

# Terrorism and Torture

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## 1. INTRODUCTION

After the events of 9/11, the concept of torture has emerged as one that is both pertinent and provoking. National polls have shown that some Americans support torture in some situations, though the majority still stand opposed. Torture has not received a tremendous amount of discussion in the philosophical literature, though I suspect that the leftward slant of academia would, for the most part, ensure limited support for torture. In this paper, I would like to first discuss why torture is an important issue and then advance an argument that supports torture in limited cases.

The *Encyclopedia of Ethics* defines torture as “the deliberate infliction of violence, and through violence, severe mental and/or physical suffering upon individuals. It may be inflicted by individuals or groups and for diverse ends, ranging from extracting information, confession, admission of culpability or liability, and self-incrimination to general persuasion, intimidation, and amusement.”<sup>1</sup> I think that this is a good definition. Notably, torture is not necessarily a form of punishment, though it could be—both deterrence and retribution theorists could advance arguments in its support. Rather, torture can also be used instrumentally in order to achieve important aims, such as the acquisition of important information.

It is of course worth noting that torture is illegal in the United States and that no United States agency can legally engage in torture abroad.<sup>2</sup> As absolute as this policy stance seems, there are important questions regarding its implications. For example, if an American intelligence official is standing quietly in the corner of a room while a foreign government subjugates a terrorist suspect to torture, has the American government violated its mandate? Less hypothetically, American officials have admitted that the United States has transferred prisoners to the intelligence agencies of Jordan, Egypt, and/or Morocco, all of which are known for using torture as a method of interrogation. Reportedly, some of these prisoners have even been handed over along with lists of questions to which they might know the answers and whose answers would be valuable to the United States.<sup>3</sup> While the transfer might not always be accompanied by a list of questions, it would be very naïve to think that the United States would not welcome and has not accepted the

information that resulted from interrogations by hostile interrogators, whether that information has been actively solicited by our government or not.

A related concern has to do with the definition of “torture”; while some practices might clearly violate our anti-torture stance, there are others whose standing is less clear. A recent *Washington Post* article detailed American interrogation methods and quoted American officials who admit to the beating of prisoners, the withholding of medical treatment, and “stress and duress” techniques, such as sleep deprivation, hooding, and forcing prisoners to hold awkward positions for hours. Prisoners may be placed in environments which resemble those of hostile countries (e.g., Arabs may be distraught to observe an Israeli flag flying overhead), or they may be subjugated to interrogations by female agents—this is psychologically traumatic for men raised in conservative Muslim cultures. The officials have maintained that these practices, while certainly unpleasant, have nevertheless fallen short of torture; they maintain that all treatments of prisoners is consistent with the Third Geneva Convention of 1949 which delineated acceptable practices of confinement and interrogation.<sup>4</sup> Despite the interesting legal and policy questions inherent in a debate regarding torture, I am more concerned with the morality of torture than the legality but, insofar as legality tracks morality, if torture could be shown to be morally permissible then there might be cause for legal reform.<sup>5</sup>

## **2. THE CONFLICT BETWEEN UTILITARIAN AND DEONTOLOGICAL APPROACHES**

One reason that makes the questions as to the moral permissibility of torture so interesting is that the two leading schools of moral thought, utilitarianism and deontology, seem to disagree as to the moral status of torture. For all of the talk made as to the great differences between these programs, they seem to, at the end of the day, agree on most substantive moral questions. Torture is, I think, an interesting dilemma because the two groups not only would give different answers to the problem, but would obviously give different answers.

First, consider utilitarianism. The utilitarian argues that the right action is the one, out of those available to the agent, that maximizes total aggregate happiness. We could quite easily imagine a scenario wherein the disutility of torturing a captive (his pain, the discomfort of the torturer, expense, permanent effects to both, chance of negative events causally connected to torture, etc.) is outweighed, or even dramatically outweighed, by the utility of torture (information is provided that saves many lives and therefore garners all of the associative utilities). This utilitarian approach is most conspicuously displayed in the so-called “ticking time-bomb” cases which have been discussed by Michael Levin and Alan Dershowitz; they have both argued that torture is *obviously* justified when it is the only way to prevent a serious and imminent threat.<sup>6</sup>

The utilitarian might not welcome this consequence and argue that, as an empirical fact, such conditions as would be required to ensure these utility forecasts will never transpire (and thus his theory is not actually committed

to torture). This is, of course, irrelevant since the point is merely that utilitarianism would, in some cases, support torture. It makes no difference whether cases are real or imagined; all that matters is the theory's commitment to the moral obligation to torture in some cases. The cautious utilitarian could also argue that I have presupposed act-utilitarianism when in actuality we should be rule-utilitarians (the right action is the one, out of those available to the agent, that accords with a rule that, when generally followed, maximizes happiness). Perhaps the general adherence to the rule "torture is wrong" is more likely than its negation to maximize happiness. Unfortunately, the problems with rule-utilitarianism are well documented; one only need to ask whether rules have exceptions. Then, if the answer is yes, rule-utilitarianism collapses to act-utilitarianism and, if the answer is no, rule-utilitarianism really is not very utilitarian at all. I therefore find neither of these responses very effective and take it to be fairly straightforward that utilitarianism is, in some cases, committed to the moral permissibility and even moral obligation to torture.

On the other hand, deontology would seem to prohibit torture in all cases. Invoking Kant as the traditional torchbearer of this approach, we can see that torture would fail the categorical imperative test (whether applied to the first or second formulations). Perhaps the easiest way to see this is by applying the humanity form which states that we may only treat humanity, whether ourselves or others, as an end and never as a means only. By torturing a captive, we are treating him as a means *only* (towards the acquisition of information, e.g.); he is certainly not being treated in a manner to which he would consent. Torture fails to respect him as an autonomous agent and constitutes an attack on his dignity.<sup>7</sup>

I think that because utilitarianism would, in some cases, support torture and that because Kantian deontologists would, in all cases, reject it, torture has the position of being a very interesting concept for ethical inquiry. People no doubt have their allegiances to utilitarianism or deontology but, given the conflict, there is at least something to talk about and some forum within which to advance arguments to support one conclusion or the other.

### **3. WHAT ABOUT RIGHTS?**

One way to try to quickly end the debate is to assert that people have rights and that torturing them violates their rights.<sup>8</sup> Insofar as these two claims are true, torture could be argued to be morally impermissible. Are they true? As a descriptive claim, people certainly do have rights, in the United States these are most overtly delineated in the Bill of Rights. Even as a normative claim, most everyone agrees that people have rights, though the justifications for rights are certainly debatable.<sup>9</sup> Even John Stuart Mill recognized that utilitarianism needed to be able to accommodate a system of rights,<sup>10</sup> though many rights theorists would be unhappy with the derivative value that utilitarianism would assign to rights.

But does torture actually violate any right? Some people might think not. It could be argued that we forfeit whatever rights might protect us against torture once we engage in certain activities, such as terrorism.<sup>11</sup> The suggestion might be that through our complicity in terrorist activities, we give up certain protections (both legal and moral) that we might otherwise have had and, consequently, there exist no remaining rights which torture could be said to violate.<sup>12</sup> If this is true, that rights are the kinds of things that can be forfeited through certain circumstances, then torture would be substantially easier to defend since, given those circumstances, there would be no rights violations. Absent rights violations, appeals to the greater good could easily justify torture. There are, of course, questions as to what kinds of circumstances lead to forfeiture of rights, whether such forfeiture is partial or absolute (i.e., consists in forfeiture in some or all rights) and, if partial, which rights are the ones that are forfeited. These would be substantive questions that are certainly worth pursuing. But it is unnecessary to answer any of these questions if torture can be justified *even if* it violates rights—then the conditions and details of rights forfeiture are largely irrelevant.

So let us now presume that torture does, in fact, violate some right. I am not sure that this is always true (especially given complicity in terrorist activities) but, if torture can be defended given its violation of rights, then it can certainly be defended when it does not violate rights. Thus it seems to me that this is the position that one wishing to argue for torture must consider; if successful in this endeavor then everyone should be persuaded, but if torture can only be successfully defended by supposing that it does not violate rights, then those who suppose that it does violate rights will not be convinced. The question then to answer is, supposing that rights are inalienable and are therefore never forfeited, regardless of the atrocities committed, can torture be justified?

I think that the answer is yes. The existence of a right, particularly a claim-right, provides a reason for someone not to commit a certain act against the possessor of the right. For example, if Smith has a right to life, then this right provides a reason for Jones not to kill him. For him to do so would be wrong because it would constitute a violation of Smith's right to life. But this reason is stronger than, or even incommensurable with, other reasons. For example, Jones could not justifiably say that, though he recognized that Smith had a right to life, he elected to kill Smith because of the tremendous pleasure that he would derive from the murder. The fact that Smith's death would bring Jones pleasure no doubt gives Jones a reason to pursue Smith's death, but this reason is rendered inoperative in virtue of Smith's having a right to life. To deny this would be to completely misunderstand the notion of a right.<sup>13</sup> In this sense, Ronald Dworkin has argued that rights are trumps because, regardless of what end Jones could realize from Smith's death, the fact that Smith has a right to life will always ensure that Jones cannot justifiably kill Smith.<sup>14</sup> Thus when the interests of one person come into conflict with the

rights of another, the adjudication must always be decided in favor of the possessor of rights.

But what happens when rights come into conflict with each other? In this case, some right will necessarily be violated (recall that, for the sake of argument, that we are now assuming rights to be inalienable, so it will not do to suggest that, dependent upon circumstances, one of the two conflicting rights goes away). Imagine that a policeman comes across a gangster who is preparing to execute five people who witnessed the gangster's latest crime. The five victims are about to have their rights violated and the policeman can prevent these rights violations by shooting the gangster, though doing so would violate the gangster's rights. This situation yields a rights conflict: either the gangster will have his rights violated or else the five witnesses will have their rights violated. I take it to be fairly obvious that, in this situation, the policeman is morally justified in shooting the gangster (and moreover that he is morally blameworthy if he does not).<sup>15</sup>

What this shows is that there can be cases involving rights conflicts where one right has to be violated in order to prevent further rights from being violated. Now the application to torture should be apparent. Assume that a captive has knowledge that could prevent the deaths of innocent lives. Further assume that he is unwilling to divulge his information but could be coerced through torture. By violating his right not to be tortured, we can therefore ensure that the innocents' rights to not be killed unjustly are not violated. Even if all rights violations were equally undesirable (which is most likely not true) it certainly seems appropriate to torture the captive to obtain the information; not only are the innocents' lives saved, but rights violations are minimized. Even if you are not a utilitarian, this minimization of rights violations should seem attractive.<sup>16</sup>

Some people, most notably Robert Nozick, have nevertheless objected to this "utilitarianism of rights." Nozick has argued that rights violations are always unjustifiable, even if they are necessary to prevent further rights violations. Nozick thus conceives as rights of "side constraints," which is to say that rights are absolute and inviolable; no considerations or circumstances can warrant intentional assault on anyone's rights, regardless of the end being pursued (including minimization of rights violations overall).<sup>17</sup> This is certainly a controversial thesis—many people think that if we really value rights, then the minimization of rights violations is more attractive than rights fetishism.

Nevertheless, two points can be made in response to Nozick's position. First, Dworkin has suggested that, in cases of rights conflict, we should look not at the explicit formulation of the right but rather to the values that suggested the right in the first place.<sup>18</sup> So, if individuals have a right to life, it is because life itself is something that is valuable and worth preserving. Given a conflict then, where the violation of one person's right (to life, let's say), could prevent the violation of five other person's right to life, the values that led to the creation of the right to life would suggest violating the one in order to prevent violation of the five.<sup>19</sup> By considering why we would endorse rights

in the first place (because we value the objects of those rights), it seems permissible to act such that the underlying values (and their associative objects) are preserved to the highest degree possible.

The second response that could be made to Nozick is more on his own terms. He asks “why . . . hold that some persons have to bear some costs that benefit other persons more, for the sake of the overall social good?”<sup>20</sup> This question is indicative of a concern about certain theories of rights, including utilitarianism, that would advocate violating the rights of certain (innocent) people so that others may benefit. I think that Nozick is certainly right in that this conclusion, if drawn, is at least *prima facie* undesirable. But, insofar as we are discussing whether or not to torture terrorists (among others), we do not have innocent people! I think that we can allay Nozick’s concern by agreeing that we should not torture innocent people such that others may benefit, but by saying that complicity in terrorist activities constitutes a forfeiture of innocence. We certainly must admit that there is an important moral difference between torturing an innocent girl so that the sadist frees his hostage and torturing a terrorist who, through his own actions, has created a situation wherein someone’s rights are being or will be violated. I think that this distinction is enough to allow torture of terrorists while still being responsive to the spirit of Nozick’s concern.

As a final remark, it should also be noted that even Nozick, in a footnote, admits that it is an open question whether these side constraints are “absolute or may be violated in order to avoid catastrophic moral horror.”<sup>21</sup> While it certainly seems to me that this admission compromises Nozick’s stance, I could nevertheless grant that rights, in normal situations, could (or should) be understood as side constraints. However, many of the cases that I am interested in are precisely those in which rights would be violated in order to prevent catastrophic moral horror! So, while either of the two above responses might allay Nozick’s concern, it is not altogether clear that his opposition would be very strong in the cases that I am considering.

Therefore, I think that a strong case can be made for the idea that torture can be justified, even if it entails rights violations, so long as we find ourselves in such a quandary that rights will end up being broken whether torture occurs or not. In these situations, some rights violation is bound to occur regardless, we might as well either serve the greater good or else aim to minimize the overall violation of rights (even in a way sensitive to Nozick’s concern). Either goal suggests the permissibility of torture.

#### **4. UNDER WHAT CONDITIONS IS TORTURE MORALLY PERMISSIBLE?**

In this section, I would like to try to lay out specific guidelines for when I think that torture is warranted. I propose four conditions, all of which must be satisfied to justify torture. Before listing these, I take it to be obvious that the captive should be allowed the opportunity to voluntarily disclose information

(perhaps after worrying about the possibility of torture for a while) before torture is initiated.

First, I think that torture should only be used to retrieve information that could be used to prevent future threats from occurring. This restricts the scope of torture by eliminating two other commonly suggested potential usages: to force confessions and to deter crime.<sup>22</sup> There are, I think, good reasons to object to these usages. Forced confessions are highly unreliable; under severe duress people will often give false confessions (e.g., during the Spanish Inquisition). So there are not good reasons to believe that forced confessions are true. If the authorities are highly confident about the involvement, then a conviction in court should be easy and the confession would almost be superfluous (though perhaps expedient).<sup>23</sup> So it seems tortured confessions are, at worst, likely untrue and, at best, unnecessary!

Another option would be to torture criminals for the deterrent value—if prospective criminals knew that they might be tortured, then they might abstain from crime. First, it seems quite unfair to torture one man so that another may not commit a crime. But, second, it is unnecessary. If deterrence was all that mattered, then we could accomplish the same effect by creating a myth that criminals are tortured without actually torturing any of them. The results would be the same and nobody would have to endure the hardship. Assuming that the myth could be sustained and that there would not be risks for leakage (which I think to be reasonable assumptions), there is no need to actually torture anybody to accomplish a deterrent effect!

Information, however, seems to be an appropriate aim. The acquisition of information differs from both forced confessions and deterrence in a relevant way: torture may well be the only way to realize the goal. Forced confessions are unnecessary insofar as we have a judicial system that should be able to render the appropriate convictions. Deterrence merely requires the perception of torture, not actual torture. So the torture, in either of those cases, is unnecessary. But, it is very plausible that the only way to obtain the information that would lead to the prevention of some future crime would be through torture; there exists no redundancy program in the sense that we have in the other cases. Perhaps the suggestion could be made that intelligence should pursue leads and might be able to thwart the crimes without anyone ever needing to be tortured. But empirically, especially once time constraints are considered, this reliance on intelligence is unwarranted and imprudent. Thus torture may, in fact, be the only way to acquire the important information, which is a reason to endorse its practice.

Second, there needs to be a reasonable expectation that the captive has knowledge of the relevant information. Torture cannot be permissibly used to “fish” for information. If, for example, we know that the captive worked in a building where terrorists were known to conspire, but that he was only a janitor and was therefore highly unlikely to have had access to any information that might be used to thwart terrorist activities, it would not be permissible to torture him. But if, on the other hand, reliable intelligence reveals the

captive to have been intimately associated with those who likely planned a threat, torture would be appropriate. If the association is unclear or dubious, then torture should not be exercised (at least until further intelligence is forthcoming). Furthermore, there are pragmatic reasons for not torturing someone who is not thought to have the information—he may produce misinformation.

Third, there must be a reasonable expectation that the information that the captive has knowledge of corresponds to an imminent and significant threat. If the threat is temporally distant, there is no reason to pursue torture now. Between the present and the time that the threat becomes imminent, developments might take place that would render torture (in the present) unnecessary. For example, it is possible that the captive will have an ideological shift and no longer wishes to contribute to the terrorist act. If this is the case, he may voluntarily provide the information needed to stop the act. Also, it is possible that the threat is revealed through some other means (e.g., intelligence, confession of someone else, etc.). It would certainly be better to wait for these further developments than to needlessly engage in torture. Similarly, the threat must be significant. A “terrorist act” that involves the destruction of an unidentified dog house certainly does not warrant a torture laden inquiry to discern the location of the bomb. But, if we can reasonably assume that the captive knows the location of a bomb that is going to explode in some building at noon tomorrow, thus killing thousands of people, there would be both an imminent and significant threat and, given satisfaction of the other criteria, torture would be acceptable.

Fourth, there needs to be a reasonable expectation that acquisition of the information can lead to prevention of the terrorist act. If it is thought that the situation cannot be disarmed, even if the details are forthcoming, there is no reason to torture. For example, imagine that we know the captive has details concerning a bomb that will detonate an unoccupied building tomorrow but all of our bomb squads are already assigned to important projects (expensive, occupied buildings, let’s say), then there is no reason to pursue the information. Similarly, if we know that the bomb will detonate in thirty minutes but we do not know where, there is no reason to start torture that will give us the answer too late.

So, I think that the conditions necessary to justify torture are: the use of torture aims at acquisition of information, the captive is reasonably thought to have the relevant information, the information corresponds to a significant and imminent threat, and the information could likely lead to the prevention of the threat. If all four of these conditions are satisfied, then torture would be morally permissible. For example, imagine that we have just captured a high ranking official with an internationally known terrorist group and that our intelligence has revealed that this group has planted a bomb in a crowded office building that will likely explode tomorrow. This explosion will generate excessive civilian casualties and economic expense. We have a bomb squad prepared to move on the location when it is given, and there is



plenty of time for them to disarm the bomb before its explosion tomorrow. We have asked this official for the location of the bomb, and he has refused to give it. Given these circumstances (which satisfy all four of my criteria), I think that it would be justifiable to torture the official in order to obtain the location of the bomb.

## 5. WHAT FORMS OF TORTURE ARE PERMISSIBLE?

After arguing for the permissibility of torture under certain circumstances, something should be said as to which forms of torture should be allowed. There are certainly a wide range of (historically) practiced techniques, which can range from the mundane (e.g., food deprivation) to the creative (e.g., removal of fingernails). Perhaps some forms of torture are more permissible than others? Or maybe there are some that should be avoided altogether? The first obvious remark is that the inflicted torture should never inflict more than the minimum trauma necessary to obtain the desired compliance. For example, if someone would be willing divulge important information after being deprived of his lunch, there is no reason to remove all his fingernails. So torture programs would necessarily be tailored to both the physical and psychological constitutions of the captives. These assessments no doubt present some epistemic burdens, but psychological profiling should reveal to within a reasonable margin what would be the minimum necessary.

Generally, I think that torture can be broken down into three categories: physical, psychological, and other-directed.<sup>24</sup> Physical torture involves an infliction of physical pain (or discomfort) with the intention of surpassing the threshold of the captive. Examples of this form would be electroshock or drowning/suffocating. There is no doubt a psychological element to these forms (e.g., it is incredibly disconcerting to find oneself in the process of being drowned), but the primary assault here is on the physical constitution of the captive—the physical elements *lead* to the psychological elements. Psychological torture consists in assaulting the psychology of the captive. Bright lights, sleep deprivation, and harassment are all examples of this form. These techniques inflict a tremendous amount of psychological pressure without attempting to harm the body in any way; the psyche is targeted directly. I think that both physical and psychological torture, in all their forms should be allowed, though I reiterate that only the minimum necessary to extract the information is allowed. This rejoinder, for all intents and purposes, effectively eliminates *any* uses of many of the so-called inhumane and brutal forms of torture.

The third category of torture, other-directed, occurs when someone other than the (primary) captive is tortured in order to coerce his cooperation. In the aforementioned discussions of both physical and psychological torture, it was assumed that the recipient of the torture would be the same person in whose compliance we were interested. We could certainly imagine cases, however, where an effective way to reach the desired goal would be to torture someone close to the captive, most likely in plain view. Examples of this

would be raping a terrorist's daughter or burning his mother. It is possible that such techniques would be highly effective, and that they might also be supported by considerations of prudence—if the bomb will explode soon, it would not do to go through a physical torture process wherein the captive continuously loses consciousness because of the pain.

I do not think that other-directed torture is morally permissible for two reasons. First, we return to Nozick's question: why should some people bear the costs so that others may receive the benefits? I argued earlier that the complicity of the former would be a good reason—they *created* the risk (or were party to its creation) and therefore are obviously not innocent bystanders. This complicity is certainly morally relevant! There are good reasons to think, however, that the innocent bystander should not have to endure torture so that we can coerce the terrorist. This bystander has not done anything to deserve the treatment, whereas the terrorist has.<sup>25</sup>

Secondly, and more satisfyingly, I think that it is highly unlikely that other-directed torture will ever be necessary. Given the availability of other forms of torture, and given the proviso that we should never torture more than the minimum necessary, other-directed forms will not need to be used. If the options are psychological torture by other-directed torture or direct psychological torture, the latter is certainly more desirable (why involve the extra person?), and I see no reason to think that it would be any less efficacious. Insofar as other-directed torture targets the psyche of the terrorist, and therein presupposes some likelihood of loss of resistance, I think that there must be some other path to this goal through some other form of psychological torture through less controversial practices.<sup>26</sup>

## 6. FINAL REMARKS

Though, in some cases, I have argued that torture would be appropriate, there are several reasons for caution. The only aim for which I have endorsed torture, retrieval of information, presupposes that torture could be employed to successfully retrieve information. As a matter of empirical concern, is this true? I have found no indication to think that it is not. Some people, particularly terrorist operatives, are trained to withstand torture, particularly as pertains to information extraction. Nevertheless, there is no evidence that anyone can resist torture-laden interrogations indefinitely; the psychological trauma and the degree of confusion are simply too severe. Two of the more famous torture cases, those of Guy Fawkes during the Gunpowder Plot of 1605 and of Abdul Hakim Murad, a Pakistani terrorist suspect captured in the Philippines in 1995, are illustrative. Fawkes endured many treatments, ranging from hanging by his wrists to the rack, and, within four days, gave up the names of his co-conspirators. Murad, however, lasted longer; despite having cigarettes extinguished on his genitals, sitting on ice cubes, and being nearly drowned, he remained mostly silent. But, when interrogators told him that he was being sent to Israel, he started talking out of fear of even worse treatments from Israeli interrogators.<sup>27</sup> Everyone has a limit and, given time,

any information can be extracted. Experience seems to show that not even that much time is required—many prisoners disclose quickly. Obviously the interrogators need to know what the most effective techniques would be; this would allow them to extract the information more quickly and allow them to minimize the suffering of the prisoner—psychological profiling can go a long way toward addressing these concerns.

But there is a more substantial problem: misinformation. While we might be confident that there are ways to extract the necessary information, a greater concern has to do with the relevant information being masked by irrelevant, or false, information, some of which the terrorists have been trained to weave into their disclosures. This undoubtedly presents a serious problem, particularly as terrorists from the same cells might have the same misinformation which could serve to corroborate itself. Nevertheless, I do not think that this is a reason not to torture, just that there will be higher demands placed upon the intelligence community to filter through the acquired information. By checking interviews against other facts, they can hopefully go a long way toward figuring out what to trust and what to reject. However, the prospect of misinformation does complicate the situation.

In this paper, I have argued that torture is, under some circumstances, morally permissible. In doing so, I have not presupposed utilitarianism to be correct, but have argued that even other normative approaches would be able to accommodate this conclusion. The conditions that I have suggested to be met in order to allow torture are: pursuit of information, reasonable expectation that the captive has the information, reasonable expectation that the information corresponds to an imminent and significant threat, and reasonable expectation that the information can be used to disarm the threat. There are, of course, substantive issues as to what constitutes reasonable expectation, but I think that we could settle these ostensibly, or else be confident that we have made progress on the formal account. I have also stressed that, though I would support torture if these conditions were met, we should still be prudent to administer the minimum amount of torture necessary (measured both in terms of intensity and quality) that is necessary to achieve the desired goal. Hopefully this moderate position has both intuitive appeal and is theoretically attractive.

## Endnotes

1. L.C. Becker and C.B. Becker, eds., *Encyclopedia of Ethics* (New York: Routledge, 2001), 1719–20.

2. This is due in no small part to interpretations of the eighth Amendment and its prohibition against “cruel and unusual punishment.” I certainly have little to contribute to the legal interpretations, but it is worth noting from the outset that the forms of torture that I will end up endorsing are *not* ones that involve torture as punishment. Thus we may be able to quickly slide past this (legal) hurdle.

3. “Ends, Means, and Barbarity,” *The Economist*, January 11, 2003. While officials have claimed that fewer than one hundred prisoners have been involved in such

transfers, thousands have been held with “American assistance” in countries which are known for brutal treatment of prisoners.

4. Dana Priest and Barton Gellman, “U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities,” *Washington Post*, December 26, 2002.

5. For example, Alan Dershowitz has argued for the legal sanctions of torture through “torture warrants” which would be issued by judges. See his “Is There a Torturous Road to Justice?,” *Los Angeles Times*, November 8, 2001. There may, however, be reasons to think that even if torture were morally permissible, it should not be legally sanctioned. See, for example, Tibor Machan’s “Exploring Extreme Violence (Torture)” *Journal of Social Philosophy*, 1990, 92–97.

6. See Levin’s “The Case for Torture” *Newsweek*, June 7, 1982 which is a nice (albeit non-technical) article that presents this view in somewhat more detail. See also Dershowitz (2001).

7. We could also see that torture would fail the law form of the categorical imperative. The maxim “I torture the captive” would yield a contradiction in will when universalized and compared with my standing intention which would entail the desire that I, the torturer, not be tortured.

Stephen Kershnar has argued that this appeal to Kant’s second formulation is not enough to “override” the warrant to torture on the grounds of desert. If this is true, it would not affect my conclusion. However, the true Kantian would see dignity as an incommensurable value, and not one that merely provides a value which can be outweighed by competing considerations. Therefore I do not think that Kershnar’s argument is likely to convince a Kantian; thus the tension with which I am concerned still remains. See his “Objections to the Systematic Imposition of Punitive Torture,” *International Journal of Applied Philosophy* 13.1 (1999): 47–56.

8. Following Wesley Hohfeld’s classic distinction, rights are typically broken down into four categories: claim-rights, liberties, powers, and immunities. A claim-right imposes duties on others. For example, if someone has a right not to be killed, then everyone else has a duty not to kill him. Someone has a liberty to do *x* if nobody has a claim-right against him doing *x*. But, unlike claim-rights, liberties do not confer duties on others. For example, I have the liberty to win a footrace; nobody has a claim-right against me winning the race but, at the same time, nobody (particularly the other racers) has a duty to let me win the race. Powers are abilities to change someone’s rights status. Ministers, for example, can change the rights of a couple by marrying them—once married, their legal rights have changed. Immunities exempt one from certain powers. Thus someone may be given an immunity such that a judge (who has powers) cannot change that person’s rights, such as through restrictions of liberties. Torture, if it violates rights, would violate claim-rights; the most sensible interpretation of torture would be that people have a right not to be tortured which means that others have duties not to torture them.

I suppose that torture could, in some senses, restrict liberties in that, while someone is being tortured, they lack the ability to pursue some ends that they would otherwise be able to. But violation of liberties seems to me to be a non-essential part of torture. We could, for example, imagine torturing someone in such a way that they were still free to exercise their liberties (or at least the majority), such as torturing while, at the same time, allowing the recipient the ability to walk around, talk to his friends, etc. Thus I take the substantial purported rights violation in torture to involve violation of claim-rights.

9. See, for example, Jeremy Waldron, ed., *Theories of Rights* (Oxford: Oxford University Press, 1984).

10. John Stuart Mill, *Utilitarianism* (Indianapolis: Hackett, 1979), Chap., 5.

11. I will consider fighting terrorism (whether domestic or international) as the prototypical application of torture. The reason for this is that terrorist activity frequently consists in broad networks and derives from advance planning. The situations where I shall argue that torture is most appropriate involve these sorts of features. There are certainly non-terrorist situations wherein I would also support torture, and the choice to discuss terrorism should not be viewed as evidencing any ideological bent; I choose it merely for convenience and simplicity.

12. There could be also be a more moderate position, one that I see instantiated in our legal system, that complicity leads to forfeiture of some, but not all, rights (such as the right to freedom, but not the rights to legal representation and due process).

13. Unless, of course, one were a utilitarian. Given that torture can easily be defended on utilitarian grounds, let us consider instead the (more traditional) non-utilitarian notion of rights.

14. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), ix.

15. It would be very hard to argue with someone who wanted to dispute this conclusion, which I think that very few people would. Perhaps some deontologists would still maintain the wrongness of this act; I make some comments on the plausibility of this position below.

16. Appealing to a minimizing of rights violations is not utilitarian, but is probably still consequentialist (though I do think that deontologists could find some merit to this approach, or even that it could be directly accommodated by their theories). This idea is worked out nicely in Amartya Sen's "Rights and Agency," *Consequentialism and its Critics*, ed. Samuel Scheffler (Oxford: Oxford University Press, 1988), 187–223.

17. Robert Nozick, *Anarchy, State, Utopia* (New York: Basic Books, 1974), 28–35. Alan Gewirth argues for a similar position in "Are There Any Absolute Rights?" *Philosophical Quarterly* 31 (1981): 1–16.

18. Dworkin 191.

19. This is, of course, much different from assuming that we should kill innocent people in order to harvest their organs to save the dying. Those that are already dying are not having any rights violated and therefore we could not violate the rights of the innocent "donor" in order to minimize overall rights violations (we would end up with one rather than zero). The case I discuss above closely approximates Bernard Williams's famous Jim and the Indians case wherein the journalist is given the option of executing one Indian so that all of the Indians are not executed. (Williams even agrees that Jim should accept the offer, though uses this thought experiment as evidence against utilitarianism since he thinks the decision is not obvious, even though choosing to execute obviously maximizes utility). See J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973).

20. Nozick 33.

21. Nozick 30. I would like to thank Michael Levin for directing me to this point.

22. The *Encyclopedia of Ethics* also listed intimidation and amusement as purposes of torture. I take these to be obviously impermissible. A less common suggestion is that torture should be used for retribution. I do not really have any comments on this idea other than to point out that it hinges upon the plausibility of retributive

theories of punishment, which I find to be lacking. However, if retribution can be defended, then torture on retributivist grounds would readily follow.

23. If the evidence from which the authorities derive their certainty of the involvement is inadmissible in court, then perhaps the confession really is needed. Even in these cases, I think that forced confessions should be disallowed and, minus this alternative, I think that the authorities would work more diligently and prudently in obtaining the incriminating evidence.

24. There are surely other useful ways to categorize forms of torture, but I find these to be intuitive and helpful for future discussion. We could also discuss tortures as acts (e.g., electroshock) versus omissions (e.g., food deprivations), but I think that most of the interesting questions fall under which acts are permissible, so this distinction would be unilluminating. If one thought that the problem with torture was that it violated a sphere of independence that all rational beings have, we might want to talk of tortures as being invasive (e.g., sodium pentothal and other "truth drugs") versus non-invasive (e.g., bright lights). There is nothing wrong with any of these approaches, I just choose mine for ease and intuitive appeal.

25. The utilitarian, of course, might not care at all who is tortured, so long as the ends justify the means. I think this attitude is problematic, though I do not propose here to launch into a critique of utilitarianism. At a minimum, such a response would fail to respect the "separateness of persons" (John Rawls' famous phrase) by treating people as utility containers rather than distinct beings worthy of respect. See John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

26. We could, of course, lie to the terrorist and tell him that his daughter will be, or is being, raped in an attempt to gain disclosure.

27. Peter Maass, "If a Terror Suspect Won't Talk, Should He Be Made To?," *New York Times*, March 9, 2003.