

The Fallacy of Torture and the Ticking Bomb Scenario

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Abstract: *Debates about torture never get old. It does not take a rocket scientist to comprehend its harms. And yet, it is (also) not surprising to learn that torture is widely practiced throughout the world despite legal formalists have moved heaven and earth to put an end to this practice. It is reported that 79 out of 155 countries have adopted the UN Convention Against Torture have practiced certain forms of torture (and still). The prevalence of this phenomenon is partially owned to the reason that it is extremely difficult to grasp an exact definition of torture, even though a lot of scholarly effort has been channeled. To that end, this paper will shed light on the dynamics of torture. In examining the universal definition of this phenomenon, this paper will point out that any attempt to wrap words around torture can be problematized. The definition will be broken down to have a see-through of all internal elements of torture. This line of analysis is insightful to probe the unique wrongness of this phenomenon. Torture is wrong at all levels. It violates personal autonomy and societal trust, and—what inherently makes it crowd out from other heinous crimes is that— it destroys the victim’s agency. This wrongness cannot be morally justifiable under any circumstances, even in a Ticking Bomb Scenario (TBS). The TBS presents the justification for an urgent use of torture for a greater good, however, it is based on a utilitarian fallacy that under strained pressure the tortured would talk. In fact, it is not the victim but torture talking. If allowed, torture is like an epidemic spreading widely. Certainly, we do not want to live in a society constructed by torture.*

Keywords: Torture; Moral philosophy; Personal autonomy; Societal trust; Destruction of agency.

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1. Introduction

Debates about torture never get old. One does not need to be a rocket scientist to know that torture is bad. There is nothing surprising to learn a fact that torture is committed throughout the world despite legal formalists have moved heaven and earth to prohibit its use. It is claimed that 79 out of 155 countries have adopted the UN Convention Against Torture (CAT), are violating it.¹ This practice partially comes from the fact that it is extremely difficult to grasp an exact definition of torture. First, this paper will delve into the question of the meaning of torture. By giving the universal definition of this practice, I will point out that not only this one but any attempt to wrap up torture into words can be problematized. Afterwards, the definition is broken down to have a see-through of all elements inside torture for a better understanding of this practice. This breakdown analysis happens to be helpful to examine the moral distinctiveness of torture, and insightful to catch the distinction of the phenomenon.

Section three deals with the unique wrongness of torture. I will follow Wisniewski's chain of thought arguing that pains, violations of trust and autonomy contribute largely to the core wrongness of torture, however, fail to capture the evil nature of this practice. What makes torture crowd out from other heinous crimes is its aim to destroy victim's agency. This wrongness cannot be morally justifiable under any circumstances, even in the Ticking Bomb Scenario (TBS). Finally, concluding remarks will be provided to recap all main points addressed.

2. Torture and its unique wrongness

2.1. *The meaning of torture*

The line between torture, coercion, and manipulation, or whether such techniques as sleep and sensory deprivation, isolation, or prolonged questioning should count as forms of torture, is seemingly very blurry.² To capture the notion of torture, it must be premised upon the evil nature of such practice. In addition, for a better understanding of torture, I shall draw a line to show the distinction between this practice and other ill-treatment.

Article 1 of the CAT proudly reads:

"... 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

¹ Lauren Glenmere, *Torture, Asian and Global Perspectives*, Volume 03, No. 06, Dec 2014, p. 28.

² David Sussman, *What's Wrong With Torture?*, *Philosophy and Public Affairs* 33, No. 1, 2005, p. 1.

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.”

Accordingly, torture contains four elements: (i) severity of pain or suffering; (ii) inflicted with intent; (iii) for a purpose; and (iv) the involvement of, or acquiescence by, a state official.³ To have a full and better understanding of torture, I will break down each element to show that to amount to torture, all those four elements must be met at the same time. The breakdown analysis happens to be very helpful and insightful for the next section where I examine the moral aspect of torture.

First of all, pain is not necessarily a bad thing to have. As a part of evolution, sometimes undergoing through pain is beneficial and positive for a human being, for example childbirth giving, tooth removal. Furthermore, the level of pain of someone varies without any fixed standards for assessment. As a result, any attempt to quantify how much pain would amount to torture, appears unrealistic and implausible. Secondly, infliction of pain or other distress is committed intentionally and purposefully. While one might accidentally kill, one cannot accidentally torture. I might intentionally inflict a pain on someone for example punching a guy in the face, however, it is not considered as torture. In addition, it is required that torturers and victims are placed in a distinctive kind of social setting and relationship to one another.⁴ Consent of victims plays a vital part in this case to justify the morality of the act. Autonomy of victims is violated. The victim of torture is powerless to shield herself and unable to put up any real moral or legal resistance to the perpetrator.

Thirdly, the perpetrator uses torture as a tool to achieve his aim. His purpose might be to satisfy his pleasure, terrorize or punish victims, impel them to make a confession or gather intelligence. Last but not least, all the acts are committed by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity.

In jurisprudence, torture might be confused with other forms of ill treatment. The European Court of Human Rights tends to consider torture as distinct in two ways. First, the Court recognized that deliberate inhuman treatment causes very serious and cruel suffering.⁵ In addition, the Court endorses the CAT's approach to torture by stressing the purposive element of torture.⁶ However, it is claimed that the Court still seemingly relies

³ M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p.28.

⁴ D. Sussman, Fn 2, p. 6.

⁵ Ireland v. United Kingdom, 1978, para. 167.

⁶ Selmouni v. France, 1999, para. 98; Kismir v. Turkey, 2005, para. 129.

on the severity of suffering as the decisive criterion and this approach obfuscates the differentiation.⁷

In contrast, it is argued that purpose ought to be distinguishing element, as follows:

*“The decisive criteria for distinguishing torture from [cruel, inhuman and degrading treatment or punishment] may best be understood to be the purpose of the conduct and the powerlessness of the victim rather than the intensity of the pain or suffering inflicted, as argued by the European Court of Human Rights and many scholars.”*⁸

The emphasis on powerlessness points out that subjection to torture presupposes in a circumstance the victim is under a total control of torturer.⁹ Torture constitutes a calibrated level of suffering beyond that of any forms of ill treatment. Furthermore, pain or suffering matters but the way and context in which such pain or suffering endured is the key factor. Hence the purposive element approach to torture gives a better and more accurate understanding of this phenomenon.

The CAT’s definition appears to capture all the proponents of torture, however, still tags along a number of loopholes. Firstly, it emphasizes the involvement of states, but puts aside the accountability of individuals committing torture. Secondly, it is contended that from historical and philosophical viewpoint, any attempt to define torture seemingly fails to address it adequately.¹⁰ Torture has been practiced in too many divergent ways, and in too many wildly different circumstances. In other words, today torture is far different and subtle from ancient version due to a number of changes, for example the advancement of technology. Besides, for the philosopher, a failure to achieve the account that ‘covers all cases of what is to be analyzed is traditionally the gold standard of explanation’, is a failure to provide any worthwhile account at all.¹¹

Torture has gone all the way from barbarous acts to more sophisticating methods to terrorize and humiliate its victims for a wide range of aims as stated above. An evident example is the extensive practice of torture under Bush administration. In a memo by the Office of Legal Counsel, it is claimed that waterboarding does not inflict any severe physical pain or suffering on the subject, but ‘simply is a controlled acute episode, lacking connotation of a protracted period of time generally given to suffering.’¹² Notably, waterboarding is used repeatedly at any time for a long period. It is unarguable that this

⁷ M. Farrell, *The Prohibition of Torture in Exceptional Circumstances*, p. 4.

⁸ UNCHR, ‘Report of the Special Rapporteur: Manfred Nowak’, para. 39.

⁹ UNCHR, *Ibid.*, para 39; D. Sussman, *Defining Torture*, 37 Case Western Reserve Journal of International Law 225, 2006, 227.

¹⁰ J. Wisnewski, *Understanding Torture*, p. 5.

¹¹ *Ibid.*

¹² Memoranda of The U.S. Office of Legal Counsel, Aug 2002.

practice evidently causes the psychological trauma for detainees who were its victims.¹³ This kind of trauma tends to relive the assault in victims' minds and make them suffering later on even when waterboarding ends.

This example is to reiterate that our current understanding of torture is very resilient and plastic. Emphasis on one element of torture may lead to misconception of such practice, for example pain should not and cannot be understood in a uniform manner. Otherwise, it creates another loopholes for torture to grow. "In the moral and sentimental universe, nothing may be torture, and, with a slight shift of perspective, everything may be torture."¹⁴ The metaphor indicates that torture evolves constantly in different forms and no single definition can cover all of its evilness and wrongness.

2.2. The immoral aspect of torture

Then what is morally special about torture? Before answering this question, one needs to understand the nature of this practice. Torture definitely is morally incompatible with any civilized values. Hereinafter I shall argue this statement holds the same value even in the Ticking Bomb Scenario (TBS).

Studying about pain as pointed out in the section one shows us that pain is not always a bad thing. Pain is wrong only when it is made into suffering. Deliberate infliction of suffering and pain is tremendously abhorrent to most people's perception, especially to liberals.¹⁵ The aim of torture is to strip away from its victims all the qualities of human dignity that liberalism prizes. It isolates, terrorizes and humiliates its victims. It gives them the ultimate fear that they are not only powerless to resist but also must scream and beg for a mercy. The victims are impelled in the fastest and most urgent way possible to get away from the pain they are suffering by satisfying torturers' demands even if they have no idea what it is all about. This kind of acts reflects cruelty and tyranny in microcosm that liberals rank first among vices.¹⁶

There must be something morally special about torture that distinguishes it from all other kinds of violence and cruelty. The wrongness of torture cannot be fully grasped by understanding it as just an extreme instance of these more general moral categories.¹⁷ Torture is seen more morally offensive than other ways of inflicting physical or psychological pain. As distinguished above, torture is distinct from other forms of ill treatment. Hereinafter, I follow Wisnewski's chain of thought on the wrongness of torture by exploring how torture constitutes violations of trust, autonomy and agency.

¹³ J. Wisnewski, Fn 10, p. 45.

¹⁴ J. Wisnewski, Fn 10, p. 46.

¹⁵ D. Luban, *Liberalism, Torture, And The Ticking Bomb*, p. 1425-1461.

¹⁶ *Ibid.*, p. 1438.

¹⁷ D. Sussman, Fn 2, p. 3.

2.2.1. *Violation of trust*

Torture results in the rise of social mistrust in States using it. In a civilized society, it is state responsibility to protect dignity of persons, not to violate it. The trust of torture victim is 'utterly annihilated'. In return, the state uses torture loses moral standing in international community. Then the mistrust is like an epidemic disease spread widely to those who do not undergo torture. They see a state of powerlessness does nothing but torture his citizens, violates his own rule of law principles and allows impunity to abhorrent actors that must be punished.

This account tries to explain the wrongness of torture by referring to its negative consequences for those other than the person tortured. However, I do not think it can adequately capture the unique wrongness of torture since states are expected to do the right not the wrong thing and prohibition torture is only a part of it. The mistrust of a whole civilized society is inevitable if states do what they are not allowed to do such as genocide. In my opinion, this account should be seen as a consequence of torture, not the root cause makes torture unique.

2.2.1. *Violation of autonomy*

Torture possesses the coercive nature, thus violates autonomy of its victims which is regarded 'intrinsically valuable'. On this point, there is a need to continue distinguishing torture's wrongness from other acts like coercion and brainwashing.

David Sussman conveys a point that torture 'aims to manipulate its victims through their own responses, as agents, to felt experience of their affects and emotions in a context of dependence, vulnerability, and disorientation.'¹⁸ Meanwhile, coercion exploits the agent's rational responses to the cognitive content of these feelings. The victims' acts will be influenced through their own appreciation of their reasons for action. Coercion involves 'too direct an appeal to its victim's rationality to count as torture', requires the autonomy of the agent being coerced. Brainwashing, just like the way it is put, attempts to exploit the victim's affects and bodily responses to directly subvert or restructure his rational capacities and commitments. All of beliefs, desires and perceptions of the victim are reshaped at the brainwasher's want.

Torture is believed to exist somewhere between coercion and brainwashing even though they often overlap.¹⁹ Torture often involves coercion. In order to direct its victim, torture puts them in the panic and insecure state of mind and completely lost in understanding of what is being done to him. In torture, victim's feeling becomes his own problem and he struggles to find himself accountable for responding to it. Moreover, torture dismantles the very capacity for rational deliberation.

¹⁸ D. Sussman, Fn 2, p. 8.

¹⁹ D. Sussman, Fn 2, p. 9

Violation of autonomy, even though is often intrinsically wrong, can be sometimes considered necessary and morally justified in certain circumstances, for example legitimate defense. Therefore, this account contributes largely to the wrongness of torture, somehow still does not catch the uniqueness that only this phenomenon possesses. After all, only humanity and agency of the person matter.

2.2.2. Destruction of agency

Let me once again repeat the plasticity of torture that it can be nothing but also everything. Torture is not easily detectable since bodily effects are not always the same. Employing pain inflictions is not always necessary to create the fear and terrifying obsession, but the use of sleep deprivation, solitary confinement, phobias, sexual humiliation, forced nudity, and environmental manipulations may lead to a similar outcome. The agency of the person is destroyed and grinded under torture's feet intentionally. It is the aim of all forms of torture: breaking the agent. This is the core wrongness of torture.

The singular goal of torture is "to destroy the integrity of human being in front of them, to isolate him from society, by using different methods of torture that deprive him of his fundamental trust in humanity and make him look crazy in the eyes of society."²⁰ It wipes out the victim's ego, effectively dehumanizes and deconstructs her agency. The victim's trust in everyone around her is destroyed during the process that makes a human inhuman. It makes the victim incapable of directing her own actions, determining the significance of the things that populate the world around her. On this point, it is worth to refer to the point made by David Sussman:

*"Unlike other kinds of unwanted imposition, pain characteristically compromises or undermines the very capacities constitutive of autonomous agency itself. It is almost impossible to reflect, deliberate, or even think straight when one is in agony. When sufficiently intense, pain becomes a person's universe and his entire self, crowding out every other aspect of his mental life. Unlike other harms, pain takes its victim's agency apart 'from the inside,' such that the agent may never be able to reconstitute himself fully."*²¹

It is scientifically proved that torture does leave its mark on its victim's brain.²² After broken down, torture victim loses control over her own autonomy and self-determination sense. Moreover, the persistent suffering does not end there but continues enduring with numerous symptoms on the victim for the rest of her life. Since then, torture

²⁰ Britta Jenkins, *There, Where Words Fail, Tears are the Bridge: Thoughts on Speechlessness in Working with Survivors of Torture*, in *At the Side of Torture Survivors: Treating a Terrible Assault on Human Dignity*, p. 143.

²¹ D. Sussman, Fn 2, p. 14

²² J. Wisnewski, Fn 10, p. 75.

would lead to a permanent condition of very intense emotion and hyper-tension which viciously reproduce pain in victim's mind in an endless circle. The internalization of trauma multiplies the pain the body experiences keeps torturing effect on the victim day by day.

One might argue that killing also destroys victim's agency since it eliminates her capacity to carry out her will. However, torture does it in a very different way: it causes a great harm to its victim and it is just a beginning of a slow descent into death. Oriental has a proverb that roughly translated: making one suffer is worse than killing him since killing is too fast and easy, but suffering is woeful and eroding him everyday until it fully swallows him.

In victim's eye, the whole social world collapses. She struggles to re-integrate into society, and often is incapable of rejoining family life. The victim becomes suspicious about everything and everyone around her. The moment of torture as well as its aftermath always put her in an insecure and fearful state of mind. No matter where she goes, she seemingly carries the pain and suffering along because it is now a part of her past. At any moment, flashback comes and relives the suffering in the course of everyday life, hampers any attempt to seek for a successful treatment. As a result, pursuing any kind of therapy to release herself gradually goes beyond her reach. Hopelessness and powerlessness continues undermining the agency. It isolates and alienated the victim. The notion of civilization and humanity has disappeared since the intense pain has become 'a person's entire universe and his entire self, crowding out every aspect of his mental life.'

3. Torture in the TBS

As clarified clearly above, violations of trust and autonomy contribute largely to the wrongness of torture, however cannot capture entirely the core evilness of such practice. Only the destruction of agency can distinguish torture from other forms of ill-treatment and heinous crimes. This wrongness is never morally justifiable under any circumstances, even in the TBS.

In the TBS, there is a bomb supposedly planted somewhere in the crowded city. The police have arrested the suspect allegedly responsible for the bomb implanting, however, he has refused to reveal the location of the bomb. The question is whether the police should torture the suspect to extract information regarding the bomb.

The utilitarianism suggests the idea that the greatest good for the greatest number. Generally, the life of many people outweighs the pain of the suspect, thus torture is a should-do thing. Meanwhile, Kantian moral theory argues that the essential wrongness with torture "is the profound disrespect it shows the humanity or autonomy of its victim."²³ Everyone deserves to be treated as an end rather than a means to achieve

²³ D. Sussman, Fn 2, p. 13.

other's purposes. However, both theories fail to answer the question of moral uniqueness of torture. For utilitarians, sometimes it is permissible to torture, other times it is not. This approach is very confusing and inconsistent. Kantian theory, in my opinion, does value human dignity and autonomy, however fails to delve deep into the agency to shed the light on the moral uniqueness of torture.

The TBS shows us a different side of torture and makes us view the torturer through a different lens. For liberals, cruelty and tyranny is abhorrent and disgusting, so is torture. Now in the TBS light, the torturer is not cruel or insensitive brutish man but instead "a conscientious public servant, heroic the way that New York firefighters were heroic, willing to do desperate things only because plight is so desperate and so many innocent lives are weighing on the public servant's conscience."²⁴ Suddenly and abruptly, he becomes a hero since he is willing to do bad things for the good reason. This nuance mitigates partially the evilness of this practice in people's eyes.

However, if lives of many people outweigh the pain of an individual, why not torture the loved ones of the suspect in front of him to make him talk? Chances to practice torture, even on innocent persons, will be in direct proportion to the number of people might be involved. Personally I think ordinary people are biased against the suspect even though there is no clear evidence to guarantee that he is the perpetrator. The principle of presumption of innocence saying that no one is deemed guilty when there is no legitimate court judgment, is violated. Generally, the TBS urges people to act urgently even when they do not know where the bomb is and who is responsible for it.

The immorality towards the torturer might be mitigated, however torture still remains its evil nature. Torture in the TBS continues demonstrating its primary and singular goal: the breaking of the agent, the destruction of agency. Despite the uncertainty about the case and the perpetrator, torture is employed to first strip away the suspect's will, wipe out his personality and rip apart his ego into pieces until he is fully controlled and directed by the torturer. There is one thing can be sure about that he would have to carry the pain and suffering of torture inside him for the rest of his life, even if he is not the source of information for the location of the bomb.

4. Concluding remarks

There is a need to reiterate the plasticity of torture: it can be nothing and it can be everything. Pain and suffering matter, however, to understand torture, one must always embrace the purposive element of torture which is also the evil nature of this phenomenon: destruction of agency. Under no circumstance, this act is morally justifiable even in the TBS, since the aim remains unchanged is to break the agent. Torture violates

²⁴ D. Luban, Fn 15, p. 1441.

every fundamental human value that we appreciate in the civilized world. It is like an epidemic disease spreading so fast and widely if an exception permitted. Surely, we do not want to live in a society constructed by torture.

Reference

International Treaties, Bodies' Comments, Case law

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UNCHR, 'Report of the Special Rapporteur: Manfred Nowak'

Ireland v. United Kingdom, 1978, para. 167.

Selmouni v. France, 1999, para. 98;

Kismir v. Turkey, 2005, para. 129.

Secondary literature

Lauren Glenmere, *Torture, Asian and Global Perspectives*, Volume 03, No. 06, Dec 2014, p. 28.

David Sussman, *What's Wrong With Torture?*, *Philosophy and Public Affairs* 33, No. 1, 2005, p. 1.

M. Nowak and E. McArthur, *The United Nations Convention Against Torture: A Commentary*, Oxford University Press, 2008, p.28.

M. Farrell, *The Prohibition of Torture in Exceptional Circumstances*, Cambridge: Cambridge University Press, 2013.

D. Sussman, *Defining Torture*, 37 *Case Western Reserve Journal of International Law* 225, 2006, 227.

J. Wisniewski, *Understanding Torture*, Edinburgh: Edinburgh University Press.

D. Luban, *Liberalism, Torture, And The Ticking Bomb*, in *Virginia Law Review*, vol. 91, issue 6, 2005, p. 1425-1461.

Britta Jenkins, *There, Where Words Fail, Tears are the Bridge: Thoughts on Speechlessness in Working with Survivors of Torture*, in *At the Side of Torture Survivors: Treating a Terrible Assault on Human Dignity*, p. 143.

Memoranda of The U.S. Office of Legal Counsel, Aug 2002.