



Torture

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HENRY SHUE

Torture

But no one dies in the right place
Or in the right hour
And everyone dies sooner than his time
And before he reaches home.

Reza Baraheni

Whatever one might have to say about torture, there appear to be moral reasons for not saying it. Obviously I am not persuaded by these reasons, but they deserve some mention. Mostly, they add up to a sort of Pandora's Box objection: if practically everyone is opposed to all torture, why bring it up, start people thinking about it, and risk weakening the inhibitions against what is clearly a terrible business?

Torture is indeed contrary to every relevant international law, including the laws of war. No other practice except slavery is so universally and unanimously condemned in law and human convention. Yet, unlike slavery, which is still most definitely practiced but affects relatively few people, torture is widespread and growing. According to Amnesty International, scores of governments are now using some torture—including governments which are widely viewed as fairly civilized—and a number of governments are heavily dependent upon torture for their very survival.¹

So, to cut discussion of this objection short, Pandora's Box is open. Although virtually everyone continues ritualistically to condemn all torture publicly, the deep conviction, as reflected in actual policy, is in many cases not behind the strong language. In addition, partial justifications for some of the torture continue to circulate.²

1. See Amnesty International, *Report on Torture* (New York: Farrar, Straus and Giroux, 1975), pp. 21-33.

2. I primarily have in mind conversations which cannot be cited, but for a written source see Roger Trinquier, *La Guerre Moderne* (Paris: La Table Ronde,

One of the general contentions that keeps coming to the surface is: since killing is worse than torture, and killing is sometimes permitted, especially in war, we ought sometimes to permit torture, especially when the situation consists of a protracted, if undeclared, war between a government and its enemies. I shall try first to show the weakness of this argument. To establish that one argument for permitting some torture is unsuccessful is, of course, not to establish that no torture is to be permitted. But in the remainder of the essay I shall also try to show, far more interestingly, that a comparison between some types of killing in combat and some types of torture actually provides an insight into an important respect in which much torture is morally worse. This respect is the degree of satisfaction of the primitive moral prohibition against assault upon the defenseless. Comprehending how torture violates this prohibition helps to explain—and justify—the peculiar disgust which torture normally arouses.

The general idea of the defense of at least some torture can be explained more fully, using “just-combat killing” to refer to killing done in accord with all relevant requirements for the conduct of warfare.³ The defense has two stages.

- A Since (1) just-combat killing is total destruction of a person,
 (2) torture is—usually—only partial destruction or temporary incapacitation of a person, and
 (3) the total destruction of a person is a greater harm than the partial destruction of a person is,
 then (4) just-combat killing is a greater harm than torture usually is;

1961), pp. 39, 42, 187-191. Consider the following: “Et c’est tricher que d’admettre sereinement que l’artillerie ou l’aviation peuvent bombarder des villages où se trouvent des femmes et des enfants qui seront inutilement massacrés, alors que le plus souvent les ennemis visés auront pu s’enfuir, et refuser que des spécialistes en interrogeant un terroriste permettent de se saisir des vrais coupables et d’épargner les innocents” (p. 42).

3. By “just combat” I mean warfare which satisfies what has traditionally been called *jus in bello*, the law governing how war may be fought once underway, rather than *jus ad bellum*, the law governing when war may be undertaken.

- B since (4) just-combat killing is a greater harm than torture usually is, and
 (5) just-combat killing is sometimes morally permissible,
 then (6) torture is sometimes morally permissible.

To state the argument one step at a time is to reveal its main weakness. Stage B tacitly assumes that if a greater harm is sometimes permissible, then a lesser harm is too, at least sometimes. The mistake is to assume that the only consideration relevant to moral permissibility is the amount of harm done. Even if one grants that killing someone in combat is doing him or her a greater harm than torturing him or her (Stage A), it by no means follows that there could not be a justification for the greater harm that was not applicable to the lesser harm. Specifically, it would matter if some killing could satisfy other moral constraints (besides the constraint of minimizing harm) which no torture could satisfy.⁴

A defender of at least some torture could, however, readily modify the last step of the argument to deal with the point that one cannot simply weigh amounts of "harm" against each other but must consider other relevant standards as well by adding a final qualification:

- (6') torture is sometimes morally permissible, provided that it meets
 whichever standards are satisfied by just-combat killing.

If we do not challenge the judgment that just-combat killing is a greater harm than torture usually is, the question to raise is: Can torture meet the standards satisfied by just-combat killing? If so, that might be one reason in favor of allowing such torture. If not, torture will have been reaffirmed to be an activity of an extremely low moral order.

4. Obviously one could also challenge other elements of the argument—most notably, perhaps, premise (3). Torture is usually humiliating and degrading—the pain is normally experienced naked and amidst filth. But while killing destroys life, it need not destroy dignity. Which is worse, an honorable death or a degraded existence? While I am not unsympathetic with this line of attack, I do not want to try to use it. It suffers from being an attempt somehow just to intuit the relative degrees of evil attached respectively to death and degradation. Such judgments should probably be the outcome, rather than the starting point, of an argument. The rest of the essay bears directly on them.

ASSAULT UPON THE DEFENSELESS

The laws of war include an elaborate, and for the most part long-established, code for what might be described as the proper conduct of the killing of other people. Like most codes, the laws of war have been constructed piecemeal and different bits of the code serve different functions.⁵ It would almost certainly be impossible to specify any one unifying purpose served by the laws of warfare as a whole. Surely major portions of the law serve to keep warfare within one sort of principle of efficiency by requiring that the minimum destruction necessary to the attainment of legitimate objectives be used.

However, not all the basic principles incorporated in the laws of war could be justified as serving the purpose of minimizing destruction. One of the most basic principles for the conduct of war (*jus in bello*) rests on the distinction between combatants and noncombatants and requires that insofar as possible, violence not be directed at noncombatants.⁶ Now, obviously, there are some conceptual difficulties

5. See James T. Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts 1200-1740* (Princeton: Princeton University Press, 1975). Johnson stresses the largely religious origins of *jus ad bellum* and the largely secular origins of *jus in bello*.

6. For the current law, see Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 [1955], 6 U.S.T. 3516; T.I.A.S. No. 3365; 75 U.N.T.S. 287. Also see United States, Department of the Army, *The Law of Land Warfare*, Field Manual 27-10 (Washington: Government Printing Office, 1956), Chap. 5, "Civilian Persons"; and United States, Department of the Air Force, *International Law—The Conduct of Armed Conflict and Air Operations*, Air Force Pamphlet 110-31 (Washington: Government Printing Office, 1976), Chap. 3, "Combatants, Noncombatants and Civilians." This Convention was to be revised at a Geneva Conference in 1977; of considerable interest are the recommendations for greater protection of civilians advanced in Subcomm. on International Organizations of the House Comm. on Foreign Affairs, 93d Cong., 2d Sess. (1974), *Human Rights in the World Community: A Call for U.S. Leadership*, p. 38.

For the history, see Johnson, especially pp. 32-33 and 42-46, although I am interested here in the justification which could be given for the principle today, not the original justification (insofar as it was different).

The prohibition against attack upon noncombatants is considered by some authorities to be fundamental. See, for example, Jean Pictet, *The Principles of International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1966), p. 53: "This general immunity of the civilian population has not

in trying to separate combatants and noncombatants in some guerrilla warfare and even sometimes in modern conventional warfare among industrial societies. This difficulty is a two-edged sword; it can be used to argue that it is increasingly impossible for war to be fought justly as readily as it can be used to argue that the distinction between combatants and noncombatants is obsolete. In any case, I do not now want to defend or criticize the principle of avoiding attack upon non-combatants but to isolate one of the more general moral principles this specific principle of warfare serves.

It might be thought to serve, for example, a sort of efficiency principle in that it helps to minimize human casualties and suffering. Normally, the armed forces of the opposing nations constitute only a fraction of the respective total populations. If the casualties can be restricted to these official fighters, perhaps total casualties and suffering will be smaller than they would be if human targets were unrestricted.

But this justification for the principle of not attacking non-combatants does not ring true. Unless one is determined a priori to explain everything in terms of minimizing numbers of casualties, there is little reason to believe that this principle actually functions primarily to restrict the number of casualties rather than, as its own terms suggest, the *types* of casualties.⁷ A more convincing suggestion about the best justification which could be given is that the principle goes some way toward keeping combat humane, by protecting those who are assumed to be incapable of defending themselves. The principle of

been clearly defined in positive law, but it remains, in spite of many distortions, the basis of the laws of war." It is often assumed by others that the exigencies of a stable form of mutual assured destruction (MAD) make unavoidable the targeting of a nuclear deterrent on the enemy's civilian population and that therefore priority on avoidance of civilian casualties is impossible in nuclear war. For a persuasive contrary view, see Bruce M. Russett, "Assured Destruction of What? A Counter-combatant Alternative to Nuclear MADness," *Public Policy* 22 (1974): 121-138.

7. This judgment is supported by Stockholm International Peace Research Institute, *The Law of War and Dubious Weapons* (Stockholm: Almqvist & Wiksell, 1976), p. 9: "The prohibition on deliberately attacking the civilian population as such is not based exclusively on the principle of avoiding unnecessary suffering."

warfare is an instance of a more general moral principle which prohibits assaults upon the defenseless.⁸

Nonpacifists who have refined the international code for the conduct of warfare have not necessarily viewed the killing involved in war as in itself any less terrible than pacifists view it. One fundamental function of the distinction between combatants and noncombatants is to try to make a terrible combat fair, and the killing involved can seem morally tolerable to nonpacifists in large part because it is the outcome of what is conceived as a fair procedure. To the extent that the distinction between combatants and noncombatants is observed, those who are killed will be those who were directly engaged in trying to kill their killers. The fairness may be perceived to lie in this fact: that those who are killed had a reasonable chance to survive by killing instead. It was kill or be killed for both parties, and each had his or her opportunity to survive. No doubt the opportunities may not have been anywhere near equal—it would be impossible to restrict wars to equally matched opponents. But at least none of the parties to the combat were defenseless.

Now this obviously invokes a simplified, if not romanticized, portrait of warfare. And at least some aspects of the laws of warfare can legitimately be criticized for relying too heavily for their justification on a core notion that modern warfare retains aspects of a knightly joust, or a duel, which have long since vanished, if ever they were present. But the point now is not to attack or defend the efficacy of the principle of warfare that combat is more acceptable morally if restricted to official combatants, but to notice one of its moral bases, which, I am suggesting, is that it allows for a "fair fight" by means of protecting the utterly defenseless from assault. The resulting picture of war—accurate or not—is not of victim and perpetrator (or, of mutual victims) but of a winner and a loser, each of whom might have enjoyed, or suffered, the fate of the other. Of course, the satisfaction of the requirement of providing for a "fair fight" would not by itself make a conflict morally acceptable overall. An unprovoked and

8. To defend the bombing of cities in World War II on the ground that *total casualties* (combatant and noncombatant) were thereby reduced is to miss, or ignore, the point.

otherwise unjustified invasion does not become morally acceptable just because attacks upon noncombatants, use of prohibited weapons, and so on are avoided.

At least part of the peculiar disgust which torture evokes may be derived from its apparent failure to satisfy even this weak constraint of being a "fair fight." The supreme reason, of course, is that torture begins only after the fight is—for the victim—finished. Only losers are tortured. A "fair fight" may even in fact already have occurred and led to the capture of the person who is to be tortured. But now that the torture victim has exhausted all means of defense and is powerless before the victors, a fresh assault begins. The surrender is followed by new attacks upon the defeated by the now unrestrained conquerors. In this respect torture is indeed not analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenseless. In combat the other person one kills is still a threat when killed and is killed in part for the sake of one's own survival. The torturer inflicts pain and damage upon another person who, by virtue of now being within his or her power, is no longer a threat and is entirely at the torturer's mercy.

It is in this respect of violating the prohibition against assault upon the defenseless, then, that the manner in which torture is conducted is morally more reprehensible than the manner in which killing would occur if the laws of war were honored. In this respect torture sinks below even the well-regulated mutual slaughter of a justly fought war.

TORTURE WITHIN CONSTRAINTS?

But is all torture indeed an assault upon the defenseless? For, it could be argued in support of some torture that in many cases there is something beyond the initial surrender which the torturer wants from the victim and that in such cases the victim could comply and provide the torturer with whatever is wanted. To refuse to comply with the further demand would then be to maintain a second line of defense. The victim would, in a sense, not have surrendered—at least not fully surrendered—but instead only retreated. The victim is not, on this view, utterly helpless in the face of unrestrainable assault as long as he or she holds in reserve an act of compliance which would satisfy the torturer and bring the torture to an end.

It might be proposed, then, that there could be at least one type of morally less unacceptable torture. Obviously the torture victim must remain defenseless in the literal sense, because it cannot be expected that his or her captors would provide means of defense against themselves. But an alternative to a capability for a literal defense is an effective capability for surrender, that is, a form of surrender which will in fact bring an end to attacks. In the case of torture the relevant form of surrender might seem to be a compliance with the wishes of the torturer that provides an escape from further torture.

Accordingly, the constraint on the torture that would, on this view, make it less objectionable would be this: the victim of torture must have available an act of compliance which, if performed, will end the torture. In other words, the purpose of the torture must be known to the victim, the purpose must be the performance of some action within the victim's power to perform, and the victim's performance of the desired action must produce the permanent cessation of the torture. I shall refer to torture that provides for such an act of compliance as torture that satisfies the constraint of possible compliance. As soon becomes clear, it makes a great difference what kind of act is presented as the act of compliance. And a person with an iron will, a great sense of honor, or an overwhelming commitment to a cause may choose not to accept voluntarily cessation of the torture on the terms offered. But the basic point would be merely that there should be some terms understood so that the victim retains one last portion of control over his or her fate. Escape is not defense, but it is a manner of protecting oneself. A practice of torture that allows for escape through compliance might seem immune to the charge of engaging in assault upon the defenseless. Such is the proposal.

One type of contemporary torture, however, is clearly incapable of satisfying the constraint of possible compliance. The extraction of information from the victim, which perhaps—whatever the deepest motivations of torturers may have been—has historically been a dominant explicit purpose of torture is now, in world practice, overshadowed by the goal of the intimidation of people other than the victim.⁹ Torture is in many countries used primarily to intimidate potential opponents of the government from actively expressing their

9. See Amnesty International, 69.

opposition in any form considered objectionable by the regime. Prohibited forms of expression range, among various regimes, from participation in terroristic guerrilla movements to the publication of accurate news accounts. The extent of the suffering inflicted upon the victims of the torture is proportioned, not according to the responses of the victim, but according to the expected impact of news of the torture upon other people over whom the torture victim normally has no control. The function of general intimidation of others, or deterrence of dissent, is radically different from the function of extracting specific information under the control of the victim of torture, in respects which are central to the assessment of such torture. This is naturally not to deny that any given instance of torture may serve, to varying degrees, both purposes—and, indeed, other purposes still.

Terroristic torture, as we may call this dominant type, cannot satisfy the constraint of possible compliance, because its purpose (intimidation of persons other than the victim of the torture) cannot be accomplished and may not even be capable of being influenced by the victim of the torture. The victim's suffering—indeed, the victim—is being used entirely as a means to an end over which the victim has no control. Terroristic torture is a pure case—the purest possible case—of the violation of the Kantian principle that no person may be used *only* as a means. The victim is simply a site at which great pain occurs so that others may know about it and be frightened by the prospect. The torturers have no particular reason not to make the suffering as great and as extended as possible. Quite possibly the more terrible the torture, the more intimidating it will be—this is certainly likely to be believed to be so.

Accordingly, one ought to expect extensions into the sorts of “experimentation” and other barbarities documented recently in the cases of, for example, the Pinochet government in Chile and the Amin government in Uganda.¹⁰ Terroristic torturers have no particular reason not to carry the torture through to the murder of the victim,

10. See United Nations, General Assembly, Report of the Economic and Social Council, *Protection of Human Rights in Chile* (UN Document A/31/253, 8 October 1976, 31st Session), p. 97; and *Uganda and Human Rights: Reports to the UN Commission on Human Rights* (Geneva: International Commission of Jurists, 1977), p. 118.

provided the victim's family or friends can be expected to spread the word about the price of any conduct compatible with disloyalty. Therefore, terroristic torture clearly cannot satisfy even the extremely mild constraint of providing for the possibility of compliance by its victim.¹¹

The degree of need for assaults upon the defenseless initially appears to be quite different in the case of torture for the purpose of extracting information, which we may call *interrogational torture*.¹² This type of torture needs separate examination because, however condemnable we ought in the end to consider it overall, its purpose of gaining information appears to be consistent with the observation of some constraint on the part of any torturer genuinely pursuing that purpose alone. Interrogational torture does have a built-in end-point: when the information has been obtained, the torture has accomplished its purpose and need not be continued. Thus, satisfaction of the constraint of possible compliance seems to be quite compatible with the explicit end of interrogational torture, which could be terminated upon the victim's compliance in providing the information sought.

11. A further source of arbitrariness is the fact that there is, in addition, no natural limit on the "appropriate" targets of terroristic torture, since the victim does not need to possess any specific information, or to have done anything in particular, except possibly to have acted "suspiciously." Even the latter is not necessary if the judgment is made, as it apparently was by the Nazis, that random terror will be the most effective.

It has been suggested that there might be a category of "deserved" terroristic torture, conducted only after a fair trial had established the guilt of the torture victim for some heinous crime. A fair procedure for determining who is to be tortured would transform the torture into a form of deterrent punishment—doubtless a cruel and unusual one.

Such torture would stand only with a general deterrent theory of punishment according to which *who* is punished depends upon guilt, but *how much* he or she is punished depends upon supposed deterrent effects. I would think that any finding that terroristic torture could be fitted within a deterrent theory of punishment (provided the torture was preceded by a fair trial) could cut either way and would be at least as plausible a reason for rejecting the general theory as it would be for accepting the particular case of terroristic torture. But I will not pursue this because I am not aware of any current practice of reserving torture as the sentence for people after they are convicted by a trial with the usual safeguards. Torture customarily precedes any semblance of a trial. One can, of course, imagine various sorts of torture other than the two common kinds discussed here.

12. These two categories of torture are not intended to be, and are not, exhaustive. See previous note.

In a fairly obvious fashion the torturer could consider himself or herself to have completed the assigned task—or probably more hopefully, any superiors who were supervising the process at some emotional distance could consider the task to be finished and put a stop to it. A pure case of interrogational torture, then, appears able to satisfy the constraint of possible compliance, since it offers an escape, in the form of providing the information wanted by the torturers, which affords some protection against further assault.

Two kinds of difficulties arise for the suggestion that even largely interrogational torture could escape the charge that it includes assaults upon the defenseless. It is hardly necessary to point out that very few actual instances of torture are likely to fall entirely within the category of interrogational torture. Torture intended primarily to obtain information is by no means always in practice held to some minimum necessary amount. To the extent that the torturer's motivation is sadistic or otherwise brutal, he or she will be strongly inclined to exceed any rational calculations about what is sufficient for the stated purpose. In view of the strength and nature of a torturer's likely passions—of, for example, hate and self-hate, disgust and self-disgust, horror and fascination, subservience toward superiors and aggression toward victims—no constraint is to be counted upon in practice.

Still, it is of at least theoretical interest to ask whether torturers with a genuine will to do so could conduct interrogational torture in a manner which would satisfy the constraint of possible compliance. In order to tell, it is essential to grasp specifically what compliance would normally involve. Almost all torture is "political" in the sense that it is inflicted by the government in power upon people who are, seem to be, or might be opposed to the government. Some torture is also inflicted by opponents of a government upon people who are, seem to be, or might be supporting the government. Possible victims of torture fall into three broad categories: the ready collaborator, the innocent bystander, and the dedicated enemy.

First, the torturers may happen upon someone who is involved with the other side but is not dedicated to such a degree that cooperation with the torturers would, from the victim's perspective, constitute a betrayal of anything highly valued. For such a person a betrayal of cause and allies might indeed serve as a form of genuine escape.

The second possibility is the capture of someone who is passive toward both sides and essentially uninvolved. If such a bystander should happen to know the relevant information—which is very unlikely—and to be willing to provide it, no torture would be called for. But what if the victim would be perfectly willing to provide the information sought in order to escape the torture but does not have the information? Systems of torture are notoriously incompetent. The usual situation is captured with icy accuracy by the reputed informal motto of the Saigon police, “If they are not guilty, beat them until they are.”¹³ The victims of torture need an escape not only from beatings for what they know but also from beatings for what they do not know. In short, the victim has no convincing way of demonstrating that he or she cannot comply, even when compliance is impossible. (Compare the reputed dunking test for witches: if the woman sank, she was an ordinary mortal.)

Even a torturer who would be willing to stop after learning all that could be learned, which is nothing at all if the “wrong” person is being tortured, would have difficulty discriminating among pleas. Any keeping of the tacit bargain to stop when compliance has been as complete as possible would likely be undercut by uncertainty about when the fullest possible compliance had occurred. The difficulty of demonstrating that one had collaborated as much as one could might in fact haunt the collaborator as well as the innocent, especially if his or her collaboration had struck the torturers as being of little real value.

Finally, when the torturers succeed in torturing someone genuinely committed to the other side, compliance means, in a word, betrayal; betrayal of one’s ideals and one’s comrades. The possibility of betrayal cannot be counted as an escape. Undoubtedly some ideals are vicious and some friends are partners in crime—this can be true of either the government, the opposition, or both. Nevertheless, a betrayal is no escape for a dedicated member of either a government or its opposition, who cannot collaborate without denying his or her highest values.¹⁴

13. Amnesty International, 166.

14. Defenders of privilege customarily portray themselves as defenders of civilization against the vilest barbarians. Self-deception sometimes further smooths the way to treating whoever are the current enemies as beneath con-

For any genuine escape must be something better than settling for the lesser of two evils. One can always try to minimize one's losses—even in dilemmas from which there is no real escape. But if accepting the lesser of two evils always counted as an escape, there would be no situations from which there was no escape, except perhaps those in which all alternatives happened to be equally evil. On such a loose notion of escape, all conscripts would become volunteers, since they could always desert. And all assaults containing any alternatives would then be acceptable. An alternative which is legitimately to count as an escape must not only be preferable but also itself satisfy some minimum standard of moral acceptability. A denial of one's self does not count.

Therefore, on the whole, the apparent possibility of escape through compliance tends to melt away upon examination. The ready collaborator and the innocent bystander have some hope of an acceptable escape, but only provided that the torturers both (a) are persuaded that the victim has kept his or her part of the bargain by telling all there is to tell and (b) choose to keep their side of the bargain in a situation in which agreements cannot be enforced upon them and they have nothing to lose by continuing the torture if they please. If one is treated as if one is a dedicated enemy, as seems likely to be the standard procedure, the fact that one actually belongs in another category has no effect. On the other hand, the dedicated enemies of the torturers, who presumably tend to know more and consequently are the primary intended targets of the torture, are provided with nothing which can be considered an escape and can only protect them-

tempt and certainly unworthy of equal respect as human beings. Consequently, I am reluctant to concede, even as a limiting case, that there are probably rare individuals so wicked as to lack integrity, or anyway to lack any integrity worthy of respect. But, what sort of integrity could one have violated by torturing Hitler?

Any very slight qualification here must not, however, be taken as a flinging wide open of the doors. To be beyond the pale in the relevant respect must involve far more than simply serving values which the torturers find abhorrent. Otherwise, license has been granted simply to torture whoever are one's greatest enemies—the only victims very many torturers would want in any case. Unfortunately, I cannot see a way to delimit those who are genuinely beyond the pale which does not beg for abuse.

selves, as torture victims always have, by pretending to be collaborators or innocents, and thereby imperiling the members of these two categories.

MORALLY PERMISSIBLE TORTURE?

Still, it must reluctantly be admitted that the avoidance of assaults upon the defenseless is not the only, or even in all cases an overriding, moral consideration. And, therefore, even if terroristic and interrogational torture, each in its own way, is bound to involve attacks upon people unable to defend themselves or to escape, it is still not utterly inconceivable that instances of one or the other type of torture might sometimes, all things considered, be justified. Consequently, we must sketch the elements of an overall assessment of these two types of torture, beginning again with the dominant contemporary form: terroristic.

Anyone who thought an overall justification could be given for an episode of terroristic torture would at the least have to provide a clear statement of necessary conditions, all of which would have to be satisfied before any actions so extraordinarily cruel as terroristic torture could be morally acceptable. If the torture were actually to be justified, the conditions would, of course, have to be met in fact. An attempt to specify the necessary conditions for a morally permissible episode of terroristic torture might include conditions such as the following. A first necessary condition would be that the purpose actually being sought through the torture would need to be not only morally good but supremely important, and examples of such purposes would have to be selected by criteria of moral importance which would themselves need to be justified. Second, terroristic torture would presumably have to be the least harmful means of accomplishing the supremely important goal. Given how very harmful terroristic torture is, this could rarely be the case. And it would be unlikely unless the period of use of the torture in the society was limited in an enforceable manner. Third, it would have to be absolutely clear for what purpose the terroristic torture was being used, what would constitute achievement of that purpose, and thus, when the torture would end. The torture could

not become a standard practice of government for an indefinite duration. And so on.

But is there any supremely important end to which terroristic torture could be the least harmful means? Could terroristic torture be employed for a brief interlude and then outlawed? Consider what would be involved in answering the latter question. A government could, it might seem, terrorize until the terror had accomplished its purpose and then suspend the terror. There are few, if any, clear cases of a regime's voluntarily renouncing terror after having created, through terror, a situation in which terror was no longer needed. And there is considerable evidence of the improbability of this sequence. Terroristic torture tends to become, according to Amnesty International, "administrative practice": a routine procedure institutionalized into the method of governing.¹⁵ Some bureaus collect taxes, other bureaus conduct torture. First a suspect is arrested, next he or she is tortured. Torture gains the momentum of an ingrained element of a standard operating procedure.

Several factors appear to point in the direction of permanence. From the perspective of the victims, even where the population does

15. I am assuming the unrestrained character of terroristic torture as it is actually practiced. Besides the general study by Amnesty International cited above and below, Amnesty International regularly issues studies of individual countries. Of particular interest, perhaps, is: *Report on Allegations of Torture in Brazil*, 3d ed. (London: Amnesty International Publications, 1976). The Committee on International Relations of the United States House of Representatives has published during 1975-1977 extensive hearings on torture in dozens of countries. And other nongovernmental organizations, such as the International Commission of Jurists and the International League for Human Rights, have published careful accounts of the nature of the torture practiced in various particular countries. I believe that the category of terroristic torture used in this article is an accurate reflection of a very high proportion of the actual cases of contemporary torture. It would be tedious to document this here, but see, for example, Amnesty International, pp. 21, 26, 103, 199.

Nevertheless, it can be granted that terroristic torture is not necessarily unrestrained. It is conceivable for torture to fail to be constrained by the responses of its victim but to be subject to other constraints: to use brutality of only a certain degree, to conduct torture of unlimited (or limited) brutality but for only a limited time, to select victims who "deserve" it (compare note 11), etc. I have not discussed such a category of "constrained terroristic torture" because I believe it to be empty—for very good psychological and political reasons. On the methodological question here, see the concluding paragraphs of this article.

not initially feel exploited, terror is very unsuitable to the generation of loyalty. This would add to the difficulty of any transition away from reliance on terror. Where the population does feel exploited even before the torture begins, the sense of outrage (which is certainly rationally justified toward the choice of victims, as we have seen) could often prove stronger than the fear of suffering. Tragically, any unlikelihood that the terroristic torture would "work" would almost guarantee that it would continue to be used. From the perspective of the torturers, it is rare for any entrenched bureau to choose to eliminate itself rather than to try to prove its essential value and the need for its own expansion. This is especially likely if the members of the operation are either thoroughly cynical or thoroughly sincere in their conviction that they are protecting "national security" or some other value taken to be supremely important. The greater burden of proof rests, I would think, on anyone who believes that controllable terroristic torture is possible.

Rousseau says at one point that pure democracy is a system of government suitable only for angels—ordinary mortals cannot handle it. If Rousseau's assumption is that principles for human beings cannot ignore the limits of the capacity of human beings, he is surely right. (This would mean that political philosophy often cannot be entirely nonempirical.) As devilish as terroristic torture is, in a sense it too may be a technique only for angels: perhaps only angels could use it within the only constraints which would make it permissible and, then, lay it aside. The partial list of criteria for the acceptable use of terroristic torture sketched above, in combination with strong evidence of the uncontrollability of terroristic torture, would come as close to a *reductio ad absurdum* as one could hope to produce in political philosophy. Observance of merely the constraints listed would require a degree of self-control and self-restraint, individual and bureaucratic, which might turn out to be saintly. If so, terroristic torture would have been shown to be justifiable only if it could be kept within constraints within which it could almost certainly not be kept.

But if the final objection against terroristic torture turned out to be empirical evidence that it is probably uncontrollable, would not the philosophical arguments themselves turn out to have been irrelevant?

Why bother to show that terroristic torture assaults the defenseless, if in the end the case against it is going to rest on an empirical hypothesis about the improbability of keeping such torture within reasonable bounds?

The thesis about assault upon the defenseless matters, even though it is not in itself conclusive, because the uncontrollability thesis could only be probable and would also not be conclusive in itself. It could not be shown to be certain that terroristic torture will become entrenched, will be used for minor purposes, will be used when actually not necessary, and so on. And we sometimes go ahead and allow practices which might get out of hand. The relevance of showing the extent of the assault upon defenseless people is to establish how much is at stake if the practice is allowed and then runs amok. If the evidence for uncontrollability were strong, that fact plus the demonstration of extreme cruelty would constitute a decisive case against terroristic torture. It would, then, never be justified.

Much of what can be said about terroristic torture can also be said about instances involving interrogational torture. This is the case primarily because in practice there are evidently few pure cases of interrogational torture.¹⁶ An instance of torture which is to any significant degree terroristic in purpose ought to be treated as terroristic. But if we keep in mind how far we are departing from most actual practice, we may, as before, consider instances in which the *sole* purpose of torture is to extract certain information and therefore the torturer is willing to stop as soon as he or she is sure that the victim has provided all the information which the victim has.

As argued in the preceding section, interrogational torture would in practice be difficult to make into less of an assault upon the defenseless. The supposed possibility of escape through compliance turns out to depend upon the keeping of a bargain which is entirely unenforceable within the torture situation and upon the making of discriminations among victims that would usually be difficult to make until after they no longer mattered. In fact, since any sensible willing collaborator will cooperate in a hurry, only the committed and the innocent are likely to be severely tortured. More important, in the case of someone

16. Amnesty International, pp. 24-25, 114-242.

being tortured because of profoundly held convictions, the "escape" would normally be a violation of integrity.

As with terroristic torture, any complete argument for permitting instances of interrogational torture would have to include a full specification of all necessary conditions of a permissible instance, such as its serving a supremely important purpose (with criteria of importance), its being the least harmful means to that goal, its having a clearly defined and reachable endpoint, and so on. This would not be a simple matter. Also as in the case of terroristic torture, a considerable danger exists that whatever necessary conditions were specified, any practice of torture once set in motion would gain enough momentum to burst any bonds and become a standard operating procedure. Torture is the ultimate shortcut. If it were ever permitted under any conditions, the temptation to use it increasingly would be very strong.

Nevertheless, it cannot be denied that there are imaginable cases in which the harm that could be prevented by a rare instance of pure interrogational torture would be so enormous as to outweigh the cruelty of the torture itself and, possibly, the enormous potential harm which would result if what was intended to be a rare instance was actually the breaching of the dam which would lead to a torrent of torture. There is a standard philosopher's example which someone always invokes: suppose a fanatic, perfectly willing to die rather than collaborate in the thwarting of his own scheme, has set a hidden nuclear device to explode in the heart of Paris. There is no time to evacuate the innocent people or even the movable art treasures—the only hope of preventing tragedy is to torture the perpetrator, find the device, and deactivate it.

I can see no way to deny the permissibility of torture in a case *just like this*. To allow the destruction of much of a great city and many of its people would be almost as wicked as purposely to destroy it, as the Nazis did to London and Warsaw, and the Allies did to Dresden and Tokyo, during World War II. But there is a saying in jurisprudence that hard cases make bad law, and there might well be one in philosophy that artificial cases make bad ethics. If the example is made sufficiently extraordinary, the conclusion that the torture is permissible is secure. But one cannot easily draw conclusions for ordinary cases from extraordinary ones, and as the situations de-

scribed become more likely, the conclusion that the torture is permissible becomes more debatable.

Notice how unlike the circumstances of an actual choice about torture the philosopher's example is. The proposed victim of our torture is not someone we suspect of planting the device: he *is* the perpetrator. He is not some pitiful psychotic making one last play for attention: he *did* plant the device. The wiring is not backwards, the mechanism is not jammed: the device *will* destroy the city if not deactivated.

Much more important from the perspective of whether general conclusions applicable to ordinary cases can be drawn are the background conditions that tend to be assumed. The torture will not be conducted in the basement of a small-town jail in the provinces by local thugs popping pills; the prime minister and chief justice are being kept informed; and a priest and a doctor are present. The victim will not be raped or forced to eat excrement and will not collapse with a heart attack or become deranged before talking; while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer. The torture is purely interrogational.¹⁷

Most important, such incidents do not continue to happen. There are not so many people with grievances against this government that the torture is becoming necessary more often, and in the smaller cities, and for slightly lesser threats, and with a little less care, and so on. Any judgment that torture could be sanctioned in an isolated case without seriously weakening existing inhibitions against the more general use of torture rests on empirical hypotheses about the psychol-

17. For a realistic account of the effects of torture, see *Evidence of Torture: Studies by the Amnesty International Danish Medical Group* (London: Amnesty International Publications, 1977). Note in particular: "Undoubtedly the worst sequelae of torture were psychological and neurological" (p. 12). For suggestions about medical ethics for physicians attending persons being tortured, see "Declaration of Tokyo: Guidelines for Medical Doctors Concerning Torture," in United Nations, General Assembly, Note by the Secretary-General, *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in relation to Detention and Imprisonment* (UN Document A/31/234, 6 October 1976, 31st Session), Annex II.

ogy and politics of torture. There is considerable evidence of all torture's metastatic tendency. If there is also evidence that interrogational torture can sometimes be used with the surgical precision which imagined justifiable cases always assume, such rare uses would have to be considered.

Does the possibility that torture might be justifiable in some of the rarefied situations which can be imagined provide any reason to consider relaxing the legal prohibitions against it? Absolutely not. The distance between the situations which must be concocted in order to have a plausible case of morally permissible torture and the situations which actually occur is, if anything, further reason why the existing prohibitions against torture should remain and should be strengthened by making torture an international crime. An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience. Anyone who thinks an act of torture is justified should have no alternative but to convince a group of peers in a public trial that all necessary conditions for a morally permissible act were indeed satisfied. If it is reasonable to put someone through torture, it is reasonable to put someone else through a careful explanation of why. If the situation approximates those in the imaginary examples in which torture seems possible to justify, a judge can surely be expected to suspend the sentence. Meanwhile, there is little need to be concerned about possible injustice to justified torturers and great need to find means to restrain totally unjustified torture.

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