Liz Adams

December 14, 2016

ENGH 302 Literature Review

Prof. Sara King

The Morality and Legality of Justifying Torture

As the threat of terrorism continues to grow around the world, the question of what to do with captured terrorists looms large. Is it justified to torture them to extract valuable and time-sensitive information, especially if there are potentially hundreds of thousands of lives at risk? Most of the existing literature on the topic, both past and current, argues no, torture is never justified. However, dissenting opinions still exist. Examining the question of torture can be broken into a dichotomy: no, torture cannot be justified, and yes, torture can be justified. Each side can be examined under two lenses, that of morality and that of legality. This literature review will discuss arguments within those spheres, to attempt to provide a conclusion to the question of the permissibility of torture.

Perhaps the most prevalent argument against torture from a moral standing is that it goes against human rights. One concept that separates modern, advanced, societies from barbaric ones of the past is that there are certain unalienable human rights, which includes the right to be free from torture. In order to answer the question “can torture be justified?” first the question of human singularity must be answered. Human singularity is the idea that each and every human being is a unique, singular, entity who cannot be replaced by any other person or object (Gilead, 2005, p. 164). The concept of torture negates human singularity because it requires the torturer to treat the victim as a replaceable object whose only purpose is to serve as a means to an end. According to Gilead (2005), “the idea of torture considers human beings as slaves and their psychical lives as a property that can be owned or robbed by other persons” (p. 166). Moreover, torture takes away the right of the victim to defend themselves. Taking away these rights is an immoral offense against the accused.

Torture is cruel and unusual, to be sure, but aren’t there extreme instances in which it could be justified? The infamous example is that of a ticking bomb that has the potential to kill thousands, if not hundreds of thousands, of people, and the person with the information to prevent this tragedy is detained by authorities. It appears logical in this case to answer, yes, torture could be permitted in order to save the lives of many innocent people. This is referred to as the consequentialist argument, because it is saying that torture is allowable because the consequences of torture are less than the consequences of not-torture. According to Juratowitch (2008), however, there are a few flaws with this line of thinking. He uses the example of torturing babies. Any sane person would find the idea reprehensible, but he asks, what if the terrorist has a soft spot for babies and torturing them would greatly increase the chances of gaining a confession from the terrorist? As he says, “…pure consequentialism must countenance as much torture, on as many innocents, as is required to avoid even greater harm” (Juratowitch, 2008, p.83). It is with these kinds of scenarios that shed doubt on a consequentialist mindset.

Perhaps, however, there is such a person who would argue that torturing babies is allowable if it leads to a better outcome. After all, which is the better end, a few tortured babies or the death of every person living in a city? A true consequentialist would argue for the former, but Juratowitch (2008) counters that “…the state may [not] cause the lesser evil to avoid someone else causing the greater evil. The obligation on the state not to act barbarically is wrongly ignored by such an approach” (p. 84). In other words, it is the duty of the state to be un-barbaric, and a barbaric act is not cancelled out by the desire to prevent a more barbaric act.

There are clear arguments against the morality of torture, however, there are often actions taken by states that, while morally wrong, are still legal (slavery often quoted as an example). It is therefore worthwhile to examine the legality of torture. It is important to note firstly that the majority of countries in the world do not recognize torture as legal, and there are several international treaties professing this as well. The most comprehensive of these is the United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (UNCAT), which “[states] torture and any form of cruel, inhuman, or degrading treatment or punishment is against international human rights law” (Anwukah, 2016, p. 5). There are countries that do not abide by this (and some may speculate the United States itself has violated this law), but those are countries not very influential in the international arena. However, laws can change, and it could be the case where a law is written to allow torture in extreme cases, even if it is not moral to do so. Consider the case of self-defense: it is legal, if perhaps not moral, to kill someone if that person is threatening the life of another individual. It is logical to conclude that a community, composed of individuals, should have that same right. Thus, if a person is threatening the lives of a community (such as a terrorist) it should be legal to do what is necessary to protect the community (such as torture), in a form of national self-defense. Bellamy (2006) points out the flaw in this reasoning. According to him, once a person is detained, they themselves no longer pose as an immediate threat, and so the idea of national self-defense no longer is applicable. Even with the ticking bomb case, if the terrorist does not personally pose a threat, they must be considered a non-combatant (p. 130).

It is possible that there would be greater standing for the legality of torture if it consistently produced reliable information, for that is what deems it effective or not. This is not the case, however. Most individuals, after being subjected to torture, would likely be willing to say anything to have the torture stop. The question remains how to determine if the given information is true and of good use. Both true and false confessions may result from torture, but there is still a burden on the state to determine which a given confession is. The state’s ability to tell the difference between the two does not increase (Schiemann, 2012). Gilead furthers this point by arguing that torture can never actually produce reliable information—such a concept is contradictory to the goal of torture, which is to force a person to divulge information against their will. “Breaking” someone into sharing knowledge can never be trustworthy knowledge (Gilead, 2005). This is because, “under torture…no memory is trustworthy. Torture distorts memory, rendering it less accurate and reliable. Torture can even destroy the actualization or realization of the reliability of any memory, and can instead convert it into hallucinations, self-deception, or delusions” (Gilead, 2005, p. 164). Moreover, torture overshadows a key component of our justice system, the assumption that all are innocent until proven guilty, because it requires the treatment of presumed innocents as though they are guilty (Gilead, 2005, p. 167). Thus far, it appears that torture contradicts our legal system without even producing consistent, reliable, information.

Although much of the literature argues against torture, the discussion would hardly be balanced without allowing for the possibility of the contradicting side. Indeed, there are reasons for permitting torture under certain circumstances. Steinhoff (2006) makes a case by first establishing that torture is not as bad as it is believed to be. Surely, it is cruel and inhumane, but if an individual were given the choice between death and being tortured for a fixed amount of time, it is almost certain that that person would always favor torture over death. In fact, one of the prime reasons we as humans believe torture to be so terrible is because of the strong emotional reaction it produces. For example, in movies “our emotional reactions to displays of torture or killing are distorted by certain limits of empathy” (Steinhoff, 2006, p. 340). We do not know what it is like to be dead, and therefore we cannot empathize with portrayals of deceased. However, we do know what it is like to feel pain and to suffer, and we can therefore empathize with those being tortured. Since torture is usually preferable to death, though, we cannot strictly measure the morality of torture by emotional reactions, given the propensity for distortion.

Given this, it seems reasonable to suggest that there are circumstances where torture could be permissible. Again using the example of a captured terrorist with knowledge of the whereabouts of a ticking bomb, the question is, should it be allowed to torture this individual to save the lives of many, many others? Earlier arguments said, no, it is not moral to do so, and the idea of doing so for national self-defense does not hold. Steinhoff (2006) uses an analogous example to illustrate the opposite: Suppose there is a malevolent doctor who wishes for the death of a cardiac patient, and so he swallows the pacemaker the patient needs to survive. The only way to save the patient is to operate on the doctor, which will kill him. A choice must be made, whether to save the innocent patient or the malicious doctor, and clearly the person who is culpable for the situation should be the one to die. This argument remains valid even if there is just one life on the line, rather than hundreds or thousands. Steinhoff uses the example of the movie *Dirty Harry*. In the movie, Harry tortures a man who kidnapped a little girl, who will die unless the man gives up her location. Steinhoff (2006) says “his right to life weighs less than the innocent defender’s right to life…It is only just and fair that the harm that will befall in this situation upon one of the two is diverted to the person who is responsible for the harm—the aggressor” (p. 342). It is not morally right to cause the death of an innocent just to avoid violating a “right” of the person ultimately responsible for the death.

There is, however, a condition for the moral provision of torture: that of its legality. Steinhoff (2006) brings up the idea of legalizing torture through the use of torture warrants. Much like search warrants, it would require the signature of a higher authority to grant the use of torture. This has the potential to lead to problems, though. For instances, “[an] insight from history is the danger that, once legitimated, torture could develop a constituency with a vested interest in perpetuating it” (Steinhoff, 2006, p. 348). This means that once a state justifies the use of torture in extreme cases, it will become easier and easier to justify using it in non-extreme cases, because the precedent will be set. It will start as being reserved for captured terrorists, but eventually will be become commonplace enough to be used in cases such as drug use. Schiemann (2012) agrees, that once torture is allowed, the frequency and intensity of its use will increase. Furthermore, there is simply no reason to legalize torture, as society just does not have a need for it. While the ticking bomb and Dirty Harry cases provide an argument for torture, the reality is that such cases are exceptionally rare. Should there be a real life happening of an event such as those, perhaps torture could morally be implemented, but (god forbid) until that comes about, there is not a basis for the legalization or institutionalization of torture.

Unfortunately, when it comes to torture, there cannot ever be experiments done, for such a thing would be extremely unethical. Further examination of the question is therefore limited to theoretical and hypothetical answers, with some examples taken from past histories. One possibility for future work could be using a computer simulation of some sort to determine what the consequences of using torture could be. This would require sophisticated technology, which perhaps does not exist yet, but should it become available, it could offer a more concrete knowledge of what the use of torture could look like.

Another possibility for further research is with memory. One of the issues with using torture is the argument that it cannot produce accurate memories. Memory is a topic little understood by neuroscientists, so perhaps if more could be discovered about it, it could answer some questions when it comes to torture. One of the more “humane” ways of torturing is through sleep deprivation, so it is feasible to design an experiment using people who suffer from insomnia and the effects that has on their short and long term memory. Using results from that, we could perhaps know more about the reliability of information gained through torture.

Finally, another way to perhaps move forward with this question is to learn about the results from past torture cases; find out what information was gained, whether it was reliable or not, etc. Unfortunately, most of these cases appear to be classified, as there exists very little information to be found. What is available is limited and does not go into much detail, so it is of hardly any use. Declassifying the information and making it available would be helpful.

The literature that exists so far when it comes to the use of torture is fairly synonymous, stating that torture is morally wrong. The exception to this viewpoint, while arguing there can be a moral basis for torture, is still in agreement with its peers, that torture should be not legalized, as that would contribute to the debasement of society. Should there come about an extreme case where the use of torture is conceivable, it would be worthwhile to revisit the moral use of torture, but let the state hope they are never faced with that dilemma.

References

Anwukah, O. J. (2016). The effectiveness of international law: Torture and counterterrorism. *Annual Survey of International & Comparative Law, 21* (1), 1-28.

Bellamy, A. J. (2006). No pain, no gain? Torture and ethics in the war on terror. *International Affairs (Royal Institute of International Affairs 1944-), 82* (1), 121-148.

Gilead, A. (2005). Torture and singularity. *Public Affairs Quarterly, 19* (3), 163-176.

Juratowitch, B. (2008). Torture is always wrong. *Public Affairs Quarterly, 22* (2), 81-90.

Schiemann, J. (2012). Interrogational torture: Or how good guys get bad information with ugly methods. *Political Research Quarterly, 65* (1), 3-19.

Steinhoff, U. (2006). Torture—The case for Dirty Harry and against Alan Dershowitz. *Journal of Applied Philosophy, 23* (3), 337-353.