

The Legal and Moral Permissibility of Torture

Yulu Zhang^{1,a,*,†}, Yangzehou Zhang^{2,b,†}, and Yijie Hu^{3,c,†}

¹Havergal College, Toronto, M5N 2H9, Canada

²Hild Bede College, Durham University, Durham, DH1 1SZ, U.K.

³Leavey School of Business, Santa Clara University, Santa Clara, 95053, U.S.

a. lulucgdx@gmail.com

*corresponding author

†These authors contributed equally.

Abstract: This paper attempts to address the legal and moral permissibility of torture under extreme situations. The use of torture has been prohibited by international law as a violation of human rights. In this paper, we will present a case of Public Committee Against Torture v. Israel, and analyse the legal permissibility of torture using the necessity defense. Furthermore, we will evaluate the permissibility of torture through contractarian, consequentialist, and deontologist viewpoints, on the premise that the act of torture has *de facto* been performed and it was the only way to obtain the truth. Ultimately, the three moral viewpoints collectively conclude that torture should be legally justifiable, while differ on the moral permissibility of the nature of the act.

Keywords: necessity defense, torture, legal and moral permissibility, contractarianism, consequentialism

1. Introduction

Imagine that a terrorist hid a bomb into a high school. It is going to blow up the whole school and the 300 students in it in 5 minutes, so there is not enough time for the students to evacuate. The only way to obtain the location of it is to torture the terrorist. Assuming that if you torture the criminal, you would be able to get the location and save the students. You know for sure that if you know the location of the bomb, you will be able to defuse the bomb. In that case, if you are the police, what's your decision? This ticking bomb scenario raises the dilemma of torturing one or letting hundreds death of others. Weighing this fundamental conflict of values about torture leads to the question we try to answer in this article: Is it morally permissible to torture a person, given the fact that: 1) the only way to obtain the truth is through torture, and 2) that the person committed to the crime? Some clarification should be made before providing the rationale for this question:

1) In that case, we know for sure that if we torture the criminal, we get the truth. It is not the circumstances which we are uncertain about whether we can get the truth by torturing or we might get a false answer from the criminal.

2) The person we intend to torture is a criminal but not a suspect. We have already known that he commits to the crime.

3) The mean of our interrogation is torture. By defining our mean as torture, we escape from the question of the definition of torture. Hence, whatever your definition of torture is, we assume that the mean of our interrogation is bad enough in that case to be viewed as torture.

What we are interested in is the justification of torture. Is it morally permissible to torture a person for the sake of saving the life of hundreds and thousands of others? We think this question is important because our answer will directly determine our response to this tricky scenario and give us a guide on how to weigh conflicts of values in this scenario. Moreover, the conclusion of this moral discussion has further implications for our judiciary legislation because it is undoubtedly that moral wrongdoing is central to legal wrongdoing.

Considering the topic of the torture, the first question will base on the justification of interrogation. In the most basic sense, interrogation refers to asking questions to obtain a truthful answer, conditional to the privilege against self-incrimination. However, any interrogation inevitably violates the suspects' liberty, his human dignity and privacy even though there is no use of any physical means. In that case, any interrogation should not be taken place without clear authorization. It is not necessary for us to dig in-depth of a law of interrogation of what physical means are to be used in the interrogation because these laws are different in the context, for example, will depend on an investigator's potential criminal liability. Eventually, the legality of interrogation is deduced from the appropriation of its purpose and its method.

The question of the justification of interrogation turns us to the question of the criminal law defence of necessity because criminal liability largely relies on the interpretation given to the defence of necessity. We can see it through Section 22 of Israel's Penal Law which provides a version of Israel's criminal law defence of necessity [1]:

A person may be exempted from criminal responsibility for an act or omission if he can show that it was done or made in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury on his person, honour, or property or on the person or honour of others whom he was bound to protect or on property placed in his charge: provided that he did no more than what was reasonably necessary for that purpose and that the harm caused by him was not disproportionate to the harm avoided.

Several notable things we can read from this section. First, it is a defence, not part of the prosecution's *prima facie* case, which means that only by a defence of necessity as such can an investigator use violence against a person to extract information or confession from him and escape liability. Second, this necessity provision is a justification but not an excuse [1]. Justification is the case we justify *prima facie* wrongful and unlawful case to be not wrongful and unlawful. For example, killing a person is *prima facie* wrongful and unlawful, but it is not wrongful and unlawful if you kill someone in self-defence. By contrast, an excuse maintains our *prima facie* judgement of a wrongful and unlawful case, however, the actor would be excused from our *prima facie* judgement due to he is not blameworthy in doing an admittedly wrongful and unlawful act. For example, it is still *prima facie* for an insane person to kill others; however, the insane person is not culpable of his admittedly wrongful and unlawful killing of others. Thirdly, general necessity provisions hold the universality of allowing the rise of a defence based on the justification that, in any circumstance violating the criminal code is the right thing to do as the alternatives would be all worse. A further reading on Israel's penal law is that the rationale behind this defence is a claim that any criminal code should allow punishment only when moral blameworthiness can be established [1]. Moreover, this moral blameworthiness can only be established when the agent is neither justified nor excused in his action. This rationale seems to lead us to the conclusion that moral blameworthiness can provide the justification for a brutal means of integration. In that sense, it can lead to an extreme situation where if the case is bad enough, there is no room for possible torture as there would only

be justified necessity defence. Furthermore, this justifies possible regular brutal means as if a mean is not to be deemed as a criminal offence, and there is no reason for an interrogator not to use it.

However, if we look into a different German provision, it is said, "The necessity defence should meet the requirement that the act is an appropriate means" [1]. German provision provides a different account which indicates that some acts are so wrong and can not be justified, whatever how good the consequence is. The fundamental moral belief is that no matter how good an end is, it does not provide the justification for the use of any means to achieve it. This leads us to the question of whether a single moral intuition can justify torture as a necessary defence. In this article, we will disagree with the justification of Israel's necessity provision that merely consequential criteria necessarily justify criminal liability. We do not deny the importance of consequential calculation when weighing the evil required by necessity defence. We are claiming that our judgement on moral rightness or wrongness is not exhausted by the consequential calculation of these actions.

2. Public Committee Against Torture v. Israel

This paper will address the case of Public Committee Against Torture v. Israel, in which deliberate torture was performed by investigators of the General Security Service (GSS) in Israel [2]. Terrorist activities are posing incessant threats to Israel's national security ever since the founding the state. The responsibilities of the GSS, hence, are to conduct investigation in order to prevent the terrorist activities before the fact – with interrogation undoubted being essential in obtaining crucial information from the suspect. However, former suspects who have been interrogated appealed to Supreme Court of Israel, accusing the GSS investigators of applying excessive psychological and physical force during these interrogations, and using methods that would not normally be used in interrogations. These methods include shaking the suspects, putting suspects into the "Shabach" position and the "Frog Crouch", which are both postures that cause suspects serious physical pain if they hold the postures for a long period of time, putting on particularly small handcuffs, and sleep deprivation by playing loud music or having intense and non-stopping interrogations.

The petitioners claim that the interrogation methods executed by the GSS investigator are inhumane and constitutes torture. Therefore they are illegal under the international law. The state, on the other hand, argues that the use of physical means during interrogation is justified by necessity defense, as specified in Israel's penal law, because suspects revealed information crucial to preventing the terrorist activities that otherwise would not be obtained. The state further argues that not only can the GSS investigators use physical means, but that they should do so - because of their responsibility to prevent danger to the citizens. In fact, the state argues that the GSS investigators were authorized in using physical means during interrogation by higher ranking officials in the GSS and ministerial approval.

However, the court noted that legal authorization requires an "explicit statutory provision": "If an authority cannot point to a statute from which it derives its authority to engage in certain acts, that act is *ultra vires* and illegal." The court made clear that certain fundamental rights, such as the right to freedom, and the right to dignity, are inviolable by governmental powers.

The court concludes that an individual GSS investigator, or any government official, is not authorized to employ physical means that infringe the suspect's liberty. The only exception occurs when these means are both "fair and reasonable" – namely, are the only means to obtaining the truth, and are not what is more than necessary to obtain the truth and ensure the safety of the investigator and the suspect – will they be justified under necessity defense. Ultimately, the courts acknowledges the difficult dilemma in protecting the safety of citizens in the country, and the need to preserve the rule of law and the nation's basic moral principles.

3. Background (Literature Review – Balance of Evils)

There are three types of moral theories suggested in the case of Torture V. Israel. All three suggested different perspectives on the topic of torture and gives out reasonable explanation for each one [1].

First comes the Act-consequentialist moral theory. From an Act-consequentialist perspective, the outcome of the action is what matters the most, over the morality involved in the situation. Consequence is considered as the most important factor which in this scenario, torturing is permissible from an Act-consequentialist standpoint. Torture might violate certain human rights away, but it might provide crucial information about a suicidal attack or an imminent bomb situation which would cause thousands of casualties. With the mindset of maximizing the outcome, it becomes a defense statement for the Act-consequentialist for their act of torture.

Second perspective is from the Rule-consequentialist. They suggest that “An action is morally correct if and only if it complies with an ideal set of rules; an ideal set of rules is any set of guidelines that, if everyone always followed them, would result in at least as much good as if they were always followed by any other set of guidelines.” The rightness of a decision should not be based on the result of the event, but following an ideal rule which is morally correct. From a Rule-consequentialist perspective, it is not permissible and morally correct to ever torture any innocent people, but there are exception such as suspects or people related to an attack. The ideal rule is not flexible, but also not absolute. Rules such as “Never torture an innocent kid” will not be accepted in the set of ideal rules. Unlike the Act-consequentialist’s view, they would consider more about the moral standard in the event, but also putting the result in the consideration process of determining whether one should be tortured or not. But once the rules are made, everyone should follow it without any exceptions.

The third view is called the “Simple Absolute View”. Simple Absolute view, as its name, should be simple and short, such as “thou shall not kill”. A simple and powerful line will be the foundation of the simple absolute view. Another important element is the “absolute”. Similar to the Rule-Consequentialist, the rule set is absolute, no other elements will affect the rule and everyone under the rule must follow. It cannot be violated, whatever the consequences may be of not violating them on some occasion. It is also applicable to what we indirectly cause as well as what we directly do through our actions, applicable to what we allow to happen as well as to what we make happen. In the Israel scenario, a simple absolute viewer would follow the rule of “thou shall not torture”, which torture of any kind or any level shall not be allowed. No matter if a man is related to an attack, no men shall have the right to torture and gain information. It is a simpler and more direct version of an Rule-consequentialist view, there might be exception among the Rule-consequentialist, but no exception among simple absolute viewers.

4. Different Moral Viewpoints on Torture

The first argument comes from a contractarian standpoint: Torture is morally permissible and legally excusable, though not legally justifiable.

The concept of a mutual contract between the state and the people plays a significant role in Socrates’ moral reasoning in Plato Crito. Socrates reasons that because the people have entered into a contract with the state the moment they consent to becoming citizens of the state, where the state protects peoples’ fundamental rights, and the people in turn are obliged to obey to the law made by state [3]. Socrates believes that because he did not defend himself against the alleged crime, he is obliged to obey the law that he has consented to obey, despite costing the price of his life. This contract between the state and the people is central to the foundation of a democratic society.

In the case of a terrorist, he would have threatened others' right to life, thereby automatically failing to fulfill his end of the contract. Therefore the state no longer have to protect his rights, including his right to liberty. Therefore, torturing the terrorist is not a morally blameworthy action.

However, it shall be made clear that torture should nevertheless be unjustifiable legally. While necessity defense can justify particular cases under extreme situations, these extreme situation are unpredictable, therefore impossible to address in statutes. Because of the lack of statutory provision, the act of torture lacks legitimacy, and is therefore unjustifiable.

In exceptional cases that can be successfully defended as necessity defense, the person committing the torture should be compelled to take action here and now – namely, the danger is imminent and there is no alternative means [4]. Necessity defense also requires that the harm the person caused is not disproportionate to the harm avoided. An example can be made in the case of an war. Killing a person in a war is permissible because the danger to being killed is imminent, and there is no alternative means to save oneself. Therefore, killing another person who is threatening one's own life, in order to save one's life, is permissible in this case.

Nonetheless, exceptions shall remain as exceptions - meaning that cases of exception shall not be taken into consideration when setting rules for normative law. To make it more clear, an act of torture under a certain circumstance performed by a certain person, though excuses that particular person from being criminally liable, does not justify the inherent wrongness torture.

The second argument is based on a deontological approach. From a deontological view, torture is morally impermissible as Kant may argue that it involves treating the criminal merely as a mean to promote the good of potential victims. From a deontological perspective, it cannot be justified if we treat the criminal just as a mean whatever how good the consequence might be. In that sense, torture is not morally permissible and cannot be legally justified.

However, I shall argue that torture should be legally excusable. I assert a functionalist view of law, that any law holds an intrinsic nature of keeping the society functioning. The consequence seems to be ignored under a purely deontological account. Nevertheless, I argue that there should be some threshold that the consequence is so bad, and we by no means can take it. Taking the ticking bomb scenario for instance, we cannot do otherwise to save life under this emergency circumstance. Furthermore, legally allowing the constant happen of such accidents is problematic as society would fall into disturbance and can hardly function anymore. Then only when the incident is bad enough to meet this threshold can it provide a necessity defence which constitutes an excuse.

I will make further clarification about why it is an excuse. First, the underlying moral wrongness of torture makes this necessity defence unable to provide a justification. Considering the intrinsic wrongness of torture, the threshold should be strict that only when the incident is so bad, which may cause irreparable damage to society can it serve as an excuse. Furthermore, the purpose of the torture thus has to be forward-looking motivated. The reason why we torture a criminal is that we have to prevent a consequence that is too bad to take and by no means to attribute the guilty to the criminal. We have to bear in mind that, the guilty of criminals does not justify torture.

In conclusion, torture is morally impermissible but legally excusable.

The third argument is from a logistic view. Torture should be morally permissible. If one might argue the morality of torture and consider torture as impermissible, then killing in a war should also be impermissible. Although all war according to the United nation shall serve a purpose of maintaining international order, but killing is still depriving all rights of human, including the most essential one which is the right to live on this earth.

Comparing killing in war, torturing only deprive some rights away from the suspect, temporarily. Rights such as self-defense are deprived in this case. But torturing in a way should be permissible since both killing and torturing in a act-utilitarianism view, both serves the purpose of avoiding

more casualties and maintaining international order and bring peace to the land. By only depriving certain rights, torture should also be permissible morally.

On the legal perspective, It is unjustifiable, but in certain scenario, excusable. It is clearly written in the international law that torturing is not allowed. There is no legal approach to justify torturing. Also, torturing serve the purpose to dig out crucial information which can stop attacks and cause detrimental casualties of innocent civilians. But stress caused by torture may affect brain activity which makes it into a unreliable source of information.

But if in an extreme scenario, when millions of life are at stake. it is excusable for torture since in an act utilitarianism view, results are more crucial comparing to the morality of the process. By making an exception in an extreme scenario, If more lives can be saved in this urgent scenario, the act of torture should be excusable.

By merging three different philosophy views, it can be concluded that torture should be morally permissible, legally justifiable but excusable in extreme situation.

5. Conclusion

In conclusion, although contractarian and logistic views conclude that torture is morally permissible, the deontological view conclude that torture is morally impermissible; however, all three standpoints unanimously come to a conclusion that torture is legally justifiable.

After all, it can be agreed upon that not all cases of torture can be treated in the same way – therefore, one rule cannot suffice. One potential solution to weighing cases involving torture is an approach similar to that of death penalty: applying a set list of aggravating factors, and take a particularistic approach towards mitigating factors [5]. In cases of torture a list of aggravating factors shall be provided, containing a list of conditions that absolutely cannot be excused using necessity defense. While the jurisdiction shall at the same time recognize the different contexts in which the cases take place - namely, the particular conditions of the offender - to allow for necessity defense. Because of the complex nature of the act of torture, it shall be concluded that while not all tortures shall be permitted, some should.

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