

## Torture and Moral Knowledge<sup>1</sup>

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### 1. "Hard Cases"

The moral literature on torture contains several variations of the "hard case" (Tindale 1996) in which torture may be morally permitted. This judgment of the "hard case" conflicts with the settled and reflective view of the authors of this literature (Shue 1978; Tindale 1996; Kershnar 2005; Miller 2005). The problem then is to find a non-ad hoc way to draw a line to rule out torture, while also recognizing the moral status of the "hard case." Then we have a morally principled argument against the moral permissibility of torture, while not ignoring the "hard case."

This paper argues torture could be justified in a real case analogous with the hypothetical "hard case." This is not ruled out by any a priori theory in this paper. But at the same time, this paper argues that if any witness claims to have observed or participated in a case sufficiently similar to justify torture in that case, we ought not to believe the witness's moral judgment. The situation of torture systematically undermines the reliability of the witness's claim of moral knowledge.

Before getting to a description of a "hard case," it is useful to take note of the relevant aspects that make it a case in which torture may be morally permissible. First, it is a case with deontological reasons for torture. It does not surprise us that a horrifying action can be justified in consequentialist terms in a hypothetical case in which the only alternative is an even greater horror. Kershnar emphasizes (2005, 228-229) that we need instead to look at cases of torture that closely follow paradigmatic cases of killing in self-

defense (Thomson 1991) or cases of defense of others when the defender has a particular obligation to do so, as parents do for their children.

Justifying the moral permissibility of torture in the "hard case" then does not rely on comparison of consequences. The only comparison needed in the justification is between torture and killing, both in self-defense. If we assume that torture is no worse than killing (contrary to Sussman (2005)), and if killing in self-defense is sometimes justified, torture may be justified in a case sufficiently similar to those in which killing is justified in self-defense.

Second, the "hard case" must be a case in which the person being tortured is known to be an attacker against whose attack the torture is a defense. As a result of this second presumption, the torture is not carried out in order merely to find an attacker. This follows from the first condition, but is worth emphasizing. In the "hard case" the attacker is known by the torturer, but the attack itself is hidden. Shue (1978, 142) and Tindale (1996, 366-370) are skeptical about this possibility, but their objections are not decisive. The presumption that the attacker is known is somewhat far-fetched, of course, but an unusual case is not a methodological mistake in ethics. In legal reasoning, perhaps, "artificial cases make bad law" (Shue 1978, 141). But in ethics such pithy aphorisms are not persuasive in the face of a well drawn hypothetical case.

Third, the "hard case" is a case in which there is no alternative course of action worth pursuing. In paradigmatic cases of killing in self-defense (Thomson 1990, 367; Thomson 1991) the defender's violent acts are justified because these will succeed in self-defense, and because the defender cannot escape in any other way. Such certainty about success cannot be obtained in even the clearest "hard" case of torture. In a standard "hard case," torture is used in an

interrogation to find the location of an impending attack. This aims at defending against the attack, but does not ensure success. Indeed, it is frequently argued that torture is not effective in interrogation.<sup>2</sup> But it is sufficient for a "hard case" that no alternative exists with any hope of success, leaving torture as the only viable option. (We shall see that, even in this weakened form, there is a problem about knowing when this third condition is met.)

The three conditions are met in an example credited by Miller (2005) to an Australian police officer. We might call this example the "Cooked Baby," or more mildly, "Beating."

A mother's car is stolen with a baby in the back seat. This theft occurs on a very hot day. The theft is just a joy ride, or else for the purpose of some other crime, so the car is abandoned somewhere with the baby still in the back seat. (This establishes this as a case of defense of another for whom there is an obligation of defense.)

The car thief is caught by the police with articles in his possession that could only have been taken from the car. (This establishes that the thief is a known attacker.) But the police do not know the location of the car.

Offers of reduced charges do not work to persuade the thief to tell the location of the car. Threats do not work. Pleas to shared humanity do not work. (This is evidence that there is no alternative to torture.)

We can skip some of the details. The police beat the car thief until he reveals the location of the car. The baby is saved. Thus torture has been justified in this "hard case."

The police officer's account continues:

The police officers' statements in the prosecution brief made no mention of the beating; the location of the stolen vehicle and

the infant inside it was portrayed as having been volunteered by the defendant. The defendant's counsel availed himself of this falsehood in his plea in mitigation. (Miller 2005, 183)

Is the police officer's account reliable? Although the officer claims that certain events occurred, these claims cannot be used as evidence in court. From the police officer's account it may seem that this is due to mere legal squeamishness or pickiness. But the legal rules for admissibility of evidence are at most secondary to the more basic question of the reliability of this witness.

## 2. Reliability in Judgment

We, or a judge or jury reviewing the case, would be able to confirm that the police officer was acting in defense of an innocent victim. The evidence connecting the car thief with the car would also presumably allow us, or a judge or jury, to verify this connection. This would verify that the torture was carried out in defense of a victim against an attacker.

The question of the reliability of the police officer's moral judgment then comes down to the police officer's judgment of the availability of alternatives to torture. Since the lack of viable alternatives is among the requirements for a hard case, we can generally ask this question in any case in which we are trying to confirm whether torture is morally permitted: Is there really no viable alternative?

This lack of alternatives is a murky matter, which argues against the reliability of the torturer's moral judgment. In the "Beating" case, the police officer is reported as having offered to reduce the charges. Did the officer offer to drop all charges? Offer a reward?

If not, then it is jumping to conclusions to think that torture was the only viable course.

In evaluating the viability of alternatives, we have to consider the car thief's motives. The Australian police officer's depiction of these is not credible. The car thief is described as "sneering, defiant, belligerent," and "he made no secret of his contempt for the police." (Miller 2005, 183) Perhaps if the car thief was motivated by sheer hatred of police, then he would have been more forthcoming if interrogated by a lawyer or judge, or by the baby's mother. Then in the police officer's account the car thief manages to tell the location of the car, just as he "lapsed into semi-consciousness."

It nearly goes without saying that there is time pressure in any torture case. In the "Beating" case, because of the heat the baby's chances of survival steadily decline. In other variations of the "hard case," there is a "ticking time bomb." Time pressure tends to work against good judgment of the presence of alternatives.

In any torture case, judgment on whether to torture will be made by a small isolated group. In the "Beating" case, the police officer makes this judgment alone. But more generally, it would be difficult to assemble a group of authorities. Even if a special jury is assembled quickly, as Kershner usefully suggests, (2005, 234) these would be subject to the same pressures of time and the narrow view of alternatives as the torturers themselves. Such isolated groups do not tend to have good judgment about the existence of alternatives.

But perhaps we should not suppose that the errors in judgment are in only one direction. Perhaps there may be erroneous decisions not to torture, when it would prevent an attack, as well as erroneous decisions to torture. But false negatives, or errors in failing to torture when it would prevent an attack, are very unlikely, whereas

false positives are made likely by unfortunate and well-known psychological facts.

In order for there to be a false negative, there needs to be an attacker in custody, presenting a hidden threat, and yet for there to be no torture, despite there being no viable alternative course of action. In a false negative, those holding the attacker in custody make the wrong judgment about the existence of alternatives, and instead imagine there is an alternative when there is none. So for there to be many false negatives, there have to be many attacks, and attackers have to be easy to catch. Only then will there be many opportunities for erroneous hesitation.<sup>3</sup>

False positives, in contrast, are unfortunately very likely. People easily adopt a narrow view of their alternatives, which can easily lead them to torture, as shown in the famous Milgram torture experiments (1974). The main result of these experiments is that 65% of experimental subjects would torture someone to death simply if asked to do so by a person with only very modest badges of authority. There was no suggestion that the victim posed a threat that might be imagined to result in the false belief that torture was justified. These subjects falsely believed they were torturing their victim merely because the victim failed to answer test questions. (The victim was only pretending to suffer.) The experimental subjects generally failed to consider alternatives, including the possibility of simply refusing to go along.

In actual cases higher authorities will want to avoid dirtying their hands, and so they will be reluctant to take immediate responsibility and eager to delegate it. This tends to push responsibility onto those who actually carry out the torture, or their immediate supervisors. They must then act in secrecy or under some

legal immunity. Responsibility for torture will generally be pushed onto small and isolated groups with intense pressure on them and little opportunity to examine alternatives or to consult others about them.

Since higher authorities have more alternatives available to them than those who carry out their policies, the recourse to torture suggests that alternative policies are blocked from consideration. In a state whose officials torture, this is indicative of other political problems.

It may be asked where the moral limits are on viable alternatives to torture in defense against hidden attack. What in general is a viable alternative course of defensive action?<sup>4</sup> This is a good question, but answering it would require a broader moral account of everything that might be at stake in defense against a hidden attack. This would include, among other things, the value of the victims' lives, the value of political commitments including commitments not to torture, and the value of whatever else might be sacrificed in the course of defense. For the purpose of this paper, however, it is not necessary to weigh all these and solve this complex problem. It is enough to see that it is a mistake to restrict our view to a narrow range of violent defense. This restriction seems to result from the way higher authorities delegate actions to lower level officials such as police, rather than from any moral reasons.

### 3. Torture and Enlightenment

There are hypothetical "hard cases" in which torture is morally permissible. This means only that torture is not ruled out a priori in by any ethical theory considered here. But the people who make a judgment to torture will consistently have poor judgment, and make their judgments in situations that are conducive to poor judgment.

Those in the position to make the decision cannot be relied on, not because they are bad people, but because the situation distorts their judgment. Unless there is an exceptionally good reason to believe witnesses' and participants' claims that torture was justified, we should not believe such claims. We should not accept such claims as moral knowledge.

The remedies for this poor judgment, however, are well known. There should be a transparent and reviewable procedure for deciding whether there are no alternatives to torture. Most importantly, this procedure should provide due process for the accused. The standard way of ensuring that alternatives are given proper consideration is division of authority, such as in a fair and adversarial legal process, providing for legal representation, cross examination of witnesses, discovery of evidence, etc. In effect, there needs to be a fair trial prior to torture in order to prevent what will otherwise be a rush to judgment. If torturers were required to arrive at their decision to torture through a reliable decision process, it is not likely that any torture would occur.<sup>5</sup>

Interrogational torture in a "hard case" seems to be a way of learning the facts necessary for the purpose of preserving life. In this, interrogational torture seems to be required by enlightenment thinking, in which the purpose of seeking knowledge is the betterment of humanity. But this idea of enlightened torture conflicts with our experience of what methods of finding facts are reliable in situations involving conflicting interpretations and fallible judgment.<sup>6</sup> The cautious approach to fact-finding in such situations requires the fact-finders deliberately to expose themselves to open debate and adversarial procedures. If this does not occur, we have no reason to expect reliable knowledge of the permissibility of torture.

Finally, it should be noted that in this paper, it was assumed that any attacker was correctly identified as an attacker. In reality this identification is very likely to be erroneous. But this assumption is required for the "hard cases," and this paper makes the assumption for the sake of argument.

#### Notes

1. Thanks to Jeremy Wisniewski for encouragement, and thanks especially for Stephen Kershner for clarifying a difficult issue.
2. Fein et al. (2006) find that little is known at all about what does or does not work in interrogation.
3. Bush Administration terrorism policies seem to suppose that there are many false negatives. Imprisoning people without due process is a violation of human rights. This may perhaps be justified if this prevents false negatives. But since the convictions on terrorism-related cases actually obtained by the Bush Administration have all been for dubious or trumped up charges of "material support" for terrorism, or for immigration offenses, there is little reason to believe that people imprisoned actually are attackers. David Cole (2006) reviews the Bush Administration record of terrorism prosecution.
4. Andrew Fiala posed this question at a Society for Philosophy in the Contemporary World session at the American Philosophical Association Pacific Division 2008 Meeting.
5. Milgram's Experiment 15, "Two Authorities: Contradictory Commands" (1974, 105-107) usefully models the division of authority. The result was that experimental subjects all ceased to obey commands to torture.
6. Luban (2006) explores this strange dialectic between enlightenment and torture by focusing instead on liberalism, rather

than reliable knowledge. The focus in this paper on reliable knowledge is roughly modeled on Hume's procedure with respect to miracles in his *Enquiry Concerning Human Understanding*. Hume does not deny that miracles are possible. As long as an omnipotent being exists, there can be miracles, and Hume does not claim to know that God does not exist. But it is highly doubtful that a witness to a miracle is reliable, both for empirical reasons about the character of such witnesses and their claims, and because such testimony would run counter to reliable methods of getting knowledge of natural laws (Fogelin 2003). Likewise this paper does not deny that justifiable torture is possible, but instead argues that those judging this will tend to have distorted judgment, and make these judgments in unreliable ways.

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