

CHAPTER ONE

Introduction

Overview of the Torture Debate

OVERVIEW OF WHEN TORTURE IS PERMISSIBLE

Recent events stemming from the “war on terrorism” have highlighted the prevalence of torture. Torture is almost universally deplored. It is prohibited by international law and is not officially sanctioned by the domestic laws of any state.¹ The formal prohibition against torture is absolute—there are no exceptions to it. This is not only pragmatically unrealistic, but unsound at a normative level. Despite the absolute ban on torture, it is widely used. Contrary to common belief, torture is not the preserve of despot military regimes in third-world nations. For example, there are serious concerns regarding the treatment by the United States of senior Al Qaeda leader Khalid Shaikh Mohammad.² There is also irrefutable evidence that the United States tortured large numbers of Iraqi prisoners, as well as strong evidence that it tortured prisoners at Guantánamo Bay prison in Cuba, where suspected Al Qaeda terrorists are held.³ More generally, Alan Dershowitz has noted, “[C]ountries all over the world violate the Geneva Accords [prohibiting torture]. They do it secretly and hypocritically, the way the French did it in Algeria.”⁴

Dershowitz has also argued that torture should be made lawful. His argument is based on a harm minimization rationale from the perspective of victims of torture. He has said, "Of course it would be best if we didn't use torture at all, but if the United States is going to continue to torture people, we need to make the process legal and accountable."⁵ Our argument goes one step beyond this. We argue that torture is indeed morally defensible, not just pragmatically desirable. The harm minimization rationale is used to supplement our argument.

The pejorative connotation associated with torture should be abolished. A dispassionate analysis of the propriety of torture indicates that it is morally justifiable in limited circumstances. At the outset of this discussion, it is useful to encourage readers to seriously contemplate moving from the question of whether torture is *ever* defensible to the issue of the circumstances in which it is morally permissible.

Consider the following example: A terrorist network has activated a large bomb on one of hundreds of commercial planes carrying more than three hundred passengers that are flying somewhere in the world at any point in time. The bomb is set to explode in thirty minutes. The leader of the terrorist organization announces this via a statement on the Internet. He states that the bomb was planted by one of his colleagues at one of the major airports in the world in the past few hours. No details are provided regarding the location of the plane where the bomb is located. Unbeknownst to him, he was under police surveillance and is immediately apprehended by police. The terrorist leader refuses to answer any police questions, declaring that the passengers must die and will shortly.

Consider further the following example: Aljazeera has broadcast a video that shows notorious terrorist Osama bin Laden and four masked men with machine guns holding captive twelve U.S. civilians that were working in Iraq. The hostages were recently kidnapped by his terrorist network. Bin Laden states that if the United States does not withdraw all of its soldiers from Iraq within one week, he will torture to death each hostage. One hostage will be tortured to death each day if the

deadline is not met. The United States refuses to accede to his request. A frantic and wide-ranging search to find the hostages is unsuccessful. Nine days after the video is released, the mutilated and decapitated bodies (showing obvious signs of torture prior to being killed) of two of the hostages are found. Bin Laden is also found several hours later, near the border of Iraq and Syria. He is questioned regarding the location of the ten remaining hostages. Defiantly, he states that he has left orders to continue with the torture and murder of one prisoner per day. He refuses to answer any more questions, other than to assert that the location of the hostages is very secure and the United States will never find it. What possible justification can there be for not torturing bin Laden in order to try to prevent the torture and decapitation of more innocent hostages?

Who would deny that all possible means should be used to extract the details of the plane and the location of the bomb in the first example and the location of the hostages in the second? The answer is not many.⁶ The passengers and hostages, their relatives and friends, and many in society would expect that all means should be used to extract the information.

Although the above examples are hypothetical, the force of examples cannot be dismissed on that basis. As C. L. Ten notes, “fantastic examples” that raise fundamental issues for consideration, such as whether it is proper to torture wrongdoers, play an important role in the evaluation of moral principles and theories.⁷ These examples sharpen contrasts and illuminate the logical conclusions of the respective principles to test the true strength of our commitment to the principles. Thus, fantastic examples cannot be dismissed summarily merely because they are “simply” hypothetical.

Real life is, of course, rarely this clear cut, but there are certainly scenarios approaching this degree of desperation, which raise for discussion whether it is justifiable to inflict harm on one person to reduce a greater level of harm occurring to a large number of blameless people. Ultimately, torture is simply a very acute example of where the interests of one agent are sacrificed for the greater good. As a community, we are willing to accept

this principle. Torture is no different in nature to conduct that we sanction in other circumstances. It should be viewed in this light. Given this, it is illogical to insist on a blanket prohibition against torture.

It is contended that torture is morally permissible where it is the only means available to save innocent lives. Torture should only be used where the threat is imminent, there are no other means of alleviating the threat, and the suspect is known to have the relevant information. Torture is justifiable in these circumstances because it is less bad to inflict physical harm on a person than to allow large numbers (or in some cases a single person) to die. When rights clash and only one right can be protected we should opt for the higher-order right. To this end, the right to life is more important than the right to physical integrity.

We condone torture only in life-saving circumstances. As is discussed in chapter 6, torture has been effectively used on many occasions to thwart attacks against civilians, but it is not clear that there were not other means available to prevent these attacks. Thus, our proposal would legitimize very few reported instances of torture that have occurred.

More elaborately, the factors that are relevant to determining whether torture is permissible and the degree of torture that is appropriate are: (1) the number of lives at risk; (2) the immediacy of the harm; (3) the availability of other means to acquire the information; (4) the level of wrongdoing of the agent; and (5) the likelihood that the agent actually does possess the relevant information.

The moral arguments in favor of torture are discussed in chapter 3. It is argued that torture is no different from other forms of morally permissible behavior and is justifiable on a utilitarian ethic. It is also argued that, on close reflection, torture is also justifiable against a backdrop of a nonconsequentialist rights-based ethic, which is widely regarded as prohibiting torture in all circumstances. Thus, we conclude that torture is morally justifiable in rare circumstances, irrespective of which normative theory one adopts.

Prior to addressing these issues, in the next chapter we analyze the meaning of torture and the nature and scope of the legal prohibition against torture.

OVERVIEW OF ARGUMENTS AGAINST TORTURE

In chapters 4, 5, 6, and 7, we consider the main counter arguments to our proposal.

The first is the slippery slope or thin edge of wedge argument. If torture is condoned in the circumstances we set out it will, so the argument runs, result in the widespread use of torture. Secondly, and related to this point, is that legalizing torture will dehumanize society.

A more pragmatic objection to our proposal is that torture does not work. Suspects that are tortured will, supposedly, not “fess up.” This is the third main line of criticism. The fourth point made by some critics is that legalization of torture would be “antidemocratic.”

Our responses are relatively short. The task has been attenuated by the fact that the critics have not attempted to undermine the underlying (consequentialist) ethic upon which our proposal is based. Rather, they have been aghast at the conclusions to which utilitarianism commits us (condoning torture), and some critics have doubted whether a proper consideration of all the relevant variables leads us to condoning torture in any circumstances. There has been no attempt by the critics to develop an alternative normative theory that justifies their stance on torture and can be invoked to provide answers across a range of moral issues.

There is one qualification to the statement that the critics have not sought to undermine the moral ethic we endorse. Many critics have stated that our proposal is flawed because “the end does not justify the means.” This is more akin to a “throwaway line,” than a considered and measured criticism. Nevertheless, despite how one chooses to characterize the criticism, it has been

said frequently enough to merit a response. This is dealt with in chapter 10.

THE WIDER IMPLICATIONS OF THE TORTURE DEBATE TO MORAL THEORY

There are two other central matters that are addressed in this book. The first, discussed in chapter 8, is what we consider to be the most powerful objection to our proposal. That is the argument that rights do not clash in the situations where we believe life-saving torture is permissible, because, if innocent people are killed by others, we bear no responsibility for this since the killings are not committed by us. This argument is flawed but it gets to the heart of the issue and offers the best explanation as to why the torture debate has been so divisive.

An explanation is fitting because it is rare for a proposed legal reform to generate so much (ill) feeling. The critics of our proposal are well intentioned and their responses are driven by a revulsion toward the prospect of torturing a person. We too find this abhorrent (but less so than allowing innocent people to be murdered). If we are all so appalled by the prospect of deliberately inflicting pain and accept that it is an important moral maxim, how can it be that such vastly different conclusions are reached regarding the moral status of torture? In chapter 8, we get to the heart of this dilemma.

In chapter 9, we discuss why torture matters, far beyond the contours of the discussion at hand. The circumstances in which life-saving torture are justifiable will occur infrequently. Nevertheless, the debate is important because it has implications well beyond the narrow practice of torture. The supposed absolute ban on torture highlights much about what is wrong with contemporary moral thinking. The critics are committed to the nonsensical conclusion that the right to physical integrity (of the suspect) is more important than the right to life (of the potential victims) and seem resolute in their conviction not to extend their sphere of moral concern beyond the interests of the suspect to other affected parties, namely the victims. An analysis

of this type can only occur in the context of a moral fog, which is where contemporary moral thought finds itself.

It is in the context of such an environment that moral issues are often resolved not on the basis of clear thinking and reasoned analysis but according to who makes the loudest emotive retort. To this end, we undertake a “meta-analysis” of the debate at hand and the way it has been played out. The emotion that this debate has generated underscores the view that moral debates, at least in part, often turn into emotion-venting episodes.

This can result in even the best-intentioned participant engaging in “reverse extremism.” (It is reverse because it is based on a feeling of righteousness.) Extremism in all its manifestations, at least potentially, stifles debate and ultimately leads to stereotypical views of people. Indeed many of the torture opponents have engaged in the exact type of besmirching that leads to polarized communities and violence by some groups toward others.

The reason for this and how to avoid it in the future is examined in chapter 9.