

Is the Use of Torture Ever Morally Permissible?

Written by Leo Barnes

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<https://www.e-ir.info/2020/09/16/is-the-use-of-torture-ever-morally-permissible/>

LEO BARNES, SEP 16 2020

In 1911, the author of the article on 'Torture' in the Encyclopaedia Britannica was able to state that 'the whole subject is now one of only historical interest as far as Europe is concerned' (Waldron, 2012, p.187). Torture's relegation to mere historical interest did not last, however. The debate surrounding the moral permissibility of torture preoccupied the British throughout the 1960s and 70s, the Israelis throughout the 1980s and 90s and has continued to feature in philosophical discourse since 9/11 and the subsequent War on Terror (Gross, 2010, p.122; Neuhauser, Stoecker, 2014, p.302). I will argue that the use of torture is never morally permissible, principally because of its attack on and destruction of human dignity and autonomy. Defining what constitutes torture remains a vexed question, however, I will use David Luban's (2014, p.450) definition that torture is the 'assertion of the torturer's limitless power and the victim's absolute helplessness' achieved through the 'infliction of severe pain or suffering on a victim in the torturer's custody or control'. Firstly, I will lay out my argument for torture's moral impermissibility due to its degradation of human dignity and autonomy, followed by an exploration as to why such degradation should be impermissible whilst killing in war is permissible. I will then explore the objections to this argument, namely the ticking-bomb terrorist hypothetical, to which I will offer a reply. I will then explore the argument for torture's moral permissibility through liability and the legal mechanics through which this could be facilitated, before offering a final reply to these arguments.

I argue that torture is never morally permissible due to its violation of dignity and autonomy, this being unacceptable when living in a moral and just society. I argue we should uphold a standard of morality that affords all humans a sufficient level of dignity and agency, a level that torture subverts. The pain and suffering inflicted during torture is significant, however, it is this pain in conjunction with the complete powerlessness and subservience to a malign enemy that destroys the victim's autonomy and dignity (Luban, p.449). The primacy of these values and the 'inviolable nature of human dignity belies any justification' for torture (Sung, 2003, p.199). Torture victims are forced into experiencing levels of disgust, shame and subservience that no moral society should inflict upon another human being (Hartogh, 2014, p.206). Torture destroys the integrity and agency of the victim's personhood, personality and life experience, reducing their existence to 'a kind of anti-life' (Luban, Shue, 2012, p.863; Sussman, 2006, p.230). This deontological view rejects the consequentialist outcomes of torture, but declares torture morally impermissible on grounds that these moral rules should be applied to even the most heinous of individuals, as it is a principle of humanity that we respect these fundamental values in all people (Leidner, 2018, p.159; Meisels, 2010, p.195). I also argue that the instrumentalisation of the torture victim, using the victim purely as a means, is immoral to a degree that it should not be permissible under any circumstances. This is a broadly Kantian view that the victim becomes 'a suffering instrument of the torturer', having pain inflicted upon them solely for the purpose of destroying their will and for their continued use as a means for the torturer's ends (Juratowitch, 2008, p.87).

This argument elicits the question of how one can propose the absolute moral impermissibility of torture whilst declaring killing in war morally permissible. I would argue that torture can be morally impermissible whilst mandating absolute pacifism, primarily because of the fundamental difference between how torture and killing in war impinges human dignity. Dignity is a fundamental facet of human life that must be afforded to all, however, as much as killing destroys life, it does not by necessity destroy dignity (Shue, 1978, p.125). On a battlefield, there is a fundamental rule, both morally and legally, that one cannot harm those who are defenceless. However, torture necessitates the defencelessness of its victim and as such, it cannot be considered under the same moral and normative guidelines. Further, on the battlefield, there is a degree of reciprocity wherein combatants have a fair

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chance and ability to defend themselves against threats (Roth, 2005, p.390). Torture, however, breaches this reciprocity and condemns the victim to a level of degradation and dehumanisation that is especially cruel as although killing takes a life, torture abuses it (Ignatieff, 2004, p.137). This abuse is particularly morally abhorrent as it does not just degrade and debase the victim's humanity, it forces the victim to become complicit in their own debasement and an accomplice in the destruction of their own dignity and agency (Conroy, 2000, p.169; Randall, Lutz, 1991, p.109; Basoglu, 1992, p.205).

The extent of this abuse is best elucidated by David Sussman (2005), whose Neo-Kantian view argues that torture not only violates dignity and agency, it turns this agency against itself and forces the victim to become complicit in their own violation, meaning that torture is not just the destruction of basic humanity but the forced self-betrayal of oneself. This level of abuse on basic values and enforced self-abuse should not be permitted in a moral society. Sussman (p.19) argues that torture is especially insidious as it goes beyond just disrespecting these values, it is a 'deliberate perversion' of them, turning an individual's dignity and agency against itself. Torture forces the tortured to become an active part in their own degradation, for example, in Abu Ghraib, torture victims were forced to masturbate in front of their captors, displaying their most private of thoughts and acts to others (Sussman, p.22). Soldiers can kill each other in combat, they can even kill their prisoners, however, only a torture victim is compelled to offer up their own intimacy and sense of self to be used against them, further contributing to the extreme destruction of dignity and autonomy that torture inflicts (ibid). Therefore, torture should be considered under a different moral and normative framework to active combat. Its degree of cruelty and destruction is so severe, including the infliction of self-betrayal and complicity in one's own degradation, that it warrants absolute moral impermissibility.

The primary objection to this argument stems from the consequentialist tradition, most notably represented by the ticking-bomb terrorist hypothetical (TBT). Jeremy Bentham formulated the first scenario that resembled a TBT hypothetical, with Jean Lartéguey popularising the scenario in the 1960s (Allhoff, 2012, p.89; Davies, 2012, p.3; Hassner, 2018, p.90). The TBT scenario comes in many forms, however, almost all invariably involve a captive terrorist who has knowledge of the location of a bomb that will go off and kill numerous people, with torture potentially revealing its location (Farrell, 2013). The argument follows that allowing numerous people to die, by not torturing the terrorist, is a far greater harm than the harm inflicted on the terrorist. This is a purely consequentialist argument that ignores the immorality of the act of torture and focuses exclusively on the outcomes, disregarding the moral implications of torture and focusing on a utilitarian cost-benefit analysis. An extension of this utilitarian approach can be seen in Mirko Bagaric and Julie Clarke's (2005, p.611) five conditions that, if met, would make torture 'morally defensible', including the number of lives at risk, the level of wrongdoing of the potential torture victim, and the immediacy of the harm posed.

Richard Posner (2002, p.30) argues that there has been a long history of suspending human rights at times of severe emergencies, especially when many lives are at stake, with the TBT scenario providing just another instance in which human values and rights that would normally be respected can be violated for the greater good. This has led to torture being labelled the 'lesser of two evils', with torture being morally permissible and necessary if the potential good was for the benefit of the public at large (Gert, 1969, p.623; Parry, 2004, p.160). This, however, leads to a moral dilemma, whether to respect the right of the prospective torture victim not to be tortured, or to protect the innocent civilians' lives. Michael Walzer (1973) puts forward a Neo-Machiavellian argument whereby those in a position of authority have a responsibility to 'dirty their hands' and sanction torture for the sake of their fellow citizens. As such, torture in these scenarios becomes morally permissible, however, its permissibility is down to the fact that it is excusable, not justifiable.

My response to the TBT argument is threefold, initially based on the implications of the consequentialist logic, secondly, based on the unrealistic nature of the TBT hypothetical, and thirdly on the immorality of using such a hypothetical. The TBT's consequentialist logic means that those who favour this approach must legitimately consider 'as much torture, on as many innocents, as is required to avoid greater harm', thereby eliminating their ability to have 'any moral compass independent of outcomes' (Juratowitch, 2008, p.83-4). Further, the TBT's focus on utilitarian outcomes neglects to account for the 'higher pains' that torture inflicts, including psychological impacts such as dread, shame and humiliation (Twining, Paskins, 1978; Randall, Lutz, 1991, p.28-30). The infliction of these 'higher pains' is what facilitates the destruction of dignity and autonomy and condemns torture to its moral impermissibility, a

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factor that the consequentialist fails to recognise.

Secondly, I argue that the TBT argument should be removed from all philosophical consideration entirely as its inability to bear any resemblance to reality renders the hypothetical and its implications meaningless. The hypothetical's premises make it near impossible for a TBT scenario to ever actually occur; we could never be sure of the premises upon which it is founded with the certainty that TBT necessitates (Mayerfield, 2008, p.114; Schepple, p.325). I would argue that this leads the argument to fall into the deductive fallacy, whereby its conclusions are invalid due to the reliance on empirically questionable premises (Bufacchi, Arrigo, 2006, p.360). Hypotheticals can 'clear away the messiness of the real world', however, the clarity that the TBT hypothetical demands the audience to subscribe to includes a set of premises and false assumptions that amount to 'intellectual fraud' (Mayerfield, p.113; Luban, p.45). As such, I argue we should disqualify the TBT argument and its conclusions from consideration, especially as we are aware of the reality of the destruction of the victim's humanity via torture.

Thirdly, it is immoral to include the TBT argument in considerations of torture's moral permissibility. The immorality of the TBT hypothetical stems from its manipulation of its audience as it conveys an 'incomplete and one-sided picture of reality', in which the victim's humanity is ignored and suppressed in order to focus on the deliberately crafted utilitarian outcomes (Thaler, 2018, p.105). This dehumanisation detracts from the humanity of the victim and makes authorising torture a morally attractive option. This manipulation is compounded by 'idealisation' – the adding of positive features to the hypothetical – such as the ability to save hundreds or thousands of innocent lives, to induce the hypothetical's audience into supporting torture whereas in reality, those positive features are rarely, if ever, present (Shue, 2006, p.231). Furthermore, the TBT hypothetical is 'constructed as a moral romance' that simplifies the moral complexities of the situation 'in order to enlist sympathy', inducing the audience to lend their support for practices that have implications far wider than the hypothetical acknowledges (Finlay, 2011, p.422, 432). Subscribing to these hypotheticals, therefore, is irresponsible and immoral.

However, there is still an objection to the absolute moral impermissibility of torture grounded in the concept of liability. This has chiefly been advanced by Jeff McMahan (2008), who argues that the terrorist has a responsibility for the threat that they pose to innocent individuals, this responsibility makes them liable to be tortured if the torture is a means of saving innocent lives from the terrorist's actions. The terrorist used their autonomy to choose to pose this threat to innocent lives, as a result, if torture is the only way to save lives then it was his autonomy that has led him to be liable to torture, making the torturer morally excused (ibid, p.99). McMahan (2018, p.200-3) rejects the consequentialist view and bases the permissibility of torture on the liability of the victim to experience torture that is used in a defensive way, much as defensive killing in the face of imminent lethal threats is allowed. This argument was also put forward by Jeremy Bentham, who said of a criminal refusing to cooperate that with 'every moment that he persists in his refusal he commits a fresh offence', arguing that they are 'committing an ongoing offence' that makes them liable to further pain (Twining, Twining, 1973, p.312; Meisels, p.170). This logic has been adopted by numerous scholars who contend that if there is a sufficient level of 'culpability' or 'moral guilt' in the potential victim, or if the victim 'acted sufficiently unjustly' and if the torture would 'save his victims or potential victims', then it would be morally permissible (Moore, 1989, p.326; Machan, 1990, p.94; Kamm, 2004, p.65; Steinhoff, 2006, p.337).

Although McMahan proposes that torture can be acceptable in principle, he argues that this does not mean individuals deserve to be tortured or that it should be legal practice. However, there has been one notable argument for the moral and legal permissibility of torture; torture warrants. The concept of a torture warrant has primarily been offered by Alan Dershowitz, with an ex ante authorisation of the practice via judicial channels. Dershowitz (2002a, p.477) proposes that if the authorities had a suspect who was withholding information that could save lives and there was a reasonable chance that with the use of torture such information would be released, they could go to a judge who could issue a torture warrant. Dershowitz (2002b; 2002c, p.158) acknowledges that this could legitimise torture to a dangerous degree, however, he states that warrants would only be issued if there was an 'absolute need to obtain immediate information in order to save lives', and that it would eventually lead to fewer instances of torture. Other scholars, such as Charles Krauthammer (2005), have also argued that there should be 'limited legal permission to use torture', as long as it is kept within the defined institutional constraints and it could yield information that might not be available via other means.

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Neither of these objections are morally or practically compelling. Regarding liability, McMahan (2008, p.104) declares that despite his conclusion that torture may be morally permissible in principle, this 'is of virtually no practical significance' because the institutional implications should prohibit torture from ever occurring. I would add that, regardless of institutional implications, the victim would not be liable to torture because no human should be liable to the destruction of dignity, autonomy and humanity that torture inflicts, and no human is liable to a level of self-betrayal and complicity in their own destruction that torture involves. In response to Dershowitz's argument, I would argue that his myopic vision of judicial authority and moral philosophy makes us choose between 'national security and human dignity', and is an oversimplification that ignores the moral nuances that the debate requires (Sung, p.209). In addition, Dershowitz's suggestion of torture warrants would likely require an ex parte decision from the judge, with no opposing litigation or argumentation, eliciting doubts over how rigorous, impartial and informed the decision from the judge could be (Roth, p.401).

However, the most pertinent response to these objections to torture's moral impermissibility stems from torture's destruction of dignity, including the dignity of the institutions that allow the practice. The English Bill of Rights of 1689 outlawed torture when it prohibited 'cruel and unusual punishment', and legal, political and civic institutions have benefited as a result (Miller, 2012, p.123). Rejecting the moral impermissibility of torture means abandoning the most fundamental bases of democracy and decency and by employing such cruel means a state can no longer claim to be based on justice, but on tyranny. It would damage institutions because allowing torture would render institutions built on liberal and moral values complicit in the planned destruction of another human's dignity and autonomy, being a practical and symbolic setback for civilisation (Roth, p.405). As Luban (p.48) notes, torture 'is a microcosm ... of the tyrannical political relationships that liberalism hates the most', devaluing the trust in and authority of 'civil, military and legal institutions' (Bufacchi, Arrigo, p.362). Further, institutionalising torture would destroy the dignity of those who carry it out, as they will be subjected to principles and practices that no individual with moral integrity should have to be exposed to (Wolfendale, 2006, p.287). It degrades those who carry it out and can cause irrevocable psychological damage, debasing their humanity and sense of self (Kateb, 2001, p.186; Krulak). As such, even if one accepts there are imaginable scenarios in which torture could be morally permissible, it would automatically cease to be acceptable due to the irreconcilable degradation of the institutions that allow it, and by extension, the degradation of the dignity and humanity of those who allow it, carry it out and are subjected to it (Waldron, 2005, p.37).

In conclusion, I argue that torture should be absolutely morally impermissible because of its impact on the most fundamental elements of humanity, principally, dignity and autonomy. These should be afforded to all humans, with torture not only disrespecting victims' dignity and autonomy, but destroying them through the self-betrayal and complicity the victim is forced into. Objections to torture's moral impermissibility range from hypothetical justifications to liability arguments, with the former being based on immoral and unrealistic logic and the latter not accounting for the severe destruction of values that torture inflicts. Allowing torture would, by extension, destroy the dignity, integrity and moral authority of our democratic and liberal institutions, thereby making it a moral necessity to conclude that the use of torture is never morally permissible.

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Date written: April 2020