

On Torture

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Abstract: The torture issue can be regarded as one of the most important issue in the human rights protection sphere. This paper returns to the intriguing moral and legal foundations of both sides to lay out what motivates it and what main arguments and concerns exist, to let any conclusion made on unbiased grounds. Though the analysis, we can briefly conclude that: on the one side, torture is a palpable evil and must be morally and legally taboo in almost all circumstances. On the other side, due to the lack of definite perception of what can be called extreme situations, and considering the defects of torture warrants, whether torture can be justified under certain circumstances is still debatable. What this paper is trying to figure out are the differences between theories, and to find out the defects and values of each theory. The balance of uncertain and intriguing interests and values on torture bring the room for debating.

Keywords: Torture, morality, legality, warrant, justification.

Torture is not a new topic and has been practiced throughout history. Many cultures had once deemed torture as a legitimate means included as part of their justice system to extract confessions or to obtain the information about a crime. The universal prohibition against torture was realized in the aftermath of WWII in 1948 with the revelation of Nazi torture and other cruel activities against human rights. With the penetration of humanistic concept, the global abhorrence has become the trend worldwide. However, as series of terrorist activities have emerged, more and more arguments have been proposed to reconsider the application of torture issue under certain circumstances, which need our reconsideration. The paper tries to elaborate the pros and cons of torture on an unbiased stand to response to the current situation.

I. IS TORTURE MORALLY WRONG?

Torture relates to a moral principle first and a legal principle second. From the religious perspective, many Christians agree that torture is intrinsically wrong and it is an insult to God. A person's dignity is the "essence of his humanity". A human being cannot be treated as an object to be disposed of for someone's tool or ideology, but must be treated as a personality (Miguel De La Torre, 2004). Each human life is sacred and of infinite worth (Peter Suber, 1998). Among the religious traditions also share the religious and ethical premise are but not limited to (Joyce S. Dubensky & Rachel Lavery, 2005): Buddhism—Hurt not others in ways you yourself would find hurtful. Confucianism—Do not unto others what you do not want them to do to you.

Taoism—Regard your neighbors gain as your won gain and your neighbor's loss as your won loss.

However, many people hold that if we take utilitarian values; namely, that torturing one person is justifiable if thousands will be saved from the information gained (Adam Raviv, 2004-2006). Since he is the one creating such a threat, he in all fairness is the one to be selected when someone has to bear the harm threatened (Michael S. Moore, 1989). However, taking a utilitarian view here is dangerous, because endorsing a utilitarian approach risks transforming human rights protection into a numbers game, a game which detracts from individual dignity, can quickly descend into the absurd that individuals are treated as a means to justify an end.

Besides, we must realize that we, as human being monsters remain in us (Andrew Sullivan, 2006). When a human being tortures, it means that "animal qualities" have overwhelmed human ones (Taha Jabir Al-'Alwani, 2004). In fact, to allow torture is just to reduce people to a subhuman level—just as animals are not deemed morally responsible for killing. The thing we should always bear in mind that whether the use of torture is truly motivated by a desire to gain valuable information. Because in reality, the victor tortures captives always for his simplest of motives: "to relive the victory, to demonstrate the absoluteness of his master, to humiliate the loser by making him scream and beg. For the victorious warrior, it's fun; it's entertainment." (Friedrich Nietzsche, 1887).

From a history perspective, rules for the humane treatment of prisoners during wartime are based on expectations of reciprocity. One side treats its enemy captives humanely in the expectation that the enemy will treat its captive soldiers in the same way (Stephen

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Holmes, 2005). The reciprocity can be exactly applied in the situation we face today. If we cannot have this sort of civilized reciprocity with the enemy, the reciprocity we have is uncivilized reciprocity: a return to the barbaric times that we can respond to their lawlessness with our own lawlessness (Stephen Holmes, 2005).

After all, how one achieves victory is also important. We must hold firmly that the goal of war is to make uncivilized countries transfer into a democracy, or else, the chance for democratization would be deeply compromised in the wake of victory. "Human dignity also includes the dignity of the suspect being interrogated. These prohibitions are 'absolute' There are no exceptions to them and there is no room for balancing." (Seth F. Kreimer, 2003). As the representative of liberty and freedom, the rights of humanity for which we were fighting should extend even in the most urgent moments of the war (Andrew Sullivan, 2006). Therefore, the law must uphold human dignity even when the state faces danger and uncertainty since it stands to differ from civilization to barbarism. That is why civilized nations should not treat terrorist in the same way they treat us. The civilization should be extended to all human beings, wherever they are in the world, simply because they are human. The civilized society is built on base of compassion: Since we cannot directly experience the feelings of other people, the only way we can know how they are affected is only to imagine what our feelings may be. Through imagination, we put ourselves in, like we are all in the same situation.

II. THE LEGALITY DEBATE OF TORTURE

Torture is regarded by progressive civil libertarians as an abomination and the universal prohibition against the use of torture has long been codified by international treaties. As a hypothetical case, the ticking bomb scenario had long been a staple of legal and political philosophers who love to debate to test the limit of absolute principles.

In the history, the principal device used to torture suspects was "an engine of state, not of law" (John H. Langbein, 2006). But as the spirit of law and humanity came to rise, torture rightly came to be seen as not only cruel and immoral but also as a hindrance to achieving truth and justice (Michael S. Moore, 1989). People gradually recognized that "the end justifies the means" is a dangerous slogan, because it undermines the process of Judicial evaluation of the evidence

(Richard A. Posner, 2006). If torture is allowed, it actually allows that under certain circumstances to punish the culprit without meeting the standard of proof, then criminal procedure had hardly any place for a law of evidence. Therefore, the deny of torture has got support and become the mainstream.

However, it also doubts that whether it shows justice to prohibit torture without any exception? If the circumstances are so urgent and millions of people's life are in danger, from the perspective of either rational reasons or common sense, it seems not be fair to sacrifice millions of people's life to promote legality at that time. After all, law in books and law in actions are not the same in the practice.

- a. There is no meaning of punishment if there is no purpose to be achieved. To adapt one of Pascal's remarks: law without reason would be absurd and abhorrent; law limited to reason would be unjust and abhorrent. Therefore, under certain circumstance, we may face the situation that punishing the torturer will not deter anyone so unfortunate as to be faced in the same circumstances in the future, and there will not realize the purpose of criminal law (Peter Suber, 1998). If we do not recognize that, then people who perform law can only act much more like little boys playing a game who become so cared about the rules that they forget why they are playing (Peter Suber, 1998).
- b. The jurisdiction should not only obey the law, but also can be able to use common sense to give us a new perspective to response to the issue. The acceptance of law should be fully considered also. Reason without feeling can build death camps; feeling without reason cannot find effective means to resist (Peter Suber, 1998). In speaking to numerous audiences since September 11th, Dershowitz has asked for a show of hands as to how many would favor the use of non-lethal torture in an actual ticking bomb case. The vast majority of audience members responded in the affirmative. The reason is that torture may sound brutal, but it does not compare in brutality with the prospect of thousands of preventable deaths at the hands of fellow terrorists (Alan M. Dershowitz, 2002). And in that situation, people cannot in conscience punish men who did what we hope to have done and felt impelled to throw off the

mask of judicial objectivity and rest on naked autobiography (Peter Suber, 1998).

However, making torture justified under certain circumstances has other perspectives which should be meticulously taken into consideration. One of the most important things we should alert is torture could be abusely used by the authority power under the mask of legality. What governments may be doing should always be alerted. Perhaps Justice Brandeis said it best: Our government is the potent teacher. If Government becomes a lawbreaker, it breeds contempt for law. The very concept of Western liberty shows that, if the state has the power to reach that deep into a person's soul and do that much damage to a human beings, then the state has extinguished all oxygen necessary for freedom to survive (Stephen Holmes, 2005). Torture is a microcosm, raised to the highest level of intensity that liberalism hates the most (Stephen Holmes, 2005). Besides, once torture is legitimized, any and all other forms of governmental actions can be justified. If agents know that they are at no risk of punishment for torturing a subject, there is a significant likelihood that officials are bound to want to explore the outer bounds of the rules; and the practice, once it is thus regularized, would be likely to become regular (Michael S. Moore, 1989).

As such, based on the defects and potential of power abuse of governments, torture warrants have been most championed by Dershowitz (Alan M. Dershowitz, 2002). He offers the legal remedy of controls and supervision over torture. Rather than prohibiting torture, he would legally sanction torture and allow judges to issue a warrant for its use, which preventing the decision made by a low ranking police officer. Dershowitz argues that in the immediate aftermath of the September 11th attacks, facing the situation that FBI officials' inability to obtain information from suspected terrorists by conventional means, there may come a time when law enforcement officials might have to resort to unconventional means, including non-lethal torture.

Thus began one of the most unusual debates in American legal and political history: Whether it could ever be justifiable for a liberal democratic society governed by a rule of law by using torture to protect itself from terrorist attacks? Dershowitz expounds that in a democratic society, torture should be made with visibility and accountability and should not be made by nameless and unaccountable law enforcement officials, risking imprisonment if they guess wrong (Alan M.

Dershowitz, 2003). If torture is going to be administered as a last resort in the ticking bomb case to save enormous numbers of lives, it ought to be done openly, with accountability, with approval by the president of the United States or by a Supreme Court justice (Alan M. Dershowitz, 2003). To some extent, torture warrants would indeed supervise the authorities to commit torture randomly. The judges would require compelling evidence before they would authorize the warrants, and law enforcement officials would be reluctant to seek a warrant unless they had compelling evidence that the suspect had information needed to prevent an imminent terrorist attack (Mirinam Cur-Arye, 2006). Therefore, it is better to have such torture done under the table, off the books and below the radar screen, with accountability and as part of our legal system (Mirinam Cur-Arye, 2006).

But the adverse effects to let judge issue torture warrants instead of strictly obeying the law should also be taken into consideration. The torture warrants issued by judges, who interpret law and could not precisely be able to analysis the emergent situation, are not scientific enough to maintain the social democracy. It entertains the possibility to misuse of torture warrants and break the rule of law.

a. To give judges' own moral standards and opinions to issue torture warrants would have the danger to be against the social democracy. Judges' job is to interpret the words of the legislature, which reflect the moral will of the people and stipulations. As Justice Springham states: Our job is to interpret the concept designated by the legislature, a strong and public constraint; our job is not to interpret our own preferences or to replace the legislature's concept with one we like better, which is the very opposite of license or discretion (Peter Suber, 1998).

Furthermore, we live in a pluralistic society. If the judge made it a rule to put the law aside to enforce his private notions of justice, then he would offend and oppress all those citizens whose moral opinions differed from his own. In that sense, appeals to justice beyond law are most dangerous and elitist attempts to subvert democracy. Making exceptions of law as usual whenever under emergency will also lead the law unpredictable and shake the foundation of dignity of law.

b. Additionally, there are epistemic problems insofar as judiciaries are not trained to evaluate

circumstances of life-threatening catastrophes. This is actually the biggest danger of torture warrants, and it occurs because judges will not have the correct calculus in mind in making the decision whether to authorize torture. We cannot exclude the possibility that the frequent willingness of law enforcement officers to lie to serve what they view as the public good; furthermore, we cannot also exclude the probability that because of intense public pressure to avoid future terrorist attacks, the judges who are charged with evaluating the requests for a torture warrant may be influenced biased.

Dershowitz proposes a torture warrant but fails to mention the exact requirements for obtaining it. What cases would be covered by such warrants? What criterion should be used to determine how coercive an interrogation should be permitted? If torture is to be allowed, then how much cruelty would be permitted? (Markus Wagner, 2003) It raises the problem that the decision of issuing warrants, would likely produce negatives, due to the incomplete and biased information upon which judges would have to rely (Adam Raviv, 2004). With so many possibilities making torture warrant is not a just choice.

- c. Furthermore, can torture be limited to very rare cases once the taboo is broken and the door opened? All systems are open to misuse and, when a society lifts the taboo on torture, it is dangerous to make people believe that the end justifies the means (Taha Jabir Al-'Alwani, 2004). Torture might be justified under the most extreme circumstances, but it would be difficult to confine its use to those very rare cases. Any system that allowed torture in extremely controlled situations is more likely to open a Pandora's Box which would risk eroding into wider use.

In sum, the defects of torture can be concluded in the following broad lists (J. Jeremy Wisniewski, 2008): (1) torture warrants will lead to more torture (John Kleinig, 2006); (2) torture warrants are pragmatically intractable; (3) torture warrants compromise judicial integrity (C Sung, 2003); (4) torture warrants undermine the values of a liberal democracy (David Luban, 2007). To take the most extreme case and uses it to establish a general rule is not true. Torture occasionally "works", but that any shorter gain is nevertheless far outweighed by long-term losses. Even

Dershowitz states that: "To legitimate torture and make it part of our legal system, even in extreme cases, risks reversion to a bad old time when torture was routine. Trying to legislate for torture use is attempting to rationalize the irrational; it is inherently sadistic, primitive and ritualistic and cannot be normalized. " After all, the difference between a great nation and a mighty nation is by its adherence to higher values and principles of law (M. Cherif Bassiouni, 2006).

III. WHETHER CAN WE USE SELF-DEFENSE AND NECESSITY DEFENSE TO JUSTIFY TORTURE?

Self-defense and necessity defense have long been regarded as the justifications of breaking the law. In normal cases, defendants argue that the liability should not be imposed on their actions as a crime was necessary to defend oneself or property, or prevent some greater harm. But before we admit these two theories we should first wonder why do we tolerate preventive killing? One reason is based on the assumption that those unfortunate circumstances someone has to die and that it is better for the aggressor to die than for the innocent victim of aggression to die (Peter Suber, 1998). Then, we may conclude that the theories of self-defense and necessity defense are all based on the idea that people's life can be measured, we balance the bigger interest and the lesser one and make the decisions. The defect of the idea is obvious: if we abandon the utilitarian values to measure each individual's life, then the theory of self-defense is doubtful.

In the ticking bomb case, some people hold that it seems perverse that a person's right not to be caused mental or physical pain (even if only for a brief period) really trumps the right of hundreds, perhaps thousands, to be protected from death and injury (Karen J. Greenberg, 2005). The circumstances justify it insofar as he chooses the lesser evil. Where it gets interesting is whether torture could ever be the lesser evil, particularly given worries about its efficacy, institutional requirements, nefarious spread, and so on (Bernard Williams, 1973). Besides, when we use the theory of either self-defense or necessity defense, we should prove that killing is a bigger evil than torturing. However, what makes torture more illiberal than bombing and killing? Why torture might always be impermissible even if killing is sometimes justified? It is because that all forms of torture are much worse than death (J. Jeremy Wisniewski & R. D. Emerick, 2008). "If life calls for a special kind of respect or concern from us, then torture, insofar as it aims to transform life into

a kind of anti-life, must be morally offensive in a way that is different from and perhaps greater than even killing.” (David Sussman, 2006). The answer lies in the relationship between torturer and victim. Torture aims to strip away from its victim all the qualities of human dignity that liberalism prizes. It does this by the deliberate actions of a torturer, who inflicts pain one-on-one, up close and personal, in order to break the spirit of the victim (David Luban, 2005).

Even if it is admitted that there are no doubts about the legal foundation of self-defense and necessity defense, then further check should be done to test whether the theory of self-defense or necessity defense can justify torture. The paper will future elaborates that self-defense will never justify torture and necessity defense can only be used by fulfilling strict conditions, avoiding the unreasonable use of these two concepts to expand the application scope of torture.

a. Self-defense can never justify torture. In traditional self-defense, the person against whom one uses defensive violence is dangerous; in the torture case, however, an enemy combatant in detention does not himself present a threat of harm (John yoo, 2003). He is helpless and defenseless, and is entirely at the interrogator’s mercy (Andrew Sullivan, 1989). The torturer himself is seldom in physical jeopardy. In an interrogation torture case, the person being tortured is attacking no one (David Luban, 2005).

Moreover, taken to an extreme, it has the risk of torturing an innocent person. In many situations, we lack the foundation of how certain the person under torture actually know the information we desire for. There are significant uncertainties involved here. Therefore, the true cost of allowing torture must balance the possible murder of innocent victims.

b. Necessity defense can only be used by fulfilling strict conditions. The sacrifice of innocent person’s interest is justified when necessary to save those of another which have a higher value. Necessity defense may not apply in case of uncertainty and exits one prerequisite that to let other people die is useful and effective to safeguard oneself. However, in the torture case, we cannot be one hundred percent sure that the victim we are torturing can tell vital and useful information for us to prevent the catastrophe.

If the necessity defense is to have legal force, then it must be severely restricted. Like the *The Case of The Speluncean Explorers—Nine new opinions*, the judge Burnham declared that allowing people kill another one must fit the conditions that no alternative means can be adopted and there are at least four alternatives to killing (Peter Suber, 1998): (1) waiting for the weakest to die of natural causes, (2) eating inessential extremities, (3) trying the radio again, and (4) waiting a few more days. They must show their belief that the choose is in necessity, genuine and reasonable under those circumstances. They must show that there was an objective basis to believe that no other options were open to them. If those who use torture fail to make an adequate case for the necessary use, they will face criminal charges or an appropriate punishment for breaking the law.

IV. CAN TORTURE ACTUALLY WORK?

Even if we admit the morality and legality of torture, there still begs the question: Can transparent torture ever actually work?

Indeed, fear breeds information. But in the real world, it is doubtful whether the interrogators is certain that the suspect being questioned has accurate and reliable information that is immediately useful (Miriam Gur-Arye, 2006). History’s most important lesson is that it has not been possible to make coercion compatible with truth (John H. Langbein, 2006). The course of examination under torture is steered by pain, controlled by individual qualities of mind and body, directed by the president of the court, diverted by caprice, tainted by hope, invalidated by fear, and the result is that in all these straits there is no room left for the truth (Stephen Holms, 2005). Pain alone will often make people numb and unresponsive (Sanford Levinson, 2006). As Paola Gaeta argues that torture “does not necessarily and ineluctably avert the imminent danger to life and limb, because the suspected terrorist may not have the information, or may not have the right information, or may remain silent.” (Paola Gaeta, 2004). Terrorists who are willing to die for their cause would also be willing to plant false tales under torture.

Torture hardly works even with the torture warrants. In the ticking bomb scenario, since the situation is urgent, time is on the side of the terrorist. If he is determined to kill people, he could tell them anything or even nothing at all. The time-consuming processes of obtaining a warrant, extracting information from the suspect through torture and verifying the information

may simply cannot achieve the result. Perhaps after all that is done, it is already too late.

With so little time, it might be more practical to make the authorities' efforts to evacuate any building that suspected of being a target. Modern technology would probably allow us to do a better job of winnowing suspects and of monitoring and hence deterring suggestive questioning. If tortured is allowed, by contrast, interrogators will have less motivation to develop more refined and conceivably more effective methods of seeking and establishing the truth.

V. CONCLUSION

Whether it is possible, necessary or desirable to morally and legally justify the use of torture is never easy to have an absolute answer. The determination and balance of values have always played the vital role in the debate. To insist on one view at the expense of the other is exactly misunderstanding the nature of the problem, both of which do no justice to our difficult moral reality.

From all the analysis above, when we confront the dilemma between the emergency in reality and the obedience of law, all the considerations we hold only try to achieve one ultimate goal. That is: "The way to win the war is not to adopt evil methods. Resort to torture could conceivably stave off a catastrophe, and legitimization of it would constitute an important symbolic setback in the worldwide campaign against human rights abuses." (Alan M. Dershowitz, 2002). It is necessary that the lawful means adopted to ensure that good, rather than evil, triumphs, or else, the next victim could be ourselves.

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