role in the way that he would present his evidence. Therefore, it would not be unlikely that the evidence offered to a judge or regulating body would be selective and structured in a fashion that maximises the probability of the application being sanctioned. Judicial decisions are reached upon the basis of the facts *as they have been presented to the court*, and this allows for significant deviation from the facts *as they actually are*. The objective truth of the matter is not necessarily the grounding upon which torture warrants would be granted.

Richard Posner believes that if torture warrants are granted then officials will want to see how far they can bend the rules and so the use of torture would become a regular resort.¹³ The very concept of torture eludes a precise and universal definition. It always involves pain and suffering of some description, but the extent, duration and variety has proven the subject of heated debate. Even the definition

¹³ R. A. Posner, Torture, Terrorism and Interrogation. In Levinson, pp. 291-8.

sanctioned by the United Nations (quoted at the beginning of this paper) can be interpreted so as to accord with ones particular needs and purposes. For example, Assistant Attorney General Jay S. Bybee, in a report commissioned by the Bush administration, found:

Torture... covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm... Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment, fail to rise to the level of torture.¹⁴

This excerpt neatly illustrates how the interpretation and definition of terminology can be used to ‘legally’ side-step the essential intention of agreements such as the United Nations Convention Against Torture (1984). Bybee’s arbitrary and expedient interpretation helps to illustrate the real temptation for politicians to exploit any possibility of expanding the terms of legitimate uses of physical and mental violence, should they ever be legally sanctioned. If it is the case that world powers are already attempting to broaden the use of legal violence when torture is not

¹⁴ From K. J Greenberg and J. L. Dratel (eds.), *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) pp. 213-14.

permitted, we can justifiably conjecture that they would progressively expand the use of torture warrants should they ever be introduced.

Politicians are often expected to take decisive action to eliminate a perceived threat. If they are not held in check by sufficient legal constraints there is a great danger that 'exceptional' circumstances will be re-interpreted to incorporate all kinds of expedient states of affairs. Furthermore, the use of torture can lead to double standards that are objectively unjustifiable – *we* are allowed to use immoral practices to achieve our goals in exceptional circumstances, but *the enemy* are not. A nation should be very careful to safeguard its ethical perspective and refuse to allow the introduction of practices that have the potential to erode virtuous moral prohibitions.

The deceptive attraction of the ticking-bomb scenario is that it assumes advance accurate knowledge of future states of affairs that will be allowed to occur as a consequence (indirect) of failing to forcefully extract information from a particular individual. It also assumes that these consequences can be averted by the interrogational torture of this individual. Furthermore, it is taken for granted that the authorities are certain that the detainee is both guilty and has the information that they need. The scenario takes it as an *a priori* certainty that this is the case. This obviously circumvents dealing with inconvenient aspects of reality – such as the possibility of error. It is only when we look at the sum total of all the assumptions being made, and the likelihood of their actually coinciding in any particular concrete instance, that we see that this example is heavily flawed. The only way that the

object of all of these assumptions could be known with certainty would be with retrospective knowledge. There is no way to know in advance of the act of interrogational torture that its primary objective will be achieved – if this objective is to ascertain information that will allow the preservation of life. Ticking-bomb cases invariably suffer from a dual deficiency – they are highly abstract and highly idealised.¹⁵ In these examples, a state of affairs is constructed that does not suffer from many of the difficulties inherent in reality.¹⁶ An idealised abstract state of affairs should not be assumed to sufficiently serve as a justificatory analogy with regard to something as serious as the use of torture in concrete instances.

Furthermore, one of the greatest flaws with using ticking bomb scenarios to justify torture is that, because of the time-frame in which it occurs, it necessarily excludes the possibility of what we traditionally understand as due legal process. The suspect is not afforded the protection of the legal maxim that he is ‘innocent until proven guilty’. The purpose of this assumption is that it protects the innocent and ensures that only those who have been conclusively proven guilty will be punished for the crimes of which they are accused. In the ticking bomb case, the suspect has not been tried by his peers and there is no time or opportunity to mount a legal defence. The judge must act on the information provided by the official seeking the warrant, in order to avert an immanent catastrophe (and I have already outlined the problems inherent in this process).

¹⁵ H. Shue, Torture in Dreamland: Disposing of the Ticking Bomb. *Journal of International Law* (2005), 37, p. 231.

¹⁶ See, for example, J. Kleinig, Ticking Bombs and Torture Warrants, *Deakin Law Review* (2006), 10, pp. 314-27.

When we attempt to make a legally binding moral evaluation of interrogational torture we need to focus on the *act itself* and not allow ourselves to be influenced by arguments such as that of the ticking-bomb, which has been deceptively set-up to ensure its persuasiveness. It is precisely because of the vagueness inherent in the ticking-bomb scenario that it is initially attractive. We are never told how the authorities are privy to the information it is assumed that they are certain about. We need to ask ourselves questions such as how the authorities are certain that the prisoner has the information they need. Is there not the possibility that he has been fed false information by his colleagues and that his arrest was not coincidental (although he did not know this)? Is it not possible that the wrong man is in custody? How can it be known for certain that the information gained as a result of the inflicted suffering is not a lie? We must also ask questions such as how much pain is enough to ensure a detainee will tell the truth. Should we continue the torture even after we have been told the whereabouts of the bomb, just in case the prisoner has lied to stop the pain? These are questions that are not easily answered by supporters of legalised torture. All that we do know for certain is that another human being is going to be subjected to an agonising and humiliating experience.

Perhaps one of the most important questions to pose is how society would be affected as a whole by the legalisation of torture. It takes a certain kind of person to be able to torture another. After the occurrences at Abu Ghraib (beginning in 2004) a

psychological investigation (AR 15-6 Investigation – Allegations of Detainee Abuse at Abu Ghraib) came to the following conclusion:

...the worst human qualities and behaviours came to the fore and a pervasive dominance came to prevail, especially at Abu Ghraib. Inadequate and immoral men and women desiring dominance may be drawn to fields such as corrections and interrogation, where they can be in absolute control over others.¹⁷

Should society entrust such a huge responsibility on individuals such as these? Let us suppose for a moment though that the torturer does not fit the above profile. Would it not be the case that a moral or empathic person would suffer severe anguish, if forced to extract information from another through violent means? It would only be with great reluctance that a virtuous individual would proceed to inflict degradation and suffering on another. But this leads to another problem; a reluctant torturer is likely to be an incompetent torturer. Effective torture as an information extraction tool requires that it be implemented by experts who understand the nature of the enterprise in its intricacies, and who have the training and proficiency to achieve their objective. Torturers, in order to be effective, need to have honed skills, and this requires an entire institutional framework that allows for the evolution of their 'trade'. Torture, when used by the state, is not the province of isolated individuals, but is an institution in itself. Why is this the case? Arrigo summarises the point as follows:

¹⁷ Greenberg and Dratel (eds) *The Torture Papers*, p. 448.

The use of sophisticated torture techniques by a trained staff entails the problematic institutional arrangements that I have laid out: physician assistance, cutting edge, secret biomedical research for torture techniques unknown to the terrorist organisation and tailored to the individual captive for swift effect; well trained torturers, quickly accessible at major locations; pre-arranged permission from the courts because of the urgency; rejection of independent monitoring due to security issues; and so on. These institutional arrangements will have to be in place, with all their unintended and accumulating consequences, however rarely terrorist suspects are tortured... [T]he harm to innocent victims of the terrorist should be weighed against the breakdown of key social institutions and state-sponsored torture of many innocents.¹⁸

I would also like to note that there are many historical instances in which an innocent victim of torture has admitted to crimes that he did not commit in order to finally end the infliction of pain and degradation to which he has been subjected. I believe that the forced compulsion to do so is the result of a degree of personal violation that is tantamount to rape. The subject is forced to collude against himself in order to satisfy the purposes of his tormentor. The torturer exploits the weakness of the detainee's body, in order to make it an instrument that will ultimately bend the subject's agency so that it conforms to the torturers will. The deepest core of the

¹⁸ J. M. Arrigo, A Utilitarian Argument Against Torture Interrogation of Terrorists. *Science and Engineering Ethics* (2004), 10, p. 543.

individual is forced to plead for the victim to placate the torturer – and this is perhaps the ultimate act of self-disloyalty.

The ceaseless, self-announcing signal of the body in pain, at once so empty and undifferentiated and so full of blaring adversity, contains not only the feeling ‘my body hurts’ but the feeling ‘my body hurts me’ ...¹⁹

The victim is forced to betray himself in a way that is outside the boundaries of anything we might regularly consider within the precincts of acceptability in warfare and policing.²⁰ There is no prospect of any argument, legal or moral, making any impact on the perpetrator – as the victim knows that he is operating outside such constrictions. The tortured individual knows that during the ordeal he is entirely at the whim of the interrogator. In a significant sense, torture defiles the humanity of the individual in a way that exceeds even murder.²¹ Truth is never guaranteed as the result of the infliction of pain and suffering, there will always be the tendency of the sufferer to admit to exactly what the torturer presumes he is guilty of, or for him to say what he believes is expected of him, in order end his torment. In such instances, I believe that truth and justice are the first casualties.

Conclusion

¹⁹ E. Scarry, *The Body in Pain* (New York: Oxford University Press, 1985), p. 47.

²⁰ David Sussman, What’s Wrong with Torture? *Philosophy and Public Affairs* (2005), 33, p. 4.

²¹ Most international conventions for this reason prohibit torture, while allowing that in particular circumstances killing is justified.

One may very well argue that in the course of this paper I have frequently relied on what are no more than intuitions about human nature and the propensity of man to slip towards greater evils once lesser evils have been allowed. This is not a charge that I would deny, or feel that I need to defend in great detail. History has borne testimony to the inherent flaws in human nature and its propensity to slip from virtue when expedient. We need only look at the contemporary world to understand that ‘oversights’ and ‘rendition warrants’ are never transparent and the reluctance to provide public details of the extent and limit of such practices is constantly manifest. Public officials will always have ample excuses to suppress the details of such ‘black ops’ – after all it can invariably be argued that public knowledge of such practices would allow terrorists and enemies of the state to formulate counter-intelligence and resistance strategies. Politicians are not angels, and the motivations of an individual, even when he believes his actions and their consequences to be of the greatest public service and utility, does not guarantee that the public or the moral good is served. The truth is often a rare commodity and the granting of ‘exceptional’ torture warrants presents the thin edge of a very dangerous wedge.

I am not a utopian and I understand that in the real world there are ramifications for the citizens of any country that refuses to allow the use of torture in *any* circumstances. In accepting that we will not, under any circumstances, engage in torture (interrogational or otherwise), we preserve the foundations of a proper, moral and just society, *perhaps* at the expense of innocent lives. Nevertheless, I believe that the legacy that we conserve will be of immense benefit to future generations –

the preservation of a society that has not begun the treacherous decent down the slippery slope of ‘moral exception’ and ‘excusable’ brutality. In conclusion, I would quote Ignatieff, who concisely sums up what it means to have such a conviction:

Those of us who oppose torture should also be honest enough to admit that we may have to pay a price for our convictions. *Ex ante*, of course, I cannot tell how high that price might be.... This is a risk I am prepared to take...²²

²² Michael Ignatieff, Moral Prohibition at A Price. In K. Roth et al (eds.), *Torture: Does it Make us Safer? Is it Ever Ok?* (New York: New Press, 2005), supra note 26, p. 27.