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There’s a Time for Torment, or  
How I Stopped Worrying and Decided to Torture the Ticking Bomb Terrorist

Imagine, for a moment, that you are a police officer, and after a long chase you have apprehended a foreign terrorist responsible for planting an atomic bomb in a crowded stadium. Time is short, the bomb could go off at any moment, and the only way to stop it in time is to enter a code which the terrorist alone is in possession of. The terrorist is about to succeed in his endeavor, and is disinclined to give you the code, even after you have offered him anything he desires in exchange for his cooperation. What would you do? I can tell you what I would do: I would take out my knife, stab the terrorist in the knee, and ask him to tell me the code. If he refused, I would stab him in the other knee and ask him again; if he refused a second time, I would continue alternately stabbing him and asking him until he either told me the code or the bomb went off. What is more, if you were the one who had to make the decision to torture the terrorist or let the bomb go off and I was one of the people sitting in the stands, I would much prefer that you torture the terrorist than stand idly by, wrestling valiantly with the ethics involved while I get reduced to atoms in a nuclear explosion. In this paper, I intend to give further reasons in support of Alan Dershowitz’ assertion in “Should the Ticking Bomb Terrorist be Tortured?” that a system be instituted whereby warrants authorizing the use of torture could be granted in such cases. In part I, I will examine Bentham’s “utilitarian calculus” with the goal of exposing its flaws as a method of determining whether or not to torture the ticking bomb terrorist and replacing it with one better suited to the task, and in part II I will outline my reasons for believing that a torture warrant system is superior to a wholesale ban on torture on the one hand and to leaving the decision to torture entirely up to the agents present during the ticking bomb scenario.

I

It is obviously the case that there could potentially exist drastic situations analogous to the one outlined above which seem to point toward the use of torture being necessary in order to prevent catastrophic loss of life. While it is certainly to be hoped that such situations do not arise, it seems clear to me that there needs to be some form of system in place in the post 9/11 world that we live in to regulate the use of torture in extreme cases to protect the rights of everyone involved. In my estimation, we must prove that there exists at least one case where the ticking bomb terrorist should be tortured and demonstrate the justification for torturing him before we can come out on the side of establishing torture as an institution.   
 Dershowitz offers Bentham’s “utilitarian calculus” as the strongest argument for torturing the time bomb terrorist, and there exist serious problems with Bentham’s calculus which must be addressed before any meaningful examination of the benefits of a torture warrant system can occur. Bentham’s logic runs more or less along the lines that provided the benefit to be gained at the cost of torturing the terrorist outweighs the benefit of not torturing the terrorist and allowing a great number of people to die or be severely injured, the terrorist should be tortured. If we accept this as true, there is nothing to stop us from expanding it to apply to almost any situation. If it is truly the case that “the needs of the many outweigh the needs of the few or the one” as the saying goes, then we must face the repercussions of a subscription to pure “morality by numbers” (Dershowitz 146). Under a basic utilitarian view, anything goes, so long as the end situation is more overall good than the amount of overall evil done to reach that situation. This thinking can be twisted to support all manner of absurdities. For instance, imagine a particularly harmless terrorist who is about to detonate a bomb which would make everyone on the surface of the Earth (7.009 billion people) sneeze at the same time, causing each individual pain equivalent to .00001 dolors. Utilitarianism would seem to suggest that it is acceptable to subject the terrorist to up to *70,090 dolors of pain* in order to prevent the detonation.

Act utilitarianism of the kind which Bentham advances is also subject to a further objection, which springs from strong rule utilitarianism, namely that rules which contribute to the greatest overall good should be upheld at all times. The official sanction of torture is something which would break the rule against torture, something which “has been deemed illegitimate by the civilized world,” (Derschowitz 145). Should the United States choose to break this rule, the strong rule utilitarian argues that a cascade would occur which would lead to expanded use of torture throughout the world, to a significant loss of perceived moral superiority over countries who engage in torture on a regular basis, and “utilitarian justification [of] other possible evils of lesser magnitude,” (Derschowitz 146). As Derschowitz goes on to point out, the strong rule utilitarian runs into trouble when it is considered that the United States is a government which already condones the death penalty, war, self-defense, imprisonment, and other instances where nonlethal harm and even killing is upheld on the basis of a cost-benefit analysis. After such consideration it is difficult for the strong rule utilitarian to justify a total prohibition of torture without first proving that engaging in nonlethal harm and killing is wrong as a rule, a position which it would be very difficult if not downright impossible to defend.

Even though the strong rule utilitarian’s objection can be outmaneuvered with the preceding argument from analogy, the fact remains that act utilitarianism seems to be a less-than-ideal means for determining whether or not to torture the ticking bomb terrorist due to its inherent lack of a limiting factor. In order to defeat the objections which attend to the act and strong rule utilitarian views, I propose the application of a two-level utilitarian view similar to the one developed by R.M. Hare[[1]](#footnote-1). While Hare’s view deals with the ethics of individuals, I believe that it can be adapted to apply to governments as well without too great a stretch of the imagination. Hare advances the position that people should make decisions about what is moral based on a set of rules or precepts, except in rare situations where   
a) the basic rules conflict  
b) "though there is no conflict between principles, there is something highly unusual about the case which prompts the question whether the general principles are really fitted to deal with it,"(Hare 124), or   
c) when developing the rules. In such cases, they should make decisions from an act utilitarian point of view instead. This view can be dropped over the framework of government as follows, ‘governments and their agents should make decisions based on the law, except in situations where the law is in conflict, the law does not appear to be properly equipped to handle the situation, or when developing the law. In these cases they should make decisions based on cost-benefit analysis.’ If we adopt this view about how governments and their agents should function, we can easily justify the torture of the ticking bomb terrorist by noting that it is a situation which the law does not currently appear properly equipped to handle, and proceeding along the course suggested by cost-benefit analysis which is to torture the terrorist.

II

Now that we have concluded that there exists at least one condition where torture can be justified under a two-level utilitarian view of how governments and their agents should act, it falls to us to determine whether or not it makes sense to adopt a policy of granting torture warrants in special cases or to leave the decision up to the judgment of the agents on the ground in a given situation. I agree with Dershowitz that “in a democracy, it is always preferable to decide controversial issues in advance, rather than in the heat of battle,” (Dershowitz 162) and would argue that since we can clearly foresee the possibility for a ticking bomb scenario to arise it seems prudent to institute the use of torture warrants if we desire to provide for the protection of the rights of the person being tortured, the people trying to stop the bomb, and innocent bystanders threatened by the attack. Should a ticking bomb scenario come about under the present system, it is my belief that the potential for a miscarriage of justice to occur is too great to ignore.

Requiring a torture warrant in ticking bomb cases would protect the rights of the accused not only by restricting his compulsion under the law to giving the code to deactivate the bomb (or some similar piece of information) and freeing him from fear of self-incrimination, but also by requiring that at the very least an attempt be made to bring the matter before a judge prior to beginning the torture. This procedure would establish a paper trail that could be followed back to the responsible party in cases where a judge was unavailable and an agent proceeded to torture without a warrant. Because of this, should an innocent person be tortured, it would be easier for them to seek legal compensation if a record of the torture in the form of an application for a torture warrant existed. If the same innocent person was tortured ‘off the books,’ as is presently the only option for law enforcement personnel in ticking bomb cases, no such option is available to them, and any suit that they bring on the basis that they have been tortured will be much more difficult to win. Other benefits to the accused and those in danger of accusation also exist, such as increased protection against medically unsafe torture (like being stabbed in the knees), greater caution on the part of law enforcement officials with regards to when to torture a suspect in light of the transparency which torture warrants would provide, and the correspondingly reduced risk to the average innocent person of ever having to deal with a situation where they faced torture; as Dershowitz points out, “to a man with a hammer, everything looks like a nail, if the man with the hammer must get judicial approval before he can use it, he will probably use it less often and more carefully,” (Dershowitz 160).

The institution of torture warrants would also help to protect the rights of law enforcement personnel faced with the unthinkable decision of torturing someone or standing by while a great many people were killed. Under the present laws regarding the torture of suspects, a police officer, soldier, or agent faced with the choice presented by a ticking bomb scenario is in a truly terrible position. Not only are they faced with having to do something which could very well act contrary to their individual moral code regardless of which choice they make, they also face serious consequences after the incident has come to a close should they opt to torture the terrorist. It seems at the very least contradictory to bind officers of the law to ‘serve and protect’ while at the same time maintaining a ban on torture which could, in a ticking bomb case, very easily prevent them from serving and protecting their community. With the option to obtain a torture warrant available, the contradiction could be resolved by allowing officers faced with such a decision to do their duty without fear of reprisal should the warrant be granted. If the warrant is not granted or a judge is unavailable, the officer is still free to torture the suspect if they truly believe that it is the proper course of action as they can under the present system, but the certainty of legal repercussions should they choose to do so would likely restrict the number of officials that tortured without a warrant to those absolutely certain that their actions would be upheld upon review by a judge and jury or those willing to accept the penalty for doing so.

In conclusion, it is my belief that in light of the fact that there exists compelling evidence to torture the terrorist under a two-level utilitarian view of the ticking bomb case, that a total ban on torture is indefensible when applied to ticking bomb cases, and that there exists a potential for a ticking bomb case to arise in the world we live in, the establishment of a torture warrant system is a prudent decision for this country to make. First, having the ability to apply for a torture warrant protects the innocent targets of an attack by allowing agents to attempt to extract vital information from the terrorist. Second, it protects the terrorist from cruel and unusual forms of torture in addition to protecting them from arbitrary torture should insufficient evidence be available to secure a warrant. Lastly, torture warrants protect law enforcement officials placed in the ticking bomb situation from prosecution for doing their duty to serve and protect the targets of the attack from harm.

1. Hare, R. M. (1976). 'Ethical theory and utilitarianism'. In H. D. Lewis (ed.), Contemporary British Philosophy IV. London: Allen & Unwin, 122-5 [↑](#footnote-ref-1)