

# The Logic of Torture

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*Why the subject of torture provokes so much yelling and so little argumentation.*

During the past few years, in the wake of Abu Ghraib and Guantanamo Bay, much has been written about torture, almost none of it, regrettably, philosophically edifying. May I help?

The most important thing to keep in mind as you reflect on torture is that there are different types of question one can ask about it. Different types of question call for different types of answer (and therefore different types of expertise). First, there are conceptual questions. What is torture? How does torture differ from such things as torment, punishment, harsh treatment, cruelty, vengeance, sadism and violence? Can torture be accidental? Must it involve physical (as opposed to mental) pain? Can deprivation or confinement constitute torture? Conceptual questions such as these are about the concepts, ideas, categories and distinctions we use. Answering them is the province of philosophy.

Second, there are factual questions. Given a conception of torture, how widespread is it? Is there less of it now than there used to be, and if so, why? Who practices it, and why? What forms does it take? Is waterboarding torture? How much pain or suffering does a particular form of torture typically inflict? How much pain or suffering does a particular instance of torture actually inflict? Is torture effective as a means of gathering information? If so, how effective? Factual questions such as these are about how things are. Answering them requires investigation, consultation (with relevant experts) and observation. Philosophers, as such, have no expertise in this area. This doesn't mean philosophers can't make factual claims, for they can and do; it means their philosophical training doesn't make their factual claims more likely to be true. In other words, philosophers have no comparative advantage in ascertaining how things are.

Third, there are evaluative questions. Given a conception of torture, is torture permissible? If so, in what circumstances? Is torture ever obligatory? If so, why? Should the law permit torture? If so, how should it be regulated to prevent (or minimize the likelihood of) abuse? Perhaps torture should be illegal even if it is, in rare cases, morally permissible. Law and morality are different institutions, after all, with different purposes, standards and limitations. A thing can be morally permissible but legally impermissible, just as a thing can be legally permissible but morally impermissible.

It is important to distinguish questions about what the law is from questions about what the law ought to be. Whether torture is legally permissible is a factual question about the law. (Not all factual questions are easy to answer, obviously, and some answers to factual questions are controversial. For proof of this, see science.) Whether torture should be permitted by law, and if so in what circumstances, is an evaluative question about the law. If you want to know whether torture is legally permissible, consult an attorney who specializes in that type of law. You would not consult an attorney if you wanted to know whether torture should be legally permissible, for that is an evaluative question, and attorneys, as such, have no evaluative expertise.

Not all facts about torture are relevant to its moral permissibility. What makes a fact relevant is that it connects up to a moral principle. For example, suppose I am a hedonistic utilitarian. My principle (of utility) mandates that I maximize pleasure (or, put negatively, that I minimize suffering). This makes the amount of suffering inflicted during torture relevant. How much suffering torture inflicts, both quantitatively and qualitatively, is a factual question about which reasonable people can differ. Many facts about torture, such as where it takes place, on whom it is inflicted, and how many people administer it, are morally irrelevant and therefore of no interest to those who are interested solely in its moral status.

Just as two or more people can support the same presidential candidate for different reasons, two or more people can oppose torture for different reasons. Some people oppose torture solely because of its consequences. These are known as consequentialists. Utilitarianism is a species of consequentialism (and hedonistic utilitarianism a species of utilitarianism). To a consequentialist, no type of act is intrinsically wrong, i.e., wrong in and of itself. Lying is not intrinsically wrong; cheating is not intrinsically wrong; stealing is not intrinsically wrong; torturing is not intrinsically wrong; even killing innocent people is not intrinsically wrong. Each act, to a consequentialist, must be evaluated on its own merits. Acts that

maximize the good (e.g., happiness) are right, while acts that do not maximize the good are wrong. Consequentialists have no principled objection to torture. When an act of torture is wrong, it is wrong solely because, qua act, it fails to maximize the good. When it maximizes the good, it is not wrong.

Some consequentialists prefer to focus on rules, practices or entire moral codes rather than concrete acts. They say that we should adopt whatever rules, practices or moral codes maximize the good when generally adhered to (or followed), and then act in accordance with those rules, practices or codes. We should not evaluate acts individually, on a case-by-case basis. Since only rare cases of torture maximize the good, these theorists would adopt a rule that prohibits torture. This means that we should refuse to torture even if, in a particular case, it would maximize the good. Act-consequentialists accuse rule-consequentialists of "rule-worship." Why (they ask) should one follow a rule even in those cases where it is known that breaking the rule would maximize the good?

Deontologists reject consequentialism. Deontologists believe that certain types of act, such as torture, are intrinsically wrong. There are two types of deontologist. Absolute deontologists believe that no amount of good could possibly justify torture. Even if torturing X were the only way to save the lives of a million innocent people, it would be wrong to torture X. Even if torturing X were the only way to prevent Y from torturing a million innocent people, it would be wrong to torture X. Absolute deontology is a hard doctrine, as you can see, but it has (and always has had) its adherents.

Moderate deontologists agree with absolute deontologists that certain acts, such as torture, are intrinsically wrong, but disagree that nothing could possibly justify them. Moderate deontologists have thresholds. Here is an example of a high threshold: A moderate deontologist might believe that torture is permissible only if it saves the lives of at least 1,000 innocent people. A low threshold might require that 50 innocent lives be saved. An even lower threshold might require that five innocent lives be saved. Moderate deontologists agree with consequentialists that consequences count, but disagree that only consequences count. Moderate deontology comes in degrees, depending on where the threshold is set. Think of it this way. Consequentialism is 0; absolute deontology is 1; moderate deontology ranges from 0.000001 to 0.999999. Moderate deontology with a low threshold is close to consequentialism on the spectrum. Moderate deontology with a high threshold is close to absolute deontology on the spectrum.

You can now see that normative ethical theorists of different stripes can oppose—albeit for different reasons—a given instance of torture. An absolute deontologist can oppose it because it's a case of torture, which is categorically prohibited. A moderate deontologist can oppose it because (1) it's a case of torture, which is intrinsically wrong, and (2) it will not produce enough good to justify it. A consequentialist can oppose it because it does not maximize the good. When I hear that someone opposes torture, I want to know why. Is he an absolute deontologist? A moderate deontologist? A consequentialist? Once I get an answer to this question, I can probe for inconsistencies.

Another point to keep in mind is this: That two or more normative ethical theories converge on certain cases, or even on many cases, does not mean that they're identical. All it takes to make two normative ethical theories different is one case—actual or hypothetical—in which they produce different results, and that is the situation here with respect to absolute deontologists, moderate deontologists and consequentialists. There are cases (if only hypothetical) in which both types of deontologist condemn an act of torture while consequentialists commend it. There are cases in which absolute deontologists condemn an act of torture while moderate deontologists and consequentialists commend it. Morality, like politics, makes strange bedfellows.

One difference between law and morality is that law is practical. Law must attend to such things as efficiency. Laws are addressed to classes of people, not to individuals. You've probably heard the expression that hard cases make bad law. This is another way of saying that just because a given act is morally permissible doesn't mean that the law should permit acts of that type. Take euthanasia, for example. It may be that in a particular case, it is morally permissible for someone to engage in mercy killing. It doesn't follow from this that mercy killing should be permitted by law, for people might misapply the rule and end up killing those who don't want to be killed. The law errs on the side of caution, for practical reasons.

The reasoning just used in the case of euthanasia can be applied to torture. Even if torture can be justified in particular cases, such as when it is necessary to learn the location of a bomb, it might be dangerous for the law to allow it. Certainly we don't want torture to be routine, for that opens the door to abuses. The best policy might be to prohibit torture (having carefully defined it), while allowing as a defense the claim that it was necessary to save many innocent lives. This is only a sketch of an argument, but you can see how it might be developed. The idea is to create a strong legal presumption against torture, while allowing for the possibility of rebuttal in a court of law.

Some people think philosophers have their heads in the clouds. It's an old but false complaint. Most philosophers—even those who work in metaphysics or epistemology rather than ethics—care very much about public affairs, and their training in conceptual analysis equips them to contribute to it. We must be careful, though, about the nature and scope of philosophical expertise. Philosophers, as such, have neither factual nor evaluative expertise. (I would argue that nobody has evaluative

expertise.) Philosophers can be as wrong about the facts as anyone else, and the fact that X is a philosopher does not give X's values any greater weight.

What philosophers can contribute to public affairs—and perhaps ought to contribute—is conceptual clarification. As a result of their training, philosophers are adept at sorting things out, identifying fallacies (understood as characteristic errors in reasoning), uncovering hidden assumptions, spotting inconsistencies, and showing why one thing is or is not relevant to some other thing. Philosophers are technicians, not sages.

Nothing I have said implies that philosophers can't argue. But notice what that involves. Every argument with an evaluative conclusion must, in order to be valid, have at least one evaluative premise. (This is known as Hume's Law.) To persuade somebody to accept a conclusion, you must use only premises that he accepts. If your interlocutor rejects one of your premises, including the evaluative one, your argument gets no grip on him (although it might get a grip on someone else, with different beliefs and values). You will have to back up, as it were, and argue for the premise that your interlocutor rejects. This new argument will also need to have at least one evaluative premise. If your interlocutor rejects it, you will have to back up and argue for it—and so on, until you find common ground. The idea is to show your interlocutor that he has inconsistent beliefs. The only leverage a philosopher has is the principle of noncontradiction.

Argumentation is hard. It requires time, patience, energy, charity and intelligence. Could that be why there is so much yelling and so little arguing when it comes to important matters such as torture?

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