

The Moral Justification Against Torture

Amber Edmondson

Abstract

This article aims to highlight the ways in which fear has coloured our usual moral objections to torture resulting in a dangerous rejection of the universal stance against torture and torture methods. The panic induced by the 'ticking bomb' scenario has allowed lawyers, politicians and military officials to undermine international treaties such as the Geneva Convention and has made a mockery of the protection it affords to prisoners of war. By examining the key arguments put forward in favour of torture, we can identify arguments that appear to be a moral justification of torture but on closer inspection reveals more of a side step to international treaty obligations rather than a moral justification. Using virtue, consequentialist and utilitarian moral theory, the pitfalls of the arguments in favour of torture become clear from both a moral and practical perspective. Most relevant here is consequentialist moral theory which is often used to justify torture. However, such reasoning fails to take into account the subsequent consequences flowing from this action including radicalisation of moderates and the moral corruption of those carrying out torture. This paper clearly sets out the modern arguments in favour of torture and enhanced interrogation tactics and highlights why and where they fail. While the current media presents the ticking bomb scenario as a unique threat requiring new and flexible laws, historical responses have been largely unequivocal drawing into question current practices and contemporary justification employed by government administrations and armed forces.

I. Introduction

The 1984 Convention on Torture provides “*no exceptional circumstances whatsoever... may be invoked as a justification for torture*”.¹ Torture is also expressly prohibited under

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 165 UNTS 85 (CAT) art 2.

Third and Fourth Geneva Conventions as well as the UN Universal Declaration of Human Rights. Despite this general acceptance that torture is abhorrent, the consequentialist argument that torture may be justified in certain situations has gained alarming support. The attacks of September 11th and the current climate of fear has led to a shift in the moral stance against torture with the United States taking the lead. Yet the arguments justifying torture are weak, and it is important not to allow our usual moral objections to be silenced by panic. To demonstrate that torture is never morally justified, this paper will explore some of the most common arguments in favour of torture and discuss where and why they fail.

II. Torture as an Efficient Means of Eliciting Information

At present there is a lack of evidence that suggest that harsh interrogation techniques used by intelligence agencies produces reliable information.² Much of the current methodology and procedures employed by the CIA was reverse engineered from the U.S. Department of Defense's Survival, Evasion, Resistance and Escape (SERE) program by psychiatrists James Elmer Mitchell and Bruce Jessen.³ Developed during the Korean War, the SERE program trained U.S. soldiers to endure captivity by enemies who didn't adhere to the Geneva Convention. Moreover, this came as direct result of captured American G.I.s forced to give false confessions on Korean Television.⁴ However, the tactics and rationale employed by Korean captors were never designed to elicit information but rather to break the will of their victims.

² Intelligence Science Board Phase 1 Report. *EDUCING INFORMATION Interrogation: Science and Art Foundations for the Future* (NDIC PRESS 2006)

³ Jane Meyer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (Doubleday Publishing 2008)

⁴ Frank Summers, 'Making Sense of the APA: A History of the Relationship Between Psychology and the Military' (2008) 18 *Psychoanalytic Dialogues: The International Journal of Relational Perspectives*, 614 - 637.

Academics such as Mitchell and Jessen suggest such techniques can work to produce accurate and reliable intel although this is questionable.⁵ Dubious anecdotal evidence has also been glamorized and promoted by popular TV shows such as 24 helping to proliferate the so-called “torture myth”.⁶ Psychologically, this has had an impact on interrogator mentality resulting in more aggressive and extreme techniques.⁷

In actuality there is very little empirical evidence that supports that effectiveness of these techniques. To the contrary, substantial evidence suggests that more conventional techniques are effective.⁸⁻⁹ Indeed, high-level American commanders now suggest that rapport building and treating prisoners with respect and dignity results in better intelligence gathering.¹⁰ However it is extremely difficult to negate the perception of torture as an effective tool, and the discussion surrounding the moral/legal permissibility of this practice should be examined.

III. High Stakes Situations Warrant Torture

The consequentialist argument often utilizes the ticking bomb scenario in which torturing is permitted to save the lives of many. While this situation has never arisen through

⁵ Jeannine Bell, ‘Behind This Mortal Bone: The (In)Effectiveness of Torture’ (2008) 83 *IIJ*, 339.

⁶ Anne Applebaum, ‘The Torture Myth’ *The Washington Post* (Washington, D.C., 12 January 2005) <<http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html>> accessed 8 February 2012

⁷ Philippe Sands, ‘Torture Team: Deception, Cruelty and the Compromise of Law’ *The Guardian* (London, 19 April 2008) <<http://www.guardian.co.uk/world/2008/apr/19/humanrights.interrogationtechniques>> accessed 5 February 2012.

⁸ Summers (n 4), 614 – 637.

⁹ Bell (n 5)

¹⁰ Dexter Filkins, ‘General Says Less Coercion of Captives Yields Better Data’ *The New York Times* (New York, 7 September 2004) <http://www.nytimes.com/2004/09/07/international/middleeast/07detain.html?_r=1> accessed 5 February 2012.

the history of terrorism,¹¹ it serves as a counterpoint for discussion. In reality, it is often unclear whether or not a suspect really has valuable knowledge and the reliability of this evidence can prove to be equally problematic. A striking example was former U.S. Secretary of State Colin Powell's reliance on the confession taken from Ibn al-Sheikh al-Libi in which it was claimed that Iraq supplied both chemical and biological weapons to Al Qaeda.¹² Later al-Libi retracted his statement saying that he did so in order to make the torture stop. This testimony was subsequently used in the preceding month leading up to the invasion of Iraq.¹³ A worrying feature of torture is that confessions produced under coercion or duress may be a result of victims telling their captors what they want to hear.¹⁴

A secondary consequentialist argument also suggests that the good consequences of torturing a suspect outweigh the bad consequences. Yet consequentialists often fail to consider the consequences flowing from the torture:

1. Torture can be seen as casting the torturer as a hypocrite in the eyes of the international community. As the U.S. Senate Foreign Relations Committee noted “[America] cannot denounce torture and waterboarding in other countries and condone it at home”.¹⁵ A secondary argument suggests that this also has a legitimizing effect of allowing other states to justify torture by pointing to ambiguous and

¹¹ Susan Opatow, ‘Moral Exclusion and Torture: The Ticking Bomb Scenario and the Slippery Ethical Slope’ (2007) 13(4) *Peace and Conflict: Journal of Peace Psychology* 457 - 461.

¹² Matt Smith, ‘Al Qaeda figure who provided link to Iraq reportedly dead in Libya’ *CNN International* (Washington, D.C., 1 May 2009) <<http://edition.cnn.com/2009/WORLD/africa/05/12/libya.al.qaeda.prisoner/>> accessed 3 February 2012

¹³ Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (OUP 1985), 329.

¹⁴ Henry Carey, *Reaping What You Sow: A Comparative Examination of Torture Reform in The United States, France, Argentina, and Israel* (Praeger 2012), 201.

¹⁵ U.S. Congress Senate Committee on Foreign Relations, *Implementing Smart Power: Setting an Agenda for National Security Reform* (U.S. G.P.O 2008)

contradictory behaviour.¹⁶ Speaking more politically, if the U.S. wants to remain a “soft power” and a moral role model it cannot be seen as engaging in abhorrent activities while simultaneously demonizing other states for similar crimes.

2. There is evidence that torture “*supports terrorist recruitment by radicalizing populations*”.¹⁷ Two of the most influential anti-west speakers of the 20th century Sayyid Qutb and Ayman al-Zawahiri were both tortured at the hands of the Egyptian authorities, early on in their political careers. The experiences of these men created a fierce ideological hatred for the west, which many believe fuelled the attacks of 9/11.¹⁸ The desire for retribution and anti-west politics further became heightened and intensified leading to the radicalization of Islamic doctrine allowing for the creation of organisations such as Al Qaeda. Experiences from Northern Ireland also highlight consequences associated with heavy handed tactics. With regards to internment, Hamill notes; “*It has, in fact, increased terrorist activity, perhaps boosted IRA recruitment, polarised further the protestant and catholic communities and reduced the ranks of the much needed catholic moderates*”¹⁹

These are all vital considerations that must be considered unless one is also willing to kill suspects after they have been

¹⁶Ian Munro, ‘US a ‘negative role model’ for global torture’ *The Age* (New York, 2007) <<http://www.theage.com.au/news/world/us-a-negative-rolemodel-for-global-torture/2007/10/30/1193618884836.html> accessed 31 January 2012

¹⁷ James I. Walsh and James A. Piazza, ‘Why Respecting Physical Integrity Rights Reduces Terrorism’ (2010) 43(5) *Comparative Political Studies*, 551–57.

¹⁸ Martin A. Lee ‘The CIA and The Muslim Brotherhood: How the CIA set the stage for September 11’^{18p} *RAZOR Magazine* (2004) <<http://ce399fascism.wordpress.com/2011/02/09/the-cia-and-the-muslim-brotherhood-how-the-cia-set-the-stage-for-september-11-martin-a-lee-razor-magazine-2004/>> 4 February 2012

¹⁹ Desmond Hamill, *Pig in the middle: The Army in Northern Ireland, 1969-84* (Methuen Publishing 1985)

tortured (and possibly their torturers too). Thus, even if the positive consequences of torture slightly outweigh the potentially grave consequences, this imbalance remains insufficient to overcome normal deontological objections to such inhumane activities. Therefore, the consequentialist argument justifying torture in some circumstances is weak. Further, the use of torture violates virtue theory as no honour or gallantry is involved in the infliction of pain on one with no means to defend himself.

IV. Torture vs. Enhanced Interrogation Techniques

The Convention Against Torture, defines torture as “*the intentional infliction of severe pain and suffering, whether physical or mental*”.²⁰ Enhanced interrogation techniques however do not meet this definition and can possibly be morally justified.

Referring to the case of *Republic of Ireland v. United Kingdom*,²¹ several points can be drawn:

1. It was argued that severe physical pain meant the pain level that was associated with death, major organ failure, or the serious and permanent impairment of a significant bodily function. The European Court of Human Rights said that techniques such as wall standing, hooding and sleep deprivation did amount to inhumane and degrading treatment but did not amount to torture.²²
2. Severe mental pain meant prolonged mental harm and result from either (a) the intentional infliction of severe physical pain; (b) the administration or threatened administration of drugs or mind altering substances; (c) the threat of imminent death; or (d) the threat that some other person will be subjected to imminent death, severe physical pain, or mind-altering drugs.

²⁰ 165 UNTS 85 (CAT) art 1.

²¹ *Republic of Ireland v. United Kingdom* (1979-80) 2 EHRR 25.

²² *Ibid* para, 167.

3. Although The Convention Against Torture along with the Geneva Convention and Additional Protocol 1 prohibits cruel, inhuman and degrading treatment which do not constitute torture, it was argued that the convention merely asked states to refrain from these techniques rather than prohibiting them.

V. U.S. Legal Defence to Torture

The so-called “Bybee Memos” (drafted by U.S. Deputy Assistant Attorney General John Yoo and endorsed by U.S. Deputy Attorney General Jay Bybee), also provided for a legal defence for torture and breach of fundamental rights. The rationale and justification has been described as “*a nice strategy for getting away with murder, torture, and treason*”.²³ The tone of the memo is also particularly problematic as it does not give adequate regard to the U.S. moral obligation to international treaties. Furthermore, the memorandum claimed that even if such acts did constitute torture contravening U.S.C. §2340A (the applicable statute prohibiting torture in the U.S.), this would not be binding on the President while acting as Commander-in-Chief. The wide remit of this power subsequently allowed for the authorized torture of suspects regardless of U.S. law or its treaty obligation.

As a result of significant public outcry, the Bybee Memos was replaced by a revised opinion by Daniel Levin, Acting Assistant Attorney General. Although this subsequent memo retracted the claim that the President could not violate U.S. law and treaty obligations, it was argued that the federal prohibition did not apply as the acts themselves did not constitute torture.

²³ John Yoo’s Torture Memos (*Freedom of Thought*)
<http://freedomofthought.org/blog/?page_id=9> accessed 3 February 2012

i. Waterboarding

One particularly controversial technique is the use of waterboarding which has been described as simulating the feeling of drowning.²⁴ Both its historical precedence and status has been well documented:

1. Invented during the Spanish inquisition, waterboarding is classified as torture from many authorities such as human rights activists,²⁵ military judges,²⁶ intelligence officials.²⁷
2. U.S. soldiers were court-martialled for using the technique on Filipino soldiers in the 1898 Spanish-American war²⁸ and Japanese soldiers were convicted of war crimes after water boarding U.S. soldiers after World War Two.²⁹
3. Water boarding amounts to a mock execution which is prohibited under the Uniform Code of Military Justice³⁰
4. The U.S. prosecuted this activity as a war crime in Norway in 1948³¹

²⁴ Brian Ross & Richard Esposito, 'CIA's Harsh Interrogation Techniques Described' *ABC News* (New York 18 November 2005) <<http://abcnews.go.com/WNT/Investigation/story?id=1322866>> accessed 5 February 2012

²⁵ 'CIA Whitewashing Torture- Statements by Goss Contradict U.S. Law and Practice' *Human Rights Watch*, 21 November 2005) <<http://www.hrw.org/en/news/2005/11/20/cia-whitewashing-torture>> accessed 6 February 2012.

²⁶ Nicole Bell, 'Retired JAGs Send Letter To Leahy: 'Waterboarding is inhumane, it is torture, and it is illegal' (*Crooks and Liars* 2 November 2007) <<http://www.crooksandliars.com/2007/11/03/retired-jags-send-letter-to-leahy-waterboarding-is-inhumane-it-is-torture-and-it-is-illegal/>> accessed 6 February 2012

²⁷ Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program* (St. Martin's Press 2006)

²⁸ McCain: Japanese Hanged For Waterboarding *CBS News* (New York 18 June 2009) <<http://www.cbsnews.com/stories/2007/11/29/politics/main3554687.shtml>> accessed 3 February 2012.

²⁹ Walter Pincus, 'Waterboarding Historically Controversial' *The Washington Post* (Washington, D.C., 5 October 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/10/04/AR2006100402005.html>> accessed February 6, 2012

³⁰ UCMJ, 64 Stat. 109, 10 U.S.C. Chapter 47.

³¹ Andrew Sullivan, 'Verschärfte Vernehmung' *The Atlantic* (Washington, D.C., 29 May 2007) <<http://www.theatlantic.com/daily-dish/archive/2007/05/-versch-auml-rfte-vernehmung/228158/>> accessed 5 February 2012.

While these precedents were never referred to in the Bybee or Levin Memorandums, the current American Administration under Present Barack Obama has classed the current practice as constituting torture.³²

The line between torture and interrogation is one that can be easily blurred. The use of linguistic terms “enhanced interrogation techniques” also draws similar comparisons toward the Nazi euphemism "*Verschärfte Vernehmung*" (which translates to “*enhanced or intensified interrogation*”³³). Indeed, the high number of suicide attempts in Guantanamo Bay³⁴ and deaths such as Abdul Wali, and Dilawar³⁵ speak volumes about the seriousness of these techniques. Still, a clear definition is vital in ensuring states comply with the prohibition of torture and the claim that these acts do not technically constitute torture is insufficient.

VI. Extraordinary Rendition as an Alternative to Torture

In this situation, states transfer suspects to other countries that may employ torture or other illegal methods, thus avoiding moral blame. Such acts can be deemed to run afoul of certain international laws including Article 3 of the 1984

³² Ewen MacAskill, ‘Obama: I believe waterboarding was torture, and it was a mistake’ *The Guardian* (London 30 April 2009) <<http://www.guardian.co.uk/world/2009/apr/30/obama-waterboarding-mistake>> accessed 4 February 2012.

³³ Andrew Sullivan, ‘Bush Torturers Follow Where The Nazis Led’ *The Times* (London, 10 July 2007) <http://www.timesonline.co.uk/tol/comment/columnists/andrew_sullivan/article2602564.ece> accessed 4 February 2012.

³⁴ Pauline Jelinek, ‘Five more suicide attempts at Guantanamo’ *The Guardian* (London, 7 February 2003) <<http://www.guardian.co.uk/world/2003/feb/07/usa.guantanamo>> accessed 5 February 2012.

³⁵ Steven H. Miles, *Oath Betrayed: America’s Torture Doctors* (University of California Press 2006)

Convention Against Torture³⁶ and the Third Geneva Convention Art 12³⁷ (when concerning POWs).

Extraordinary rendition allows governments to publicly condemn torture whilst secretly making arrangements for terror suspects to be tortured elsewhere. One example is Canadian citizen Maher Arar who was deported to Syria and tortured for 10 months, before being released when the Syrian authorities became convinced he had no ties to Al Qaeda³⁸. The UK has also allowed its territory to be used for these kinds of transfers,³⁹ raising significant questions on the ability of states to use extraordinary rendition as a form of “torture by proxy”. Morally it can be seen there is little difference between the two acts.

VII. Torture vs. Capital Punishment

An additional argument follows that since death is more serious than torture, there should be some instances where torture is permissible in the same way as capital punishment. However, it is not instantly clear if death is more serious than torture.⁴⁰ However in this sense torture is not a punishment, but rather a method of interrogation. Torture merely treats the suspect as a mere means, unless the suspect deserves to be punished regardless of the information he possesses.

³⁶ Which provides that “no state shall, expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

³⁷ Which prohibits transfer of POWs to states that are not parties to the Convention or are unwilling or unable to comply with its provisions.

³⁸ Andrew Rosenthal, ‘Rendition, Torture and Accountability (editorial)’ *The New York Times* (New York, 19 November 2007) <http://www.nytimes.com/2007/11/19/opinion/19mon3.html> accessed 6 February 2012

³⁹ Mark Seddon, ‘Extraordinary rendition: just how much did David Miliband know?’ *The Guardian* (London, 1 September 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/sep/01/extraordinary-rendition-david-miliband> accessed 6 February 2012

⁴⁰ Andrew Buncombe, ‘Guantanamo Bay prisoner ‘tried to commit suicide a dozen times’ *The Independent* (London, 27 April 2006) <http://www.independent.co.uk/news/world/americas/guantanamo-bay-prisoner-tried-to-commit-suicide-a-dozen-times-475757.html> accessed 6 February 2012

Torture in this regard cannot be seen as analogous to capital punishment.

VIII. Torture Warrants to Justify Torture

Another argument follows that torture may be justified if we require the application and issuance of a torture warrant. This ensures that torture is only used in the most extreme circumstances. Warrants in this situation would only be issued where the danger is serious and imminent and there is a very strong reason to believe a suspect has information that could avert a large disaster (similar to the ticking bomb scenario).

However this does not answer the question of whether torture can be morally justified, but would mean that torture *can* be morally justified in the most extreme cases, and used *only* in these cases. Nevertheless, some academics believe that the availability of a warrant for the use of non-lethal torture would actually decrease the illegitimate use of force against suspects.⁴¹ If we look to the figures for wiretap warrants for suspected terrorists we can see that the requirement of a warrant may not necessarily limit torture. In 2008, the government made 2,082 applications for wiretap warrants of which 2,083 were approved.⁴² In 2007, only 2 applications were denied and 86 modified.⁴³ Arguably while the consequences of wrongly granting a warrant to wiretap is less severe than wrongly granting a warrant for torture, the benefits being claimed are also more considerable. Here, there is a very real risk that those responsible for issuing such warrants would be pressurized in granting them for fear of public outrage in the event of catastrophe materializing.

⁴¹ Alan M Dershowitz, 'The case for torture warrants' (*Alan M. Dershowitz*, 2002) <<http://www.alandershowitz.com/publications/docs/torturewarrants.html>> accessed 6 February 2012

⁴² *Federation for American Scientists* (Washington, D.C., 14 May 2009) <http://www.fas.org/irp/agency/doj/fisa/2008rept.pdf> <accessed 7 February 2012>

⁴³ *Federation for American Scientists* (Washington, D.C., 30 April 2008) <http://www.fas.org/irp/agency/doj/fisa/2007rept.pdf> <accessed 7 February 2012>

Deference to conservative judgment might cause warrant to be granted to ensure that such information isn't being withheld.

IX. Conclusion

In an age of terror, the once immovable and universal stance against torture finds itself on shaky grounds. It has become all too easy for academics, politicians and lawyers to justify torture by pointing to an unrealistic scenario which fails to comprehend all true consequences of engaging in torture. More dangerous is our willingness to turn a blind eye, extraditing suspects to be tortured in a bid to save our morality. The use of complex language and legal analysis to avoid the duty to comply with international law, has no place in a moral discussion of torture. Nevertheless, the fact remains that the intentional infliction of suffering in such a cruel and degrading manner is to be condemned worldwide and is to be treated as an international crime against humanity.⁴⁴ This exists notwithstanding any evidence that suggests that this will result in life saving information. Torture violates deontological, utilitarian and virtue theory and despite its common use, when properly considered, torture violates consequentialist theory. There is no situation where torture can be morally justified, ticking bomb or no ticking bomb.

⁴⁴ 147 of 192 UN member states are parties to the convention against torture.

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