On Torture

Abstract: Torture requires careful definition, because of the degree to which its definition often entails its moral condemnation. Torture involves the deliberate infliction of (intense) pain for coercive or punishment reasons. I offer a non-utilitarian argument to ethically justify torture in specific kinds of interrogative cases. This argument closely examines the moral isomorphism between cases of immediate and delayed self-defense, showing that in both cases lethal force is justified. I further show that once one’s life is forfeit, one’s other rights pertaining to the defense of one’s intended victims are likewise forfeit. As such, any form of interrogative torture necessary to procuring relevant information from persons involved in a lethal attack upon innocent persons is justified.

Presentation:

First, let me be clear that like you, I have no desire to be tortured. Like you, I have no desire to torture anyone. I wish to occupy a world in which torture is not only unnecessary but unthinkable. Like you, I find torture absolutely repulsive, sick in the extreme. But I think that my horror pertains to my sensibilities, rather than my understanding of ethics. Aesthetic revulsion toward torture does not necessitate believing it categorically unethical. War violates many aesthetic sensibilities, yet it may nevertheless be sometimes justified. Torture museums in Europe leave one feeling slimy and disgusted, since it is impossible not to imagine those devices being employed on you or someone you love. It’s hard even to conceive of a culture capable of designing such instruments of agony. But none of this goes essentially to the ethical question. In the case of torture, we need to separate the ethical arguments from our aesthetic experience.

Also, I should offer a few advance qualifiers on my terminology, since “torture” is often used the way we employ the term “murder.” While killing in self-defense might be justified, killing in cold blood would not. We reserve the term “murder” for the unjustified killing. The term “torture” seems to be similarly used, many parties to the debate assuming that if one’s
favorite form of coercion is classified as torture, then it is automatically rendered immoral.\(^1\) If “torture” is the term which designates the immoral act, then the thesis of this presentation—that torture is sometimes justified—becomes a contradiction. So, for our purposes, I will distinguish the descriptive account of what torture is from its moral evaluation.

This leads to the next semantic problem of identifying just what to include under the designation of “torture.” Many sources define torture as extreme physical compulsion, but this often just recreates the moral language problem, since “extremity” turns out to be identified with “that which is immoral.” If “extremity” means something purely descriptive, then we face the different problem of identifying the exact conditions under which the “extreme” has been met. Should “extremity” be defined as the moment when the person breaks? If so, then in some cases, a mere slap or two, or even just the threat of physical harm might break the victim. If extremity is defined relative to what people dislike, then again, this will vary.\(^2\)

But defining “extremity” is not the only problem with the definition of torture as extreme physical compulsion, since we can easily imagine examples which do not involve physical

\(^1\) This is probably a large part of the reason for the energy expended by defenders of President Bush’s policy of waterboarding Al Qaeda leaders to show that waterboarding is not torture (cf. George W. Bush (2010) Decision Points, “Of the thousands of terrorists we captured in the years after 9/11, about a hundred were placed into the CIA program. About a third of those were questioned using enhanced techniques. Three were waterboarded.” Also, see Donald Rumsfeld (5/3/11 interview Fox News) “. . . a major fraction of the intelligence in our country on al Qaeda came from individuals, the three, only three people who were waterboarded... no one was waterboarded at Guantanamo by the U.S. military. In fact, no one was waterboarded at Guantanamo, period. Three people were waterboarded by the CIA, away from Guantanamo and then later brought to Guantanamo.” Cf. also Dick Cheney (5/21/09 Speech at the American Enterprise Institute.); cf. also CIA Director Michael Hayden on 2/5/08 testifying before the Senate Intelligence Committee identifying the three waterboarded persons as Khalid Sheikh Mohammed and senior al Qaeda leaders Abu Zubaydah and Abd al-Rahim al-Nashiri; cf. also President Obama’s executive order revoking authority to employ enhanced interrogation techniques (Executive Order 13491 Ensuring Lawful Interrogations).

\(^2\) Alternatively, we might shift to defining “extremity” away from the victim’s pain (or our assessment of that pain), and instead link it to the situation at hand. For example, if usually it is wrong for military interrogators to punch someone, but in this case the victim is part of an assassination attempt on an important political figure, then we might be inclined to think that in this special situation we can justify a few punches since the result of not doing so would be so hazardous to national and/or political security. But if “extremity” is defined relative to the hardship endured by the perpetrators in not successfully prosecuting their coercion, then we will wind up with a morally useless sliding-scale criteria of “extremity.”
compulsion but are nevertheless “torturous.” Take some of the cases of the mental and emotional coercion that convince a victim to reveal information to his interrogators. Suppose, for example, that someone were to threaten to skin your children. This threat, if believed, would not constitute torture under the physicality condition, because neither you nor your children are enduring any physical harm. Yet surely this is a case of “extreme” duress, of intense emotional and mental suffering, and it might even prove more productive than physical coercion.

Furthermore, why should we suppose that coercing people with physical pain is prima facie immoral, while coercing them with emotional or mental pain is not? Why, for example, do we permit police detectives to interrogate suspects with mental and emotional coercion, often involving deceit, but we severely restrict physical duress? The reason cannot be that physical coercion leaves marks, since emotional scarring is just as real as physical scarring. Nor is it clear why we think that placing someone into a cage for thirty years is moral, while whipping them at a post in the center of the town square for thirty minutes is immoral. In both cases we are inflicting severe pain. Why is one kind of pain-infliction moral, while the other is immoral? Without some principled basis for restricting what counts as torture solely to physical pain, I see no reason not to include intense mental and emotional forms of coercion.³

So, for our purposes here, I am going to define torture descriptively as the following: torture is the employment of intense physical/emotional/mental compulsion (that may admit of degrees) to coerce a person either to provide information or to carry out some form of action, or to punish a person.⁴ I will classify the first two forms of coercive torture as coercive

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⁴ Cf. The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (http://www2.ohchr.org/english/law/cat.htm) which identifies the following four reasons for torture: to obtain a
interrogative torture and coercive response torture respectively, while the last category I’ll just call punishment torture. So, a police interrogator who offers you water and then for eight hours refuses to let you use the restroom is employing physical and emotional coercive interrogative techniques. If he switches to waterboarding, he is engaged in a moderate form of physical and emotional interrogative torture. If the interrogator also suggests that he’ll next move to smashing your fingers with a hammer, he includes a mental torture component. Electrocution of the tongue or genitals during an interrogation is an extreme\(^4\) form of physical and emotional interrogative torture. Threatening someone’s son with death or physical torture to motivate him to act as a source for your intelligence agency is an extreme form of emotional and mental coercive response torture. Crucifixion, impalement, and the wheel are examples of extreme punishment torture (of all three kinds).

With these examples clarifying the definition, I can now identify exactly what thesis I wish to defend: coercive interrogative torture of all degrees is sometimes justified. I will not be evaluating coercive response or punishment torture in this discussion.

II

Turning then to the non-ethical arguments against interrogative torture, what we hear in popular culture is by and large a series of half-arguments all strung together. “Torture is a sick practice of medieval-minded people lacking any conception of human rights. We are better than that today. In order to hold the moral high ground, we have to behave better than our enemies.

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\(^4\) Some form of an intensity or extremity condition is useful to distinguish torture from mere coercion, but this condition must not imply a moral principle that decides the matter in question by definition.
If we don’t, just imagine what they will do to our captured service men and women. Furthermore, torture violates not only the US Constitution, but the Geneva Convention. And even if terrorists captured in foreign lands are technically subject to neither, we all know that a tortured person will say anything to halt the practice. As such, it doesn’t work anyhow.”

Those of us who teach informal logic might see the value of offering such a paragraph for evaluation to our students on a final exam. But the shifting ground of argument in these kinds of appeals resembles the famous leaky-bucket criticism that has been tendered against some theistic proofs. So, it might be useful for us to begin by separating out the kinds of arguments that are leveled against interrogative torture.

Besides the ethical arguments that are of the most interest to philosophers, our policy makers in the various civil and military branches of our government are moved by many other important considerations. The arguments from our international moral prestige hold some sway, for example. We train our soldiers to think of themselves as morally just warriors, as not only being on the right side of the war, but as practicing their war-fighting in the right ways.\textsuperscript{6} Captured persons are a protected class, and they may not be harmed under current rules.\textsuperscript{7}

Furthermore, both military and foreign intelligence officers worry about the dangers that they will themselves face if captured, if torture were broadly practiced by all sides. Now, the irony, of course, is that the enemies of the United States in every major military confrontation since and including World War II have employed torture on our captured servicemen. Nor is it clear, to quickly take up the moral high-ground argument, that our goodness stems from the means of our defense rather than the values we defend.

\textsuperscript{6} Note the impact that Michael Walzer’s \textit{Just and Unjust Wars} has had on military ethical education of cadets at the military academies.

Another class of arguments includes the impracticality of torture. Some suggest that a tortured person will say anything. Then why is it used so often? Furthermore, there is plenty of evidence of people giving up information through both non-tortuous and tortuous interrogations. Yes, the tortured will say anything, just as a criminal in the police box will say anything.

Trained interrogators learn how to ferret out lies from truths via sophisticated cross-examination techniques coupled with rational-deprivation modes of coercion. Moreover, the fact that captured persons sometimes lie effectively doesn’t mean that they don’t tell the truth often enough to make the effort worthwhile, in both criminal domestic cases and foreign interrogation cases. Finally, someone initially lying may give way over time as despair and despondency set in.

Another form of the impracticality argument arises from the ranks of the military themselves. Sometimes at military ethics conferences, you’ll hear something like the following: “Are you really suggesting an Office of Torture in the Department of Defense? Will we have a ‘torturer badge’ to go under the Ranger Tab on the US Army uniform? Isn’t the fact that medieval torturers wore masks suggestive? You hide what you are ashamed of.” I agree that there are serious institutional questions that must be confronted if anything like an official “torturer” is to be created. But while I think that medieval peoples knew full well who the torturer was (suggesting the mask had more to do with the victim or the event than true

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8 We ought to distinguish the use of torture for intelligence gathering from its use to extract confessions, especially since police can apparently be fairly effective in coercing confessions from innocent people. If the police interrogator is more interested in clearing a case than learning the truth, then he might be inclined to coerce a confession. But coercion used for intelligence gathering has as its sole purpose the discovery of information that is true. In justifying coercive interrogative torture, I am not including confession extraction.

9 According to CIA Director Michael Hayden’s 2/5/08 testimony before the Senate Intelligence Committee, the waterboarding form of enhanced interrogation provided fruitful information.

anonymity), the secretive elements of interrogative torture don’t entail something wicked. The information sought and the methods employed should be classified as secret. And just as an execution may be a just form of punishment but not something to film for the evening news, the much more horrifying aesthetics of torture is something one might reasonably wish to censor.¹¹

A final practicality argument arises from the slippery-slope of permission: without clear lines prohibiting all forms of belligerent physical contact, we will be unable to definitively prohibit its misuse. Best to leave the genie in the bottle. And unlike nuclear weapons which cannot be fired without clear authorization, a culture of torturing could easily lead to unauthorized persons judging for themselves when to use it.¹² I agree that this is a worry for any permissible use of force by police or military persons. But as with all other kinds of force, rules would have to be created and procedures initiated to properly regulate it. From what has been declassified from the Bush era, no “culture of torture” was created (not counting renditions to foreign countries).¹³ According to Vice-President Cheney, only three persons in US custody

¹¹ The social and institutional consequences of failing to stop a major terrorist attack when the terrorist was in custody and might have been compelled to talk are also worth considering.


¹³ The case of mistreatment of detainees at Abu Ghraib may appear to prove that a culture of torture did follow from its official limited approval. But a “culture” tends to exist within a particular social structure, and it wasn’t the US Army but the Central Intelligence Agency that carried out the enhanced interrogations. Abuse of prisoners can occur with or without official approval of torture. Furthermore, a “culture” also seems to imply a causal relationship that would effect multiple instances of abuse, whereas the history of US military conduct since 2001 seems to show the opposite.
were waterboarded. So, it seems that torture might be managed effectively, if the authorization for its use is clearly identified.

The final class of non-ethical arguments against torture is often confused with the ethical, namely the legal arguments. There are always legitimate epistemic and procedural worries for identifying who to sanction with government force. Torture cases are no different. Furthermore, it is valuable to recall that Constitutional prohibitions on cruel and unusual punishment as well as the protections of our citizens with rules like jury trials and *habeas corpus* are not ethical rules, but procedural principles that follow from our people’s determination to protect the innocent more than condemn the guilty. Justice only requires that you get what you deserve. It doesn’t require a jury trial. But jury trials are very helpful for ensuring that errors in sanction are more likely to fall into failing to convict the guilty than falsely convicting the innocent. Finally, terms like “cruel and unusual” are unfortunately subject to many of the problems I initially applied to the term “extreme.” Colonial punishments often involved intense physical and emotional pain.  

III

Turning now to the moral justification for some cases of coercion interrogative torture, let me use a version of the infamous nuclear time bomb scenario. In this case, the police have captured the person who planted the nuclear bomb in a city, they know that they have only so much time to locate and defuse/move it, and they know that they are extremely unlikely to find it

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14 “Three people were waterboarded and the one who was subjected most often to that was Khalid Sheikh Mohammed and it produced phenomenal results for us.” (May 21, 2009, Speech American Enterprise Institute).
15 Colonial punishments included many forms of intense emotional or physical pain infliction: pillory, whipping, branding, maiming, and at least one case of drawing and quartering.
in the allotted time without the cooperation of the person in custody. Are the police justified in employing torture to coerce his cooperation?

While such scenarios seem to favor the utilitarian justification for torture, we can offer the alternative kidnapping scenario to reduce the perpetrator/victim ratio to one-to-one. In this case, we imagine that our perpetrator has kidnapped a girl, located her secretly in a hermetically sealed environment with a timed and limited oxygen supply. The situation is morally isomorphic to the nuclear bomb scenario without the lopsided ratio.

Since my goal is to avoid a utilitarian justification of coercive interrogative torture, let’s ask how we might justify coercing the perpetrator in either of these examples. Since our courts already have the power to compel witnesses to speak on pain of jail, we have reason to suppose that the right to silence is anything but absolute. But an enemy of our country (in the nuke example) is presumably not subject to the authority of our courts. Perhaps then we might think that he has a moral duty to protect human life, that his not acting to protect life in this case is reason for us to compel that assistance. But again, if we suppose that he is an enemy (in the war or terrorism senses), then it’s again not clear that he has any positive duty to protect our people.

Alternatively, perhaps we could use some form of double-effect to justify coercion. Imagine a disease for which the only cure requires surgery plus the person’s screaming in agony. Imagine further that the person strongly resisted this treatment, but without it he might die. We’d probably think that for his own good we’d be justified in tying him down and doing the surgery without anesthetic to create the necessary pain. If we could do that for the good of the

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17 It’s worth noting as Uwe Steinhoff ((2010), “Defusing the Ticking Social Bomb Argument: The Right to Self-defensive Torture,” Global Dialogue, 12 (1)), has maintained, that the kidnapping case is not purely theoretical.  
person, why can’t we do that for the good of an entire community? Why couldn’t we inflict great pain on our bomb-planter to motivate him to help save our community? Perhaps the pain could be considered a bad effect proportionately justified by the great good effected by finding and defusing the bomb. But double-effect requires that the bad effect not constitute part of the means of the good effect, whereas in the torture case it clearly does. Furthermore, in the kidnapped girl case, the proportionate good to be effected (saving one life) must be offset against the bad to be effected (torturing and possibly taking one life). Without some means to devalue the life of the bomb-planter, we might not be able to satisfy the proportionality condition.

But if we can justify devaluing the life of the bomb-planter, we may not need double-effect at all. For in self-defense\(^{19}\) cases, the defender is justified in killing his attacker because the attacker devalues his own life. We blame the attacker for his attack, recognizing his responsibility for it. If he won’t respond properly by ceasing the attack, then the victim (or a third party) earns the moral authority to recognize an inequality in the relative values of life. To use Locke’s language, the attacker forfeits his rights not to be harmed through his intention and action of committing a lethal harm.\(^{20}\)

We might see how in the case of stopping a suicide bomber this rationale would permit police officers to open fire. If the police see that the suicide bomber is about to depress the trigger on his bomb—a bomb that will kill innocent people around him—then to stop his attack, the police are justified in killing him. The ticking nuke case appears to differ, however, because the captured bomb-planter is not actively doing anything. He is in custody. So, how can self-defense be employed to justify coercing him? It appears that the bomb-planter has ceased his


action of bombing, because he planted the bomb and no longer has any role in its detonation. If
he were to die, the situation with the bomb would remain exactly the same. Since he isn’t
necessary to the action, one might argue that he isn’t a part of the action. And if he isn’t part of
the action, one cannot “stop” him in any meaningful way.

Furthermore, there is a significant temporal difference between the suicide vest
detonation and the timed nuclear detonation, a temporal gap that appears to take the bomber out
of the causal sequence in detonating the nuke. The delay between setting the timer and the
detonation seems to alter the self-defense equation, because unlike the suicide vest case, there is,
again, nothing that the police can do to stop the attacker.

But these analyses of the self-defense case put the cart before the horse. Self-defense is
so-called because the goal and warrant is not to “stop the attacker” but to protect his intended
victim. In most self-defense cases the effective way to accomplish this protection is indeed to
stop the attacker. The suicide vest scenario is a case in point. But the fact that this is usually the
way self-defense works does not entail that this is the only way to protect the victim. It is critical
that we not confuse means with ends and turn to identifying victim protection with stopping the
attacker. Both the active/passive and temporal gap criticisms make this error, assuming that the
issue is stopping an attacker (a form of agency) when the attacker is no longer attacking (a non-
agent). But the real issue is not the current causal status of the attacker, but the moral agency


involved when he planned and executed this lethal attack. His moral responsibility warrants lethal countermeasures not only to “stop his attack” but to protect his intended victims.

Since the warrant of self-defense against lethal harm includes the right to take life, and as Locke famously argues, since all other rights depend upon the right to life, self-defense against lethal threat permits the defender (or a third party) to take any action against the perpetrator necessary to defending the innocent party. The perpetrator is the locus of such defense not only because he possesses the relevant information to prevent the detonation, but because of the moral blame attached to him through his role in prosecuting that attack.23 This moral blame entails full rights forfeiture relative to protecting his intended victims.

In our ticking nuke case, the bomb-planter is involved in the action of killing several hundreds of thousands of people. But unlike the suicide vest-case, the police’s killing him won’t protect those people. Only their compelling him to identify the location of the bomb can protect the innocent. Since it is permissible to employ maximum force and kill him, it is likewise permissible to employ less force and merely inflict non-lethal pain on him. In both the suicide vest and nuclear bomb cases his moral agency in threatening innocent people with death causes him to forfeit his protections from threats to his life and liberty. In the past the old formula for natural rights included “limb.” If someone’s life is forfeit, then so are his rights to keeping his limbs intact. As such, the infliction of pain for the purposes of self-defense24 is morally justified.

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23 Self-defense should not be understood solely as a non-moral appeal to necessity. The necessity at issue is the necessity to protect innocent life providing the very moral distinction between perpetrator and victim that warrants the former’s devaluation. Consider a situation where the only possible way to prevent a man from punching me is for me to kill him. If self-defense were solely an appeal to necessity, then the necessity doctrine would permit my killing my puncher. But this is absurd, for we require additionally the moral analysis that punching is not a sufficiently aggressive attack to warrant the use of lethal force.

24 Note the crucial role this purpose plays in justifying and thereby limiting torture. Even though a person has forfeited his rights not to be harmed, it does not follow that he may be gratuitously injured. The reason for this has less to do with his rights, and more to do with our own responsibilities to normal human beings and to ourselves. An absence of rights does not confer a correlative permission to injure gratuitously, for gratuitous harm injures the
The degree and kind of pain justified is simply a question of necessity. Whatever works is justified, so long as the pain-infliction is targeted at the perpetrator.\textsuperscript{25}

Returning to the case of the kidnapped girl, we should realize now that the number of victims is irrelevant to the nature of the self-defense case. Whether the perpetrator threatens murder on one person or one hundred thousand people, in both cases he forfeits his rights so that his intended victims (or their surrogates) are warranted in employing any and all necessary force against him to enable their safety.

IV

Moving away from the timed threat scenarios, we can now justify the more general interrogations of actors involved with terrorist threats. Because a state of perpetual threat to the innocent persists, the terrorist actors have forfeited their rights and may be killed. It follows that their rights to liberty, health, and preservation of limb are likewise forfeit.\textsuperscript{26} Thus, if pain infliction is useful in defusing the more general terrorist “bomb,”\textsuperscript{27} namely their aggressive plans...
of attack against innocent people, then the innocent parties’ self-defense rights kick in against the terrorists. When “high value targets” are captured, and when they are known to possess information vital to counter-terrorism efforts, there is no moral limit to the amount and kinds of force that may be employed to extract information necessary to safeguard the lives and liberties of our citizens.

Limits on torture come into play when we look at threatening a terrorist’s innocent family, a question of targeting, or when we capture a person whose role remains unclear, a question of identification. Torture may not be used on people known to be innocent simply because they are valued by the bomb-planters. Similarly, torture may not be used to extract confessions of capital offenses, since that torture requires a warrant of forfeiture for its justification.  

Recall the previous notes that distinguished confession extraction from information gathering. Also note that in cases where the tortured person is already known to have committed relevant capital offenses, the use of torture to extract additional confessions may be justified.

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national self-defense for the purposes of acquiring additional information is justified. I acknowledge that this creates an epistemic problem where torture may be legitimated in cases where the victim no longer knows anything useful. But the torture only becomes gratuitous once the torturers have good reason to believe that their victim knows nothing else.

28 Recall the previous notes that distinguished confession extraction from information gathering. Also note that in cases where the tortured person is already known to have committed relevant capital offenses, the use of torture to extract additional confessions may be justified.