

“Torture, Terrorists, and Natural Rights”¹

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Abstract

Amidst the loud public responses to interrogation tactics used on various individuals in the past several years, the issue of torture is frequently raised but rarely, if ever, carefully discussed outside the academic literature. Most Americans have a presumption against torture, but what exactly counts as torture is widely disputed. It seems that in some cases, one person’s torture is another person’s “enhanced interrogation technique.” Justifications for torture are frequently set forth in consequentialist terms. I think this is not the best way to frame the debate. In this paper, I argue that human beings, qua human beings, have a natural right not to be tortured. I argue that this right may be grounded in human dignity and is possessed by each human being indiscriminately. As such, even the worst terrorist has dignity and must be treated as such. The difficult question regarding torture, I think, involves a case where there is a clear conflict of prima facie natural rights. I attempt to resolve this along non-consequentialist lines, suggesting that the natural right of a person (or persons) not to be murdered outweighs the natural right of a terrorist not to be tortured when certain conditions are met. As such, I am compelled to affirm that, though it ought not be legalized, torture may, in some very extreme circumstances, be the justified on natural rights grounds.

Introduction

I agree with Jeremy Waldron that it is a “matter of shame” that we must conduct a national debate about torture.² The need for this debate has been growing since 9/11, and many have added their voices since. If the public reaction to President Obama’s early 2009 release of the “torture memos” is any indication, this debate has only just begun in earnest.³ Many express firm opposition to “torture,” but there are at least two compelling reasons to enter this debate. First, it should be evident to anyone observing the public debate, that formal opposition to torture may be functionally irrelevant when one person’s torture is another person’s “enhanced interrogation technique.”⁴ Secondly, there are those who are offering a thoughtful and rigorous defense of torture under certain conditions. As such, rigorous work is still needed in the continuing conversation on this complex topic. In this paper, I will focus on torture in the context of human moral agents acting on other human moral agents so as to highlight the conflict of natural rights.⁵ I will address briefly the problem of defining torture. I will examine several of the key contributions to this debate, and identify what I think are some of the most troubling issues. I will offer a natural-rights-based argument against the use of torture and a brief account of how such a right might be grounded. While I will argue that each human being possesses a natural right not to be tortured, I will further argue that there may be extreme cases where the use of torture would be morally justified.

The Problem of Definition

¹ Many thanks to John Simmons, Jim Cargile, Nick Wolterstorff, Amy Gilbert, and Jason Smith for substantial comments on an earlier version of this paper.

² “What Can Christian Teaching Add to the Debate about Torture?” *Theology Today*, Vol. 63 (2006), p. 330.

³ Released by President Obama April 16, 2009.

⁴ For but one example, see <http://www.cnn.com/2009/POLITICS/05/13/interrogation.hearing/> (last visited, June 2, 2009).

⁵ While much of the current discussion and most ticking-time-bomb scenarios involve agents of the state acting on a suspect, doing so here would lend itself to confusion or conflation of *natural rights* and their correlative duties with *legal rights* and their correlative duties. Casting the characters simply as humans acting on other humans will highlight the natural rights and duties that are there (or not) such that it will become clear that casting the deliberator as a police officer brings rights and duties *in addition* to those natural rights and correlative duties that are already there.

Most people seem to have some intuition about what counts as torture, but actually defining 'torture' is notoriously difficult. Indeed, the published literature contains an array of definitions. The focus of this paper is *not* primarily on the issues surrounding the problem of defining torture. But failing to acknowledge the problem would only add to the confusion. An analytical definition represents a concept as a compound of at least two other component concepts. In such a definition, "*it is not the words that are the main thing.*"⁶ Any analytical definition of X must set forth the conditions that are both logically *necessary* and *sufficient* for something's being X. As such, definitions may err with respect to the conditions for what is either necessary or sufficient. Consider the following definition of 'torture' from the Stanford Encyclopedia of Philosophy:

Torture is: (a) the intentional infliction of extreme physical suffering on some non-consenting, defenceless person; (b) the intentional, substantial curtailment of the exercise of the person's autonomy (achieved by means of (a)); (c) *in general*, undertaken for the purpose of breaking the victim's will.

I take it that the author of this definition means to say that (a), (b), and (c) are necessary and jointly sufficient to constitute torture. However, qualifying (c) with "in general" renders it logically useless. It may be helpful as a descriptive point, but it does no logical work for the definition. Consider what might count as torture under the conditions of (a) and (b) alone. It seems plausible that one might employ painless techniques that would count as torture (e.g. the painless amputation of a limb performed by a trained surgeon). If so, then this definition is too narrow. On the other hand, it seems plausible that one could inflict pain on another in a case that ought not count as torture (e.g. performing a painful life saving operation a person who does not consent). One might have objections to a case such as this, but calling this torture would likely not be one of those objections. If a case like this is possible, then the definition is too broad. It counts something as torture that ought not to count as torture.

Examples abound of proposed definitions of torture that seem to open to the charge of being either too narrow or too broad, and I do not intend to resolve those issues here. Rather, I simply wish to acknowledge that these issues exist and must be kept in mind in any discussion of torture. For my purposes, I will use the following definition from the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (henceforth, "CAT"), which states:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷

I find the inclusion of "severe pain" as a necessary condition for torture problematic, but I will leave that aside for the moment.⁸ The inclusion of "severe pain" became a crucial element in establishing

⁶ Cargile, James. "Syllabus for PHIL 141." Unpublished.

⁷ Office of the High Commissioner for Human Rights, <http://www2.ohchr.org/english/law/cat.htm> (last visited May 27, 2009).

⁸ By helpfully qualifying "severe pain" with "whether physical or mental," this definition is far more helpful than those that limit pain to physical pain. One may certainly have a painless physical experience (e.g. amputation of a limb) that would likely involve severe mental pain.

the boundaries within which the U.S. interrogators could operate while interrogating detainees. I will address this later in the paper. It will be helpful now to narrow my focus to the particular type of torture in which I am interested for the purposes of this paper.

Kinds of Torture

There are numerous acts that might be performed for a variety of reasons that one might count as torture. David Luban describes the following five possible aims of torture: victor's pleasure, terror, punishment, extracting confessions, and intelligence gathering. Victor's pleasure amounts to torturing merely for pleasure it allegedly brings to the torturer. Torture as terror aims to intimidate the opposition, fearing a "fate worse than death."⁹ Torture as punishment is just what it sounds and was actively practiced for centuries. Torture as a means to extract a confession does not even seem practical today when there are so many other means of establishing guilt (e.g. DNA).¹⁰ It seems to me that there is little debate regarding the immorality of the first four uses of torture. Perhaps I underestimate the preponderance of those who would support these types of torture, but they seem to be of far less concern today than the fifth aim of torture—intelligence gathering. Luban helpfully distinguishes the aim of interrogation for intelligence from the aim of extracting a confession noting, "[...] confession is backward-looking, in that it aims to document and ratify the past for purposes of retribution, while intelligence gathering is forward-looking because it aims to gain information to forestall future evils like terrorist attacks."¹¹ This is the kind of torture that occupies the center of the current debate. The popular debate usually starts with the premise that torture is not permissible, and then proceeds to argue over what counts as torture (e.g. waterboarding, stress positions, etc.). Those in the scholarly debate tend to fall in one of two broad camps: torture is never permissible and torture is *sometimes* permissible. For my purposes, I will focus on torture as a means of intelligence gathering. However, in order to highlight the natural rights in conflict, I will restrict my actors to human beings with no special roles (e.g. Police Officer, family member). But if my scenario holds, it will help answer the cases, no doubt more likely to occur, that involve agents of the state acting on suspected terrorists. Before making a case for a person's moral right not to be tortured, I will briefly look at the legal right not to be tortured as currently articulated in various internationally recognized legal documents.

The Legal Right Not to be Tortured

One issue that is *not* under dispute is whether torture is legally justified by any U.S. or International Laws, Treaties, or Conventions. It is decidedly *illegal* to torture. I have already cited U.S. Code and the U.N. Convention Against Torture. Those are only two of many legal documents that prohibit torture. The European Convention on Human Rights, Article Three, states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹² Amnesty International points out that "every act of torture is a crime under international law" and notes the following:

- If torture is committed in an armed conflict, it constitutes the war crime of torture.
- If torture is committed as part of a systematic or a widespread pattern of similar acts, it constitutes the crime against humanity of torture.

⁹ Luban, David. "Torture, and the Ticking Time Bomb." *Virginia Law Review*, Vol. 91, No. 6 (Oct., 2005), p. 1433.

¹⁰ Though, of course, DNA testing is not as readily available in some places as it is in the United States. So there may be countries where torture for the purpose of extracting a confession remains a real problem.

¹¹ Luban, 1436.

¹² ECHR, Article Three, <http://www.hri.org/docs/ECHR50.html> (last accessed May 28, 2009)

- The Convention against Torture prohibits torture as an independent crime, as a war crime, and as a crime against humanity, absolutely and in all circumstances.
- The Geneva Conventions prohibit the war crime of torture in both international wars and internal conflicts such as civil wars or rebellions.
- The Rome Statute of the International Criminal Court prohibits torture when it constitutes genocide, a crime against humanity or a war crime.¹³

The preponderance of torture prohibitions is such that one might wonder how we ever got to the point where torture is a topic of such heated debate. I suspect, as Luban suggests, that it is due to the lack of use, historically, of torture as a means of intelligence gathering. Luban suggests that because this kind of torture has been least prominent, most discussion on torture in the previous century have simply overlooked it.¹⁴ Indeed, I have yet to discover, and suspect I will not, any law anywhere that legalizes the use of torture. Alan Dershowitz seems to be the only person speaking out in favor of legalized torture, albeit in a very specific form under extreme conditions.¹⁵ And given the restrictions he places on the use of torture, one might argue that he is simply being more consistent than those who would advocate the use, but not the legalization, of torture under “ticking time-bomb” scenarios.¹⁶

It seems clear in light of current debate that it is possible to act in such a way that some would consider torture while, at the same time, remaining within the formal boundaries of the law. For example, one version of an early memorandum regarding what techniques might be used lawfully on detainees specifically addresses what constitutes “severe pain.” Jay Bybee, former Assistant Attorney General, Office of Legal Counsel under George W. Bush, in a memorandum entitled *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§2340-2340A* writes that ‘severe pain’ as used in Section 2340 must rise to a “level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions—in order to constitute torture.”¹⁷ In December 2004, another memorandum superseded the Bybee memorandum in its entirety. But, for just over two years, Bybee’s definition of ‘severe pain’ established the parameters for staying within the bounds of U.S. Code. I can think of several acts that would not inflict ‘severe pain’ on Bybee’s definition that would certainly *seem* to constitute torture. I doubt most Emergency Room physicians would consider a broken pinky finger a “serious physical injury,” and I doubt that the pain involved with a broken pinky finger is constituent with “organ failure.” Yet, affixing a detainees hand to a table and breaking his pinky finger with a swift blow of a hammer in an effort to gain “actionable intelligence” surely seems to invite the label ‘torture.’ The point here is not to wrangle over current or past law or the policies of any U.S. President’s administration. Rather, it is to raise the question, “If torture were legal, would we have any grounds on which to protest it?” Or, “If a certain act X is legal by the letter of U.S. Law, on what grounds might we argue that it is, nevertheless, wrong and *ought* not be legal?”

The Appeal to Dignity in Legal Prohibitions Against Torture

¹³ <http://www.amnestyusa.org/war-on-terror/reports-statements-and-issue-briefs/torture-and-the-law> (last accessed May 28, 2009).

¹⁴ Luban, 1439.

¹⁵ Dershowitz, Alan. “Should the Ticking Bomb Terrorist be Tortured?” in *The Morality of War: A Reader*, ed. D. Kinsella and C. Carr. Lynne Reiner Publishers (Boulder: 2007), pp. 230-239. Dershowitz here argues for the use of “torture warrants.” His advocacy is specifically of non-lethal torture only in the context of the “ticking time-bomb” scenario.

¹⁶ For a lengthy and compelling argument against the legalization of torture in any form, see Waldron, Jeremy. “Torture and Positive Law: Jurisprudence for the White House.” *Columbia Law Review*, Vol. 105, No. 6 (Oct., 2005), pp. 1681-1750. Waldron is opposed to torture under every circumstance. One who supports the ticking time-bomb exception might still employ Waldron’s argument against legalizing torture, even in this extreme case.

¹⁷ Danner, Mark. *Torture and Truth*. New York Review Books (New York: 2004), p. 120. This memorandum is dated August 1, 2002.

Most of the prominent legal documents prohibiting torture make an appeal to human dignity as a basis for the prohibition. The CAT opens with the following lines:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [and] Recognizing that *those rights derive from the inherent dignity of the human person* (italics mine).¹⁸

Consider also Article 3 of Geneva Convention III (GCIII) regarding the treatment of participants in conflicts not of an international character:

Persons taking no active part in the hostilities [...] *shall in all circumstances be treated humanely* [...]. To this end the following acts are and shall remain prohibited [...] *cruel treatment and torture; [...] outrages upon personal dignity, in particular, humiliating and degrading treatment* [...] (italics mine).¹⁹

And Article 13 of GCIII, regarding the treatment of prisoners of war states that “Prisoners of war must at all times *be humanely treated*.”²⁰ Lest one get caught up in a dispute over the status of certain persons, consider the following from Article 5 of Geneva Convention IV regarding the treatment of civilians during time of war:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges [...] Where in occupied territory an individual protected person is detained as a spy or saboteur, [...] such person shall [...] be regarded as having forfeited rights of communication under the present Convention. *In each case, such persons shall nevertheless be treated with humanity* (italics mine).²¹

I take references to “treated with humanity” and “treated humanely” in these articles to mean the same thing as treated in a way befitting one’s dignity. Taken together, these articles insist that captives, whatever their particular legal status, be treated with “humanity” or “humanely” and protected against “outrages upon personal dignity” on the basis of moral rights that “derive from the inherent dignity of the human person,” and, as such belong to each person simply in virtue of their being a member of the “human family.” Note that GCIII, Article 13 even says that an omission (e.g. failure to treat a medical condition) that endangers the health of the prisoner is a breach of the convention. The preponderance of international treaties and conventions that reflect this thinking, and the variety of countries that agree to abide by such treaties suggests that the idea that humans possess dignity in virtue of their humanity is widely accepted, at least as a theoretical notion. Yet, the preponderance of human rights abuses around the world as well as the local debate on torture suggests, in contrast, that the idea of human dignity has little functional force. That is, most will agree to it on paper in a no-stress environment, but it takes a back seat to other considerations in the “real world” across a variety of contexts.

Grounding Human Dignity

¹⁸ Convention Against Torture: <http://www2.ohchr.org/english/law/cat.htm> (last accessed June 18, 2009).

¹⁹ Geneva Convention III, Article 3: <http://www.icrc.org> (last accessed June 18, 2009).

²⁰ Geneva Convention III, Article 13: <http://www.icrc.org> (last accessed June 18, 2009).

²¹ Geneva Convention IV, Article 5: <http://www.icrc.org> (last accessed May 28, 2009).

While assent to the proposition that humans possess dignity seems to be widespread, though certainly not universal, how to ground such dignity remains a widely disputed question.²² There is, of course, general agreement that *most* people have a right to be treated in ways that respect their dignity. I shall not attempt here to interact with all the major attempts to ground human dignity or even to fully develop my own position. I am inclined toward a theory that holds *all* people have a right to be treated in ways that respect their dignity. In particular, I am attracted to a theistic account, which I will sketch briefly here. This account, articulated as a conditional, is “available to the person who holds the theistic convictions indicated.”²³ There are other accounts of human dignity, most of which tend toward some version of a capacities-based approach. These approaches seek some intrinsic property (e.g. rational agency) on which to ground dignity. The most inclusive capacities-based approaches treat a capacity not as a strict measure of worth (i.e. greater capacity correlates to greater worth). Rather, it would treat the capacity as a threshold. Dignity would be equal, then, among all who possess the appropriate minimum capacity. Nevertheless, it seems that some human beings would still be left out on most accounts, and this seems to me a drawback of any capacities based approach.

Following Michael Perry, Wolterstorff offers a theistic account for the grounding of human rights.²⁴ In contrast to the capacities-based approaches, Wolterstorff’s account hangs on identifying an extrinsic property shared by human beings. A property is *extrinsic* just in case it depends necessarily on something outside that object, or, in this case, outside the person. Wolterstorff identifies this extrinsic property as the “worth-imparting relation of human beings to God,” or simply the property of being loved by God. He says, “[...] if God loves equally and permanently each and every creature who bears the *imago dei*, then the relational property of being loved by God [...] gives to each human being who bears it the worth in which natural human rights inhere.”²⁵ If this is the case, the property of each and every human’s being loved by God gives rise to equally inestimable worth. Because the grounding for this worth is extrinsic, the worth is unaltered by any intrinsic property in the human (e.g. age, size, mental capacity, being properly formed, etc.).

It is important to note that the worth of human beings, when construed this way is, at bottom, a *bestowed* worth.²⁶ So “if God loves [...] each and every human being equally and permanently, then natural human rights are grounded in that love; they inhere in the bestowed worth that supervenes on being thus loved.”²⁷ For my purposes, it is this equal, bestowed worth to which I refer when I speak of human dignity. If humans possess equal worth (dignity) in the way described above, then each human has a natural right to be treated in a manner befitting that worth. One specific right that arises from this is the natural right not to be tortured. Again, there is general agreement that people have a right to be treated in ways befitting their dignity, and there are other ways to ground such a right. But this is what I have in mind when I speak of the right to be treated according to one’s dignity.

Is Torture Ever Justified?

As with the general prohibition on torture, the law is clear on this question too. Are there exceptions to the prohibition against torture? According to international law, it appears that no circumstances, however extreme, warrant the use of torture. Article 2 of the CAT states, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political

²² For a nice overview of some key texts on justice and dignity, see Gilbert, Amy. “Critical Texts on Justice and the Basis for Human Dignity.” *The Hedgehog Review*, Vol. 9, No. 3 (Fall, 2007), pp. 81-87.

²³ Wolterstorff, 360.

²⁴ See Perry, Michael J. *Toward a Theory of Human Rights*. Cambridge University Press (Cambridge: 2007) and Wolterstorff, Nicholas. *Justice: Rights and Wrongs*. Princeton University Press (Princeton: 2008).

²⁵ Wolterstorff, 352-353.

²⁶ For an extended discussion on bestowal, see Singer, Irving. *The Nature of Love: Plato to Luther*. The MIT Press, (Cambridge: 2009).

²⁷ Wolterstorff, 360.

instability or any other public emergency, may be invoked as a justification of torture."²⁸ But again, the current debate acknowledges this and asks, "Given that torture is illegal under any circumstances, is the use of torture ever morally justified?" Or, lest one be accused of mere excuse making, perhaps the better question is, "Is torture ever the morally permissible?" There are a number of thoughtful and varied answers to this question. As a starting point for my own answer, I will sketch one answer with which I am sympathetic. I will then offer my own answer and interact with several key objections. Seumas Miller argues for the strong thesis that, in some extreme cases, torture is not merely morally justifiable; it is the moral duty of the authorities.²⁹

Seumas Miller: Torture is Sometimes the Duty of the Authorities

Seumas Miller argues, "Torture might be, all things considered, the morally best action to perform in some one-off emergency situations."³⁰ Nevertheless, he maintains, "Torture ought not be legalized or otherwise institutionalized."³¹ He uses two cases to support his claims. Both are variations of the so-called "ticking-time-bomb" scenarios. The case on which I will focus involves a terrorist group who has planted a small nuclear device in a big city. Miller sets forth several criteria that must be met in order to justify torture. I take it that he means these criteria to be something like those reasonably believed to be necessary in fact to warrant the use of torture. They are as follows:

1. The authorities must reasonably believe that torturing the thief/terrorist will probably save an innocent life or many lives;
2. The authorities know there is no other way to save the life/lives;
3. The threat to life is imminent;
4. The victims are innocent—"the terrorist has no good, let alone decisive justificatory moral reason for murdering them; the perpetrator is known not to be innocent.

Focusing on the terrorist, he draws out the following two unique aspects of such a case. The terrorist, he says, is "forcing the police to choose between two evils, namely torturing the terrorist or allowing thousands of lives to be lost."³² Additionally, the terrorist is "in the process of completing his (jointly undertaken) action of murdering thousands of innocent people."³³ In doing so, by refusing to disclose the location of the nuclear device, the terrorist is "preventing the police from preventing him from completing his (joint) action of murdering thousands of innocent people."³⁴ Miller argues that these circumstances place the terrorist in a unique position, different from a person who "just so happens" to know the location of the nuclear device. The terrorist, Miller says, "is more akin to someone in the process of murdering an innocent person, and refusing to refrain from doing so."³⁵ Framing it this way, Miller seems to be saying that, given the scenario he describes, torture is not merely justified; it is the moral duty of those in authority to torture the terrorist.

Miller initially makes the claim that "torture is morally justified in some extreme emergencies."³⁶ But as he makes his argument, he seems to end up making the stronger claim that when certain conditions obtain, torture is *required* by morality. The authorities are to treat the

²⁸ CAT, Article 2, para. 2. http://www.unhchr.ch/html/menu3/b/h_cat39.htm (last accessed June 10, 2009).

²⁹ Note that Miller's scenario involves the police, which add rights and correlative duties in addition to the natural rights and correlative duties on which I am focusing. For my purposes, this will make the difference between whether the torture is justified or required.

³⁰ Miller, 187.

³¹ Miller, 179.

³² Miller, 184. I prefer to think of this as a choice between two prima facie wrongs, rather than two evils.

³³ Miller, 184.

³⁴ Miller, 184.

³⁵ Miller, 184.

³⁶ Miller, 179.

terrorist in the same manner as they would treat a person “caught in the act” of physically attacking another person—forceful intervention is their *duty*.

Re-Casting the Ticking Time Bomb

Broadly speaking, I think the ticking time bomb scenario tends to get used more as an excuse to “do what needs to be done,” an excuse used often by the likes of Jack Bauer on the sensational Fox Television series *24*. I do not think Miller’s careful analysis encourages this tendency. And though I think Miller’s account has some problems, his casting is a move in the right direction. Building on Miller’s discussion, I will propose a re-cast of the ticking time bomb scenario such that it rules out any easy consequentialist, anything-goes-so-long-as-the-situation-is-dire-enough reasoning.

Terrorist as Caught in the Act

Recall that Miller compares the captured terrorist to one caught in the act of murdering an innocent person. Let’s say a terrorist initiates the time bomb and has the means to stop it and is caught shortly after initiating it. Could one reasonably frame this as Miller suggests? If one really caught a terrorist who had just activated a nuclear device, is this situation like that of catching a murderer in the act? Consider a man attacking a person in an alley. The man is beating the person with a pipe. One blow of the pipe will not kill the victim, but, if given enough time, some blow will be fatal. A policeman happens upon the incident and calls for the man to stop. Despite the policeman’s repeated verbal efforts, he continues with the beating. The policeman takes his baton and begins to beat on the assailant. The assailant seems undeterred at first, so the policeman continues to swing away. Finally, the policeman catches the assailant on the chin with his baton and knocks the man unconscious. The victim is hurt, but alive. The policeman saved the victim’s life. Did his beating the assailant with the baton amount to torture? It does not seem so. I suggest few would consider the beating to be unjustified legally or morally in this case. In fact, most would fault the police officer morally if she *failed* to stop the murder-in-progress, even if the force required had been fatal. Yet, again, not only does it not seem to amount to torture, it seems to be what is morally *required* in the situation.

I find this reframing of the ticking-time bomb as a caught-in-the-act scenario attractive. Nevertheless, I think it fails on three important counts. First, when the terrorist is taken into custody, he becomes the helpless subject of the authorities. The murderer, caught in the act, cannot in principle be both in the act and in custody at the same time.³⁷ Once in custody, the actions permitted are quite different from those one might use while “in pursuit.” More importantly, however, the terrorist who is caught in the act lacks the causal connection to the time bomb that the murderer caught in the act has to his victim.³⁸ When I refer to the terrorist caught in the act, I mean he has “started the clock” and is some distance from the bomb, not that he is holding the yellow and the red wires and about to put them in contact. Stopping the bomb requires him to take further action, namely to stop the countdown thereby preventing the explosion. The murderer caught in the act needs only to cease what he is doing. Use of whatever force is necessary to stop him from

³⁷ By ‘custody’ here, I mean physically restrained (e.g. handcuffed and detained in the back of a police car). Certainly a person in custody (i.e. in prison) could commit a murder while in custody as surely happens with some frequency. Thanks to Jim Cargile for pointing out this possibility.

³⁸ Sussman proposes a caught-in-the-act analogy of his own. In his scenario, “the police confront a very obese man who is trying to suffocate another by sitting on his chest. Like the terrorist, the fat man is defenseless before the police [...] the police lack the strength to shift him off his victim [...] it seems like the police might be well justified in making the fat man or twisting his arm [...] The terrorist relies on a bomb’s mechanism to accomplish his goal, the fat man on his weight, and it is hard to see how this difference of method could be of any great moral significance.” The “great moral significance” seems to me to lie precisely in the causal connection between the assailant and his victims. If the police mace the man in order to get him off the victim, the catastrophic event in progress *will cease*. If the police mace the terrorist or beat him, the catastrophic event in progress *will not cease*. Further action is required (e.g. disarming the bomb, disclosing the location, evacuating the area, etc.). Sussman, 16-17.

beating the victim seems to have a very high probability of saving the victim's life. Use of force on the terrorist does not seem to as high a probability. It is possible that torturing the terrorist would coerce him to stop the countdown or tell the location of the bomb, but use of torture on the terrorist does not come with the same high probability of the stopping of the bomb. In fact, it may lead the terrorist to a greater resolve to see his plot through. In the case of the murderer, killing the murderer caught in the act would more likely ensure no further harm to the victim. But in the case of the terrorist, killing him would likely ensure that his plot succeeds, assuming the device itself did not malfunction. So while recasting the ticking time bomb scenario into a caught-in-the-act scenario seems attractive at first, they are simply different scenarios and cannot be made to be genuinely analogous for at least the reasons I have given. Finally, if this recasting were to hold, the use force used on the terrorist would no longer be morally equivalent to torture. Rather, it would be morally identical to the murderer caught beating the victim. As such, the use of force on the terrorist, then, would not be any more controversial than in the case of the murderer. I do not think this particular recasting holds, but I think there is yet another way to recast the ticking-time-bomb that may warrant the use of torture.

When Rights Conflict With One Another

A more helpful reframe of the ticking time bomb scenario sees the fundamental conflict in terms of rights. If one holds that a person, qua human being, has a right not to be tortured, would not one hold that a person, qua human being, also has a right not to be blown up by a terrorist bomb? One might even think that a right not to be tortured entails a right not to be murdered. I remain neutral on this for now. But it would be odd to argue that a person has a right not to be tortured but does not have a right not to be murdered. Whereas, most of the ticking time bomb cases are framed in terms that lend themselves to utilitarian conclusions (e.g. if we torture this one person, we will save thousands of citizens), I want to reframe the scenario so as to avoid calculated, consequentialist answers. The issue at hand is not about calculating lives lost and weighing it against morality. Neither is it about doing what is "necessary" for the greater good. The question is how to arbitrate a case where someone's natural right not to be murdered (and legal right to be protected) competes with another's natural right not to be tortured? From the perspective of the deliberator in this case, the conflict is actually between a *negative duty* (i.e. "do not torture") that correlates to the right not to be tortured and a *positive duty* (i.e. "stop someone from murdering another") that correlates to preventing the violation of someone else's right not to be murdered.³⁹ It seems to me that most of the literature on torture pays insufficient attention to the uniqueness of the duty-bearers in the ticking-time-bomb scenarios. Most scenarios involve some sort of law enforcement official (e.g. police, FBI, CIA) as the deliberating agent. But, in order to highlight the natural rights in question, I need to restrict my analysis, for the moment, to the natural rights and duties of the agents involved. Casting the deliberator as an agent of the State brings with its express legal duties to "protect and serve" contributes new rights and duties to the scenario and thus alters the analysis. Legal and moral duties to "protect and serve" are not the jural correlatives of natural rights not to be murdered and tortured.

Casting the conflict in this way raises a difficulty because according to most rights theorists, we are personally responsible for never violating the basic rights of others, but we are *not* always personally responsible for preventing the violation of the rights of others by third parties. So the deliberator in this case is weighing the direct violation of the natural right of one person against the preventing of the violation of a natural right by another. Other things being equal, it would seem that the direct violation of the natural right of the one would outweigh the prevention of the violation of a natural right of another. While I agree that we are generally not personally responsible for preventing the violation of the rights of others by third parties, it seems that there

³⁹ Thanks to John Simmons for pointing out this important distinction.

are *some* rights, at least some natural rights, which may warrant such a responsibility. Perhaps this is too strong, I will argue for the weaker claim that in some cases, where a basic natural right is *in the process* of being violated, one has a responsibility to taking action in an attempt to stop the natural rights violation in progress. Probably few would consider it their personal responsibility to prevent the violation of another's legal right not to be cheated by a financial institution. I do not think, as private citizens, we have a responsibility, generally speaking, to prevent persons from having their legal rights violated by a person or an institution. On the other hand, I suggest that most would consider it their moral duty to taking action if they happened upon a rape in progress. Taking action could come in many forms (e.g. dialing 9-1-1, physically intervening, etc.), but it seems that a person would be morally culpable for failing to take *some* action. So I think in a case where such a basic natural right (i.e. the right not to be raped) is in the process of being violated, we do have a responsibility to take action. If this is arguably the case for private citizens, surely it is the case for police officers or other agents of the State, who also have the legal duty to "protect and serve" (e.g. FBI, U.S. Secret Service, etc). However, "taking action," at least for a private citizen, does not necessarily entail violating the natural right of the perpetrator not to be tortured. Dialing 9-1-1 does not seem violate anyone's natural rights. So the question, if some sort of action is morally required in a case such as this, is an action that violates the natural rights of the perpetrator justified?

Another question to ask in a case such as the above where a natural right correlates with a duty to intervene is whether that duty could prevail when in conflict with the duty not to harm an innocent third party. If it could be shown that harming an innocent third party was the only way to prevent the rape, would harming the innocent third party be morally justified? In this case there are three parties other than the deliberator: the victim, the perpetrator, and an innocent third party. For the sake of consistency, let us simply add an innocent third party to our ticking-time-bomb case. This person just happened to be in close physical proximity (e.g. buying a newspaper) when the terrorist was apprehended, and the third party was brought in to verify his non-involvement. In this case, for whatever reason, torturing the terrorist will not succeed in stopping the plot. But the terrorist can guarantee that if we torture the innocent third party, the plot will fail. So the question is are we morally justified in torturing the innocent third party in this case? Each party is a human moral agent and possesses the same natural rights in virtue of their humanity. In this case, though, the third party is only contingently involved (i.e. she just happened to be standing nearby). She has no part in the planning or execution of the plot. She is *innocent*. Since all parties bear the same natural rights in this case, the innocence of the third party seems to be the deciding factor. Some rights theorists might argue that the negative duty not to harm (i.e. to violate a person's right not to be harmed) always trumps any weaker positive duties to prevent the rights violations of others. *Ceteris paribus*, this seems correct. I suggest that this is the appropriate way to view even for the ticking-time-bomb where the question is whether or not to torture *an innocent third party*. That is, the violation of an innocent third party's right not to be tortured is not justified.

In contrast, my case invokes consideration only of the perpetrator and the victim. The perpetrator here is the second party and is not innocent. In such a case that does not consider duties arising from law or special relationships, it seems that torture may be justified if certain other conditions are met. So, I might modify Miller's criteria as follows.

1. A natural rights violation is *in progress* (e.g. the plot has been "set in motion" such that it will succeed if not actively stopped)
2. The person whose natural right not to be tortured is the *guilty* perpetrator of the heinous act in progress, and *not* some innocent third party
3. The deliberator must reasonably believe that torturing the terrorist is the only way reasonably expected to succeed in stopping the plot, and he reasonably expects to be successful

4. The threat to life is imminent
5. The deliberator can torture the perpetrator at no significant cost to himself (he will not himself be harmed, though perhaps inconvenienced)

It is important to highlight the point that the violation of the natural right of the victim is *in progress*. Adding the criteria that the rights violation be in progress narrows the space within which torture might be morally justified in such a way that the argument could not be used to justify torture as means of general intelligence gathering, simply seeking “actionable intelligence” (e.g. “Where might the next attack take place?”). Here again, this is not about utility or whether or not some tactic “works” or the “greater good” in any utilitarian sense. It is about a conflict of *prima facie* natural rights with their corresponding duties and the forced decision between two conflicting duties.⁴⁰ Miller hints at this when he describes the situation in terms of the terrorist forcing the police to choose between two evils, torturing the terrorist or allowing his plot to succeed in killing many innocent lives. I am arguing that, if humans have the natural rights I have proposed, then the very same grounding gives rise to different rights that are, in this case, in a kind of conflict. As such, the terrorist is forcing the deliberator to choose between fulfilling his duty not to torture the terrorist, thereby failing to fulfill his duty to prevent the murder of the victim, or vice versa. It seems impossible to fulfill both duties. When cast as a forced choice between either fulfilling the negative duty not to torture the terrorist and the positive duty to prevent the terrorist from murdering the victim, it seems that, in a very limited range of cases, the positive duty might trump the negative duty. But this may be too strong. Let me make only the weaker claim that torturing the perpetrator would be justified in this case when it was the only way to prevent the murder of the victim. I do not think it would be *morally required*, but it would be justified.

Having considered the case involving only ordinary natural rights bearers, let us now turn briefly to the more likely case involving agents of the State. The ordinary natural rights bearers have no duties save those corresponding to natural rights. But when the deliberator is an agent of the State, one with special duties to “serve and protect,” a whole new set of rights and duties become relevant. I know of no actual cases where the deliberator is simply an ordinary moral agent. When the deliberator is an agent of the state, the duties and rights that come under consideration seem sufficiently to tip the balance of rights claims toward the duty to prevent the harm of the victim and toward harming the perpetrator in order to accomplish this. Nonetheless, an agent of the State would not be justified in recruiting an ordinary citizen to conduct the torture. So, when the question involves the torture of the guilty person who is causally connected to the act-in-progress, the guilt and causal connection seem to be the deciding factors in a case involving ordinary moral agents. When the deliberator is an agent of the State, the duties that come with that role seem sufficiently to tip the balance in favor of torturing the perpetrator. In my example case, the deliberator weighs his duty not to torture the terrorist (correlative of the natural right of the terrorist not to be tortured) against his duty to prevent the violation of the victim’s natural right not to be murdered. As an ordinary citizen, the deliberator’s duty not to harm is sufficiently weighted such that he would not be duty bound to torture the perpetrator, though he would be justified should he choose to do so. But when the deliberator is an agent of the state with duties beyond those that correspond to natural rights, it seems to me that the additional duty to “protect and serve” warrants the claim that, in such a case, torturing the perpetrator is the morally best action to take.

Objections

⁴⁰ I do not want to restrict the scenario unnecessarily to the United States. The natural rights aspect of the discussion is State-independent. And I think International Law provisions when it comes to torture and the duty of “authorities” to protect citizens are sufficiently similar so as not to yield wildly different conclusions.

Torture May Be Justified in Theory But Never in Practice

Michael Davis argues for what he calls a “practical moral absoluteness.”⁴¹ Summarizing his argument, Davis says:

Some individual acts of torture *may* be morally justified in some imaginable circumstances (a metaphysical point), but none actually is (the practical point). *In fact*, no act of torture is morally justified (and so no institutionalization of torture that can be). For all practical purposes—and so, for moral agents like us—torture is absolutely morally wrong.⁴²

Davis offers several reasons why our common intuitions about the ticking time bomb scenarios do not warrant our concluding that torture is morally justified. Of note are the following two: the strength and “wide appeal” of an intuition evidence its reliability but are “far from decisive,” and the intuitive “should” amounts to an excuse rather than a moral justification. He illustrates this with the idea, suggested by some, that should a person commit torture in a ticking time bomb scenario, the person would surely receive a suspended sentence when tried. But, as Davis points out, a suspended sentence is not a pronouncement of innocence. It says, rather, “Guilty but excused.”⁴³ A judge who concludes the act in question is morally justifiable “should also find it legally so, creating a new legal exception.”⁴⁴ While I appreciate this point to a degree, the situation lends itself to a different interpretation. It seems plausible that a suspended sentence could be understood as saying, in effect, “guilty *and* not-guilty.” That is, a judge might find a person “guilty” of breaking the law and “*morally* not-guilty” on account of the act being morally justified in the specific case. The judge might nevertheless refrain from “creating a new legal exception” on grounds that such an act, however morally justified, should never be legal, as some have argued.⁴⁵ This seems to me roughly equivalent to a person on whom we might cast the verdict, “legally innocent, but morally guilty.” If one has moral qualms with an interrogator inflicting pain on a detainee so long as it does not rise to the level of that associated with organ failure, as authorized by the Bybee memorandum mentioned above, one might say just this.

More importantly, it seems disingenuous to argue *for* torture in a theoretical scenario, then claim that it is impossible that such a set of conditions could obtain in the actual world. If one cannot say Scenario X *cannot* happen in the actual world, then staking one’s position on the idea that Scenario X would not ever obtain seems dubious. It is hard to see how one could reasonably claim that some extraordinary set of conditions, assuming they do not violate the laws of physics and such, *could not* obtain.

Once One Concedes the Use of Torture, Anything Goes

One difficulty with the alleged justified cases of torture involves the means of infliction. Once one concedes that torture is morally justifiable in certain circumstances on account of a “ticking time bomb” scenario, how does one distinguish between a simple beating, waterboarding, and removing the detainee’s calves with red-hot pincers?⁴⁶ In other words, one might argue that there is

⁴¹ Davis, 170.

⁴² Davis, 170.

⁴³ Davis, 172.

⁴⁴ Davis, 172.

⁴⁵ While Waldron is opposed to torture under all circumstances, he offers detailed argument as to why it ought not to be legalized. One might allow for torture in extreme scenarios and adopt Waldron’s argument with regard to the legal question. See Waldron, Jeremy. “Torture and Positive Law: Jurisprudence for the White House.” *Columbia Law Review*, Vol. 105, No. 6 (Oct., 2005), pp. 1681-1750. Henry Shue seems to argue that even if torture is sometimes justified, it ought to remain illegal. See Shue, Henry. “Torture.” *Philosophy and Public Affairs*, Vol. 7, No. 2 (Winter, 1978), p. 143.

⁴⁶ Luban references Foucault’s description of the torture of the man who assaulted Louis XV. One of the techniques described is tearing the flesh from his “breasts, arms, thighs and calves with red hot pincers.” See Michel Foucault, *Discipline and Punish*, Random House (New York: 1995), p. 3-6.

no principled reason one could give to use one and not the other? Ticking time bomb scenarios are what they are partly because *time* is of the essence. Why use anything less than an extreme technique (e.g. removing a hand with a table saw) when *every second counts*. Fritz Alhoff suggests employing the “minimum trauma necessary.”⁴⁷ I take this to mean the minimum trauma reasonably thought to be necessary in fact to achieve the desired result. One might argue that this is hopelessly vague or that one ought not waste time with “milder” measures. While I agree that it is difficult to see what principle one might use to arbitrate between very harsh techniques in order to meet Alhoff’s “minimum trauma” requirement, I would reply that this is, for better or for worse, the best we have. The choice, it seems, is between total skepticism about whether we could know what is necessary and doing the best we reasonably can with what we have. The latter course is morally messy indeed, but the former cannot but lead to inaction. This points back to the difficulty of giving a tight analytical definition of torture. It seems impossible to give a definition that fully captures torture without being too wide or too narrow. Similarly, it is impossible to define, ahead of time, what amount of trauma, inflicted in what way, would be necessary in any given situation. So, lest we become frozen with indecision, we have to act reasonably according to criteria such as “minimum trauma necessary,” which, however vague, is *not* unintelligible. In terms of rights, we might say that given that we are violating rights by torturing, we ought to limit the extent of the rights-violation, even if, on balance, torturing is justified. We ought to minimize the moral costs of even our on-balance-justified acts. Given that it is arguably a worse rights-violation to permanently injure the perpetrator than to punch him in the arm (even though both violate his rights), it is, presumably, a worse rights-violation to cause greater pain or more permanent harm. “Minimum trauma” on this interpretation becomes “minimized rights-violation.”⁴⁸

Hard Cases Make Bad Law

It is said that hard cases make bad law. I presume that this mantra generally refers to actual, historical hard cases that have been prosecuted. One might further that that hard *non-actual, non-historical* cases make even worse guides for morality. But this confuses what is at issue. I take it that the point of “hard cases make bad law” is something like, it is a bad practice to take the most extreme cases and use them as the source from which to derive the general rules (laws). I agree, and I would say the same of morality. It is not the best practice to take the most difficult moral cases and use them to generate general guidelines for morality. But, in trying to deal with complex theoretical cases of involving torture, I am not trying to derive general guidelines for moral conduct. In fact, if anything, I am taking the general guidelines (e.g. treating others in a way befitting their dignity) and attempting to account for a hard case where the moral guidelines are in competition with one another. The project of making law and public policy is an entirely different project from the attempt to push our moral categories to be sensitive to the most difficult cases. That said, the objection that hard cases make bad law simply does not apply here.

Conclusion

I maintain that human beings, qua human beings, have some natural rights. I have argued that these rights may be grounded in human dignity and are possessed by each human being indiscriminately. As such, even the worst terrorist has dignity and must be treated as such. International Law, the Geneva Convention, and U.S. Code seem to be in complete agreement on *how* persons are to be treated. Some of these documents even couch this further in terms of dignity, though none of them attempt to tell a story that would ground the dignity asserted. A story that grounds natural rights for all human beings necessarily includes terrorists. The difficult question

⁴⁷ Alhoff, Fritz. “Terrorism and Torture,” *The International Journal of Applied Philosophy*, Vol. 17, No. 1, (2003), pp. 105-118.

⁴⁸ Thanks to John Simmons for this helpful clarification of the idea of “minimum trauma.”

regarding torture involves a case where there is a clear conflict of prima facie natural rights. It is difficult to offer a principled answer, though I have suggested that the natural right of a person (or persons) not to be murdered outweighs the natural right of a terrorist not to be tortured when certain conditions are met. As such, I am compelled to affirm that, though it ought not be legalized, torture may, in some very extreme circumstances, be morally justified.

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