

# **Torture, Necessity and Moral Integrity**

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With the legal architecture set up to support it in the early stages of what looks like defeat, one could be forgiven for thinking that the specter of United States sanctioned torture is fading too.<sup>1</sup> Be that as it may, a great many Americans continue to accept the notion that torture may be engaged in under circumstances such as those we face with respect to the “war on terror”.<sup>2</sup> Against such an enemy, with the only apparent alternatives being the doing of wrong in response and perishing, it would seem that the restrictions on doing wrong are temporarily lifted or at least that culpability for doing wrong is reduced. This is the animating idea behind what has come to be known as the “lesser evil” defense of interrogational torture. Interrogational torture may be bad, but doing it will prevent the worse outcome of suffering defeat at the hands of terrorists.

On the other side of the question, arguments against torture tend to come in three general families, among which there is some substantial overlap. One family is legal, in which it typically is argued that legalizing or otherwise excusing interrogational torture is hostile to norms either of positive or natural law.<sup>3</sup> A second sort of argument is prudential in nature, emphasizing such practical points as that torture committed by U.S. forces will make it more likely that they will be tortured in the event of capture, or that torture is too epistemically unreliable a method of intelligence gathering to merit its widespread practice.<sup>4</sup> Moral arguments comprise the third category. Such arguments focus neither on the legality nor the efficacy of torture, but (usually) on its moral status as a prohibited type of action. Perhaps because this sort of argument has seemed (until relatively recently) the least necessary to make, there are fewer recent examples to cite.<sup>5</sup> It seems to me, however, that this third sort of argument is the most important to make to a general audience of persons who will neither find themselves in custody of a suspected terrorist, nor faced with the prospect of prosecuting or defending someone charged with the war crime of torture. Those of us who stand behind the lines need to know why those in the ranks of

the armed services who protect us should forego the use of torture in our defense. It is my purpose in this paper to offer a few brief arguments on this score.

Before I proceed to my arguments I acknowledge a couple of intentional lacunae. One concerns the definition of 'torture'. While I am aware, certainly, of the legal issues surrounding the definition of torture and the distinction between it and its supposed lesser cousin "inhuman and degrading treatment", it makes no difference to my argument where this line is. I shall simply assume that there is no distinction, and attempt to offer arguments strong enough to rule out both. Secondly, I shall assume that actions that uncontroversially fall into the categories of torture and inhuman and degrading treatment are, in and of themselves, paradigmatic moral wrongs. Even among those who affirm that it is in some cases morally acceptable to engage in such actions under certain circumstances, very few doubt this. I shall therefore assume it without further comment.

## **I. Setting the Ground**

On first blush, it may seem that the wrongness of torture is morally over-determined. From a consequentialist point of view, for example, one might argue that the lives saved by allowing authorities the power of torture promises to threaten many more lives over time, and produce a general insecurity that leads to greater overall disutility, since there can be no guarantee that the authorities, either in present or in future compositions, will not abuse this power. Hence one can appeal to the greater good gained by refraining from torture as a sort of trump over the good of information gained from torture. The lives saved by today's torture of an external enemy may be lost in the gratuitous application, or even the substantial chilling effect, of an accepted state power to torture tomorrow.<sup>6</sup> The Kantian-deontological reasoning against torture should be even more readily apparent, since the only motive from which any act is judged good is that it is done from a sense of duty and that it pays due respect to the moral autonomy of the persons it affects. Though one could make the case that one might torture out of a sense of duty, there is no way to make the case that torture pays due respect to the moral

autonomy of those who suffer it. The good that might come as a consequence of torture is simply irrelevant for Kantians. The aretaic tradition in ethics also contains powerful resources for showing that there can be no sufficiently good reason for torture. We are called upon in this tradition to pursue moral excellence in all its forms by cultivating the virtues, and to do so by exercising our rational capacities in mediating our responses to our emotions, and in following a policy of mediation between extremes of action. Here again, the potentially beneficial consequences of torture seem not to register when compared with the conception of what matters morally. No matter what else it may be, torture is far from a moderate action and it is hard to imagine torture as something one aspiring to moral excellence might consistently endorse.

All of this notwithstanding, there are still cases in which it is argued that torture is morally permissible, even required. These are cases where interrogational torture seems to be dictated by necessity, as in the omnipresent “ticking bomb” hypothetical. Such necessity is thought to outweigh the sorts of moral considerations outlined above, the implied advice being: “survive first, worry about morality later”. How much moral weight should necessity be thought to carry?

### **I. The Necessity Argument**

No one serious about these matters would disagree with the notion that interrogational torture or even its lesser cousin “inhumane and degrading treatment” is the sort of action to which we should resort only in the last and most desperate circumstance. Once this admission is made, however, an exculpatory case for at least some instances of interrogational torture is usually made on the grounds of its unavoidability under the circumstances, on the grounds that it is *necessary* for the protection of innocent life. Nearly all defenses of interrogational torture, moral and legal, trade crucially on this property.

The well-known hypothetical “ticking time-bomb” showcases such necessity. Such arguments, importantly, need not turn on considerations about the number of people affected.<sup>7</sup> The primary aim of all such hypotheticals is to create a wedge for torture by casting it as an

*unavoidable* last resort, engaged in only out of *necessity*. If we had time to do something else we would, but we do not. We have no other choice. Even dedicated foes of interrogational torture often express reticence at the idea of abandoning it altogether in those hypothetical cases where the claim to necessity holds.<sup>8</sup> Judgments of necessity are intimately connected to judgments of justification.<sup>9</sup> When the necessity claim is thought to hold, then the interrogational torture is thought to be justified. No one argues that were there another action that would yield the same information with the same speed that we would still be justified in torturing. Hence the whole enterprise of morally legitimating interrogational torture turns importantly on the necessity question.

Arguments from necessity turn critically on epistemic considerations, and on pragmatic appraisals of available options under a given set of conditions in order to show that torture is unavoidable as a way of dealing with present circumstances. The principal problem with such arguments is that they draw too heavily on strained hypotheticals like that of the ticking bomb. The point of such hypotheticals is to gerrymander the range of available alternatives so that the respondent is led into a pragmatic cul-de-sac from which the only escape is an endorsement of interrogational torture. It is no great challenge to construct philosophical thought experiments where one fixes beforehand *certainty* about the guilt of the detainee, *certainty* about an absence of efficacious alternatives, and *certainty* about a significantly foreshortened time frame in which to act so as to save the life of his intended victim. Such examples are frequently taken to be far more convincing than they really are.

It seems unlikely, to say the least, the epistemic conditions one encounters in the actual world would approximate those in the hypotheticals in any but the most statistically improbable range of cases. It is nearly impossible to be certain of a party's guilt or innocence beforehand, and even where it is, it is nearly impossible to be certain that torturing that party will be efficacious with respect to averting the danger in the time allotted. In the real world, interrogational torture has more the character of a fishing expedition. The detainee is someone believed to have information of an unspecified nature that may be vital to the effort to defeat his

co-conspirators. He may have that information, he may not. That information may be true or useful, or it may be neither. Anything we learn from torture will require corroboration from other sources in order to count as actionable intelligence, and not merely the ravings of a broken man seeking a way—any way—out of intense pain or psychological duress. Just as with fishing, sometimes one catches nothing, and sometimes what one catches is too small or is otherwise without sufficient value to justify the effort. The disanalogies, then, between the ticking-bomb hypothetical and the actual situation of interrogators are many. These alone, however, do not undo the argument.

The real thrust of the ticking-bomb hypothetical is not to make the highly implausible case that torture is a method reliably attended with certain efficacy. Rather, its philosophical interest lies in its attack on the absolutist nature that the moral prohibition of torture is widely supposed to carry. The absolutist holds some proposition of the form “All acts of torture are morally prohibited.” The “hard pragmatist” aims at showing by reductio that the proposition held by the absolutist is illegitimate, largely because observing it would result in the unacceptable and preventable death of innocents. If he accepts that the cost of these deaths is too high to sustain the ban, then the “absolutist” must abandon his strict position of “all acts of torture are morally prohibited” in favor of some less strict alternative. The best analogy in moral philosophy is Kant’s “murderer at the door” problem. As with Kant’s murderer at the door problem, however, it is important not to make too much of what the counter-example says about the proposition in question. Just because a case can be constructed in which we might find that lying might be permitted in a case *like that*, we need not infer anything about general policy with respect to lying in the sorts of circumstances in which we typically find ourselves. We still ought to tell the truth. We are not excused from doing so by the mere possibility that inquisitive assassins could be prowling the neighborhood or by the knowledge that were we to know that we were dealing with one, our duty to tell the truth might be relaxed.

Likewise, the existence of a counterexample to an absolute ban on torture gives little practical advice concerning our day-to-day operations with respect to torture. To think that

some general sanction for torture is attained by such arguments is to infer far too much. At best, all that need be inferred is that in cases like the one described in the example, torture is permitted. Any contemplated act of torture will then have to adopt the construction given in the example as its yardstick, and as we have seen it is unlikely in the extreme that any concrete situation will actually measure up in such a way that we might think interrogational torture permissible. While such hypotheticals may count against framing the ban on torture as a necessary truth, they do not establish any sort of general permission to torture.

There are other problems as well. As Jeremy Waldron has pointed out, one moral question at issue is where we draw the line past which we will not allow our conduct to go any further:

I draw the line at torture. I suspect that almost all my readers will draw the line *somewhere*, to prohibit *some* actions even under the most extreme circumstances—if it is not torture of the terrorist, they will draw the line at torturing the terrorist's relatives, or raping the terrorist, or raping the terrorist's relatives, all of which can be posited...to be the necessary means of eliciting the information. Then the boot is simply on the other foot: Why is it so easy to abandon one absolute (against torturing terrorists) while remaining committed to other absolutes (against, for instance, raping terrorists' relatives)?<sup>10</sup>

Waldron's example here suggests that drawing the line at allowing torture is arbitrary, and I am inclined to agree. The same reasoning that would allow interrogational torture when it was seen as necessary would allow a whole host of enormities under similar conditions. This ought to point us to a flaw in that reasoning. The alternative to accepting this judgment is, as Waldron suggests, is a particularly vicious form of moral inconsistency.

The necessity argument thus seems to carry at least three core flaws: 1) it constructs the conditions of necessity so narrowly that it is unlikely that any actual situation could satisfy them, and so proves too little 2) it trades on a mistaken inference of general permission to torture on the basis of a counterexample which calls into question only the "absoluteness" of the moral prohibition on torture, and 3) it potentially licenses any brutal conduct whatsoever, or if it doesn't, it falls prey to a charge of arbitrariness.

That said, there may be those who are willing to be evil given the costs at issue. They may be willing to go all the way up to the worst on Waldron's scale in the name of efficacy in the service of what seem to them to be good ends. Considerations of efficacy, however, such that interrogational torture has "worked" in the past tend to miss the point. In my view, such considerations are analogous to considerations excusing the violation of the general moral prohibition against cannibalism in extreme survival cases. Not only can we imagine, but we actually know of several instances in which people resorted to cannibalism to keep themselves alive. That it worked, and that lives were saved in the bargain does nothing to relax the general moral prohibition. It certainly does not put my mind at ease, when I board an aircraft for a long journey, that my fellow passengers may be consumed should the need arise. Such a thought seems horrible to me, and a person who actually had the thought would seem horrible as well. There would seem to be something fundamentally and desperately amiss with the moral compass of a person who viewed his or her fellows in that way. I contend that the prohibition against torture ought to be viewed in the same way, and violations of it contemplated with exactly the same relish. The exigencies of the fight with Al Qaeda and other terrorist organizations may appear to sanction torture, but the necessity underwriting that sanction is largely illusory.

Before passing from this discussion of the flaws of the necessity argument to the topic of moral integrity, I wish to make one final observation. Those who favor torture frequently present their case in the form of a strict disjunctive dilemma:

- (1) Either one endorses torture of suspected terrorist detainees, or endorses the possibility that millions of people will die preventable deaths from terrorist acts.
- (2) One does not wish to endorse the possibility that millions of people will die preventable deaths from terrorist acts.
- (3) Therefore one must endorse the torture of suspected terrorist detainees.

This construction is at least doubly fallacious. First, it seems to contain a sort of *ad baculum* fallacy wherein we are made to agree to torture only because we fear the consequences if we do not. As any introductory student of the fallacies can readily see, the fear appealed to in premise 2 offers no rational support to the contention that torture is morally permitted. Second, the dilemma is a false dilemma. It is almost never the case that the alternatives before professionals engaged in fighting terrorists are torture and nothing. There are nearly always other means to which one might have recourse.<sup>11</sup>

That there are a range of means to choose from is an important observation, and only because it weakens the case of some torture supporters. The diversity of means available for fighting terrorists has the further implication that those persons who are engaged in the fight directly must make choices from among them. How one chooses to fight reflects on one's moral character. This brings me to the subject of integrity, to which I now turn.

### **III. Torture and Integrity**

None of the foregoing may move those who are committed to torture in the name of necessity. They may view the claim that torture is evil indifferently, or argue that nothing could follow from it but an unrealistic and impracticable absolutism about torture. It is not uncommon to hear positions like the one I've been advancing described as morally ideal but ultimately unrealistic.<sup>12</sup> The reasoning driving such judgments is that moral integrity must be balanced against efficacy in choosing responses to evil, and that sometimes, moral integrity must give way. Such apparent "tough-mindedness", however, deeply undervalues the importance of moral integrity.

One way to see this is to compare the case of torture to Bernard Williams' well-known "Jim and the Indians" case wherein Jim, a traveler, is given the alternatives of executing one of ten rebels or seeing all ten murdered by firing squad. Williams argues that it is unfair to criticize Jim for failing to execute the one Indian, since Jim is acting out of a sense of his own moral integrity. The real blame, according to Williams, rests with the captain who places Jim in this

position, and thereby seeks to make Jim a means to his end.<sup>13</sup> The case with torture is very like this. We, like Jim, have an apparent choice between our moral integrity and a potential, morally unacceptable outcome. It may seem as if our refusing to torture would make us responsible for the deaths of those we could save. Following Williams, however, it would seem as though the real responsibility rests with those who attempt to force the choice upon us. This would suggest that if an interrogator refused on moral grounds to torture the planter of the “ticking bomb”, and as a result the bomb exploded, killing a large number of innocents, that the fault would be more perspicuously located with the bomber than with the moral interrogator. Isn’t that where it belongs?

Many would say no. Consider, for example, Judge Posner’s line that “if the stakes are high enough, torture is permitted. No one who doubts that should be in a position of responsibility.”<sup>14</sup> Before a view like Posner’s is simply dismissed as hardline rhetoric, it is worth considering the nature of the duties that officials in charge of security services, soldiers, and police have *vis a vis* the corporeal protection of their constituents. Persons in these roles have fiduciary duties to the population to see that they are kept from harm, and those duties ground a correlative moral right on the part of persons in the population to expect that they will not be harmed where those charged with their safety can prevent it. This makes the front-line soldier or interrogator quite a bit unlike the character of Jim in Williams’s case. Jim stands in no special relationship to any of the persons whose harm he must contemplate. Being a pacifist, Jim has done everything he could to avoid being placed in situations like the one Pedro thrusts him into—in no way has he arrived there by any means other than dumb bad luck.

Consider, by contrast, the case of a policeman who arrives on the scene of a mass shooting in a crowded city park. Eight people have died already, and more are certain to follow if the policeman does nothing. He could stop the assailant with a single bullet that would kill or cripple him.<sup>15</sup> It seems as though he should. If he does not, then he has failed those people that the gunman kills beyond the eight already dead, and the nature of his failure seems precisely describable in terms of his failure to do his duty to protect the public. Unlike Jim, the police

officer in this case has explicitly taken on this duty by means not only of his choice of occupation, but by the act of taking an oath that binds him to his duty to protect the people of the community he serves. The case of the soldier or policeman confronted with the choice of whether or not to torture a suspected terrorist seems much more like this case than the case of Williams Jim. If the disanalogy between the situations of Jim in Williams' case and the police officer in the above case is great enough, then it seems justified to wonder whether or not a standard Williamsian case that the soldier or the interrogator is justified in foregoing torture on grounds of moral integrity is available—or if it is, whether it is to a diminished degree. Is not the soldier specially bound to put his own scruples to the side and torture the detainee, if that is what the performance of his duty requires? We certainly ask soldiers and police officers to check their moral reservations about harming other human beings at the door, so to speak, when the doing of harm is necessary in the service of their duties to protect people. Why is the case of torture any different?

Let us begin to answer this question by noting the fairly obvious point that the fiduciary duties of security personnel do not encompass any sort of action whatsoever so long as that action is undertaken in the name of protecting the population. Real life police, soldiers, and intelligence personnel do not operate with 007-like impunity. There is not only a well-developed legal framework, but internal policy frameworks too that set limits to what persons can and cannot do in the satisfaction of their duties to protect the population. There are limits, and there are punishments as well for those who transgress those limits, even in the name of doing their duty. So it is not intuitive to think that security personnel may do just anything in the service of protecting the lives of their constituents. From where then, do the moral limits on their means of fulfilling their duties come?

One suggestion is that the moral limits that constrain the choices of security personnel come from those implicit in the United States Constitution.<sup>16</sup> United States military personnel and members of security agencies like the FBI do take oaths to “defend the Constitution from all enemies, foreign and domestic”, so perhaps this suggestion makes some sense. It is also

heartening at first blush to the opponent of torture because the provisions of the Bill of Rights—in particular the Fifth and Eighth Amendments—seem to rule out the torture of suspected terrorists. As has become all too clear in recent years, however, this initial appearance is deceptive. Lawyers for the Bush Administration in fact held that torture of suspected terrorist detainees was not illegal under either the Constitution nor under the Geneva Convention, which is a part of our law owing to the incorporation clause.<sup>17</sup> If there is such “wiggle room” in the Constitution regarding the moral limits of what can and cannot be done in the service of protecting the people then it would seem as though a simple reference to its provisions will not be sufficient to establish a moral groundwork for limitations on what security personnel can and cannot do.

Now, I do not here wish to take up the question of the legal validity of the Administration’s arguments in the Taft and Bybee memos. My concern throughout this section has been to see if a Williams-style integrity defense is available to the soldier who wishes to forego the torture of a suspected terrorist. We began by noting that it seems as though, given his special fiduciary duty to protect the people of his country, that it seems as though an appeal to his own abhorrence of torture might not carry as much weight as we might suppose given the dissimilarities between the soldier or policeman and the cases that are central to Williams’ analysis, especially the Jim and the Indians case. The project we are now engaged in is aimed at seeing whether or not the role of the security professional itself might come built-in with moral standards that constrain conduct in such a way as to make it possible for the soldier to offer an integrity-based defense of a decision to forego torture on the grounds that it is incompatible with the moral construction of his role as a protector of people. We have just seen that it is at least questionable that the resources of the Constitution alone can provide the resources for that moral construction of the security officer’s role.

If the Constitution were the only place we might look for such resources then we might well have to concede that there is little chance of the soldier or policeman making a successful objection to torture. Thankfully, we are not limited to the Constitution. The moral framework a

soldier or policeman, or security official brings to his or her job is not supplied by any one document, but by an interconnected web of moral precepts, beliefs, intuitions, and judgments that are as much the property of his or her community as they are his or her own. This loosely defined web of moral beliefs is larger in scope and content than the Constitution itself, and indeed, the Constitution has itself been amended at different points in our history to bring the laws into closer harmony with it. Movements such as that for women's suffrage, the civil rights movement, and movements by and on behalf of handicapped persons all attest to the fact that the substance of our moral community far outstrips what is reflected in our legal documents.

If I am right about this, then the question that needs to be settled in order to determine whether or not the soldier or the policeman has an integrity-based defense of abstention from torture is not whether or not he believes in torture himself. Nor is it whether or not torture is contemplated under the moral auspices of the Constitution. The question that needs to be settled is whether we--the moral community that sends the soldier, the policeman, and the security official forward to our defense--believe in torture. Is torture a part of our morality? Is torture the sort of act of which we tend to approve or to disapprove? Is it something we can, in good conscience, ask someone else to do for us? Without trying to answer any of these questions with finality, it seems reasonable to say that if we take seriously everything that was said about torture and the circumstances in which it occurs in the first half of this paper, that it is at least far from obvious that torture is the sort of thing that can be uncontroversially accepted as condoned by our shared moral framework. The very fact that torture needs to be argued for in terms of its necessity suggests that there isn't much of a case for its *prima facie* acceptability.

If all this is correct, then it suggests that perhaps there is an integrity defense of sorts open to the soldier or security official who might wish to resist an order to torture a detainee. The defense would follow the familiar pattern of Williams' arguments, but with one minor modification. It would no longer be the soldier's own morality that would be problematically inconsistent with the contemplated act, but the shared moral framework of the soldier's society (of which his or her own moral views are not doubt part). His "squeamishness" would be as

much ours as his. And were he to engage in torture anyway, he would alienate himself not just from his own values, but from values that mark him as a member of the moral community he has sworn to protect as well. To lay the blame for an act of terror that was not prevented--even partially--at the feet of an interrogator who foregoes torture would be to require that in addition to risking life and limb, he risk the very sense of moral integrity that makes him understandable to himself and that is partially constitutive of his membership in the community he is sworn to protect. It is worth wondering what becomes of the moral fabric of the community that allows itself to ask this of its defenders.

Before moving on to a summary of my arguments and concluding remarks, I wish to make one final observation about integrity and torture. This observation has to do with the nature of governmental power, and the overall integrity of the civil rights of ordinary citizens.

It is tempting, in times of emergency, to think that special measures must be taken in order to ensure the survival of the nation (or culture, or "way of life", etc.). The urgency we feel in such situations is not unreasonable. It is not for nothing that threats such as the one posed by terrorism are deemed "existential threats". Without underestimating the gravity of such situations, however, it is important to bear in mind that the range of additional powers we wish to extend to those engaged in our protection is remarkable. They far exceed the powers with which we normally entrust to police, soldiers, and security agencies. Indeed, it is only because of the special nature of the threat that the extension of these powers is contemplated at all.

Now, these powers, once granted will indeed be exercised by individuals whose character and judgment may vary, or perhaps fall short of what we wish they were, but this is not any more problematic (and not any less) in the case of emergency powers than it is in the case of the ordinary investigative and police powers we extend to such persons. That the individuals in these roles do have varying character traits and powers of judgment is just one reason why public vigilance over the exercise of any such powers is always a good idea. The extension of special powers, however, poses more of a special risk than may be countered by such vigilance. This is because the special powers granted to security authorities in time of

emergency are granted not to individuals, whom we may or may not trust depending on whether or not our interests were victorious in the latest political cycle. They are granted to bureaucratically structured organizations, the precise leadership and composition of which change on a regular basis over time. This makes the powers granted to them rather like placing a loaded gun in a locked office. One may trust the current occupant of the office to use the gun wisely, but at the end of the day, the gun is attached to the office and not the man. There is no guarantee that future occupants of the office will be so wise or trustworthy.

Writing of early American political thought, the eminent historian of ideas, Bernard Bailyn observed that power and liberty were contrary ideas to them. Where power surged, liberty decreased, and *vice-versa*. It was for this reason that early Americans were keen to preserve what they saw as their natural rights against the invasions of an always-creeping, grasping state power. This, in part, explains such things as their insistence on preserving their right to defend themselves, their opposition to standing armies, and their firm belief that judges needed the oversight of the citizenry in the form of juries in order for justice to be done. It is easy now to look back on some of these beliefs as antiquated, or perhaps quaint, but I would like to close this paper by suggesting that lying underneath the apparent “quaintness” of these ideas is a very sophisticated understanding of political power and its relationship to liberty. This is an understanding of power derived not only from philosophical arguments, or historical examples, but from lived experience under a regime that recognized few if any limitations to the exercise of its power over the lives of the colonists. They observed that the integrity of a system of liberties is inversely proportional to the power of the government that oversees that system of liberties, and that power, once ceded to the government, does not return to the hands of the people. If they were right about this, and if the extension of emergency powers to various governmental apparatuses does have the nature of the loaded gun in the locked office, then it may perhaps be worth thinking about whether or not our haste to protect ourselves against existential threats has not blinded us to the threat we ourselves pose to our own moral integrity as a polity.

<sup>1</sup> Barton Gellman and Jo Becker, "Pushing the Envelope on Presidential Power", *Washington Post*, Monday, June 25, 2007.

<sup>2</sup> "America's Place in the World 2005: An Investigation of the Attitudes of American Opinion Leaders and the American Public about International Affairs", (Washington, D.C.: Pew Research Center for the People and the Press in Conjunction with the Council on Foreign Relations) November 2005.

<sup>3</sup> See, for example, most of the essays in *Torture: A Collection*, ed. Sanford Levinson (Oxford University Press) 2005 and Jeremy Waldron's excellent "Torture and Positive Law", *Columbia Law Review*, October, 2005, vol. 195, no.6, p.1715.

<sup>4</sup> Considerations like the latter are among the oldest objections to torture. See for example Cesare Beccaria, *On Crimes and Punishments* (Indianapolis: Hackett Publishing). Chapter 1 of Army field manual FM 34-52 contains modern examples this sort of argument. It is interesting to note in this connection that, anecdotes about the efficacy of torture against the likes of Khalid Sheikh Mohammed notwithstanding, the segment of Americans most averse to torture are intelligence and security professionals.

<sup>5</sup> A recent—and outstanding—exception is David Sussman, "What's Wrong with Torture", in *Philosophy and Public Affairs* 33, no. 1, 2005, pp.1-33.

<sup>6</sup> This is precisely the point missed by defenses of torture that rest on "ticking-clock scenarios" such as that described by Alan Dershowitz. See Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press) 2002.

<sup>7</sup> Richard Posner poses such a case: "Suppose your child has been kidnapped. The kidnapper is caught, reveals that that the child is locked in an underground vault, explains that the supply of oxygen is limited, and refuses to indicate the whereabouts of the vault. I think the use of torture to extract the information would be proper in such a case, provided there was no alternative method of extracting it." Richard A. Posner, "Torture, Terrorism, & Interrogation" in *Torture: a Collection*, ed. Sanford Levinson (Oxford) 2005, pp.291-299.

<sup>8</sup> See for example Jean Bethke Elstain, "Reflection on the Problem of Dirty Hands" in *Torture: a Collection*.

<sup>9</sup> In this connection see David Rodin, *War and Self-Defense* (Oxford) 2002, chapters 2 and 3 generally but particularly pp. 40-49. Rodin's discussion of the linkage between necessity and justification where rights of self-defense are concerned is illuminating in this connection, not in the least because defenders of interrogational

torture frequently appeal to intuitive notions of self-defense in order to move their intended audiences.

<sup>10</sup> Jeremy Waldron, "Torture and Positive Law", p.1715

<sup>11</sup> Terrorism is not a new phenomenon. Since the rash of aircraft hijacking in the 1960's and 70's several treaties have come into being that coordinate the efforts of states to fight terrorism and to bring terrorists to justice. There are far more of these instruments than can be mentioned here. Those unfamiliar with the international criminal law pertaining to terrorism would be well served to start with the American Society of International Law's resource page on the subject: <http://www.asil.org/resource/crim1.htm#Terrorism>.

<sup>12</sup> See for example Michael Ignatieff, *The Lesser Evil* (Princeton University Press) 2004. Even those most sympathetic to human rights concerns acknowledge the practical difficulties with following through on them. Thomas Nagel, who argues passionately for limits on the conduct of warfare that are classifiable under human rights obligations, makes a similar comment in the "War and Massacre" chapter of *Mortal Questions*, (Cambridge University Press) 1979.

<sup>13</sup> Bernard Williams, "Utilitarianism and Integrity" from J.J.C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge University Press) 1973.

<sup>14</sup> Posner, "Torture, Terrorism, & Interrogation", p.295.

<sup>15</sup> I owe this example to Dale Miller.

<sup>16</sup> This was suggested to me by Jim Hartwick, as was the objection that follows.

<sup>17</sup> See the now notorious "Bybee Memo" advising the President of the legality of interrogation techniques amounting to torture. The Bybee memo is included in Karen Greenberg's excellent collection on the legal arguments surrounding interrogational torture, *The Torture Debate in America* (Cambridge University Press) 2006.