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Brecher, B. (2007). *Torture and the Ticking Bomb*. Oxford: Blackwell Publishing.

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The ‘ticking bomb’ scenario is now familiar: a terrorist has planted a bomb in a city centre and it is due to go off in one or two hours’ time. The terrorist has been caught by the police, but refuses to reveal the exact location of the bomb. The captors foresee that the only way to prevent huge loss of life is to torture the terrorist in order to ascertain where the bomb is, so that it can be defused. Would torture be morally justified in this case? A related but different issue is whether a government would be justified in introducing new legislation whereby interrogational torture would be legally permitted within certain tightly defined institutional constraints such as the requirement that a judge approves a ‘torture warrant’ for that case.

Brecher is opposed to all torture on deontological grounds; to torture is to begin by recognising someone as a person and ‘as a being whose body is integral to their identity’ (79); the torturer then breaks the body, and thus breaks the person. The essence of torture is treating someone ‘as not a person’. Since one ought not to treat persons that way, one ought not to torture – it is always wrong.

However, in this text, Brecher tackles the subject from a utilitarian perspective. His reason for doing so is that those who argue for the justifiability of interrogational torture, or for the justifiability of its legalisation, do so on utilitarian grounds. His intention is to expose the flaws in those arguments and establish the wrongness of interrogational torture and the wrongness of the legalisation of interrogational torture on the very grounds that are erroneously supposed to justify them (12). And this, he says, is enough to establish that it would be wrong in other cases (11).

Brecher clarifies and explains a range of positions on the issue, all of which he opposes. For some advocates of legalisation, torture is morally justified in the ticking bomb case and so should be legalised, guaranteeing tight regulation & avoiding hypocrisy. For other advocates torture is morally wrong but happens, and so should be legalised thereby guaranteeing tight regulation & avoiding hypocrisy. On the other

hand, those against legalisation say torture *is sometimes* justified but should not be legalised because of likely consequences.

He chooses to focus on Dershowitz's argument for legalisation of interrogational torture, because it is sophisticated and influential and therefore dangerous (6) Dershowitz claims that his position is that he is morally opposed to Interrogational torture but that it is sometimes the least bad option. Since torture is in fact used in these cases it would be better to legalise and regulate it because this would reduce instances and restrict use, and because honesty is always best.

Brecher gives two reasons to think that Dershowitz's's real position (contrary to what he says) is that torture is morally justified. First, for a utilitarian, the act that has the least bad outcome is not a 'lesser of two evils', it just is the morally right action. Second, Dershowitz's reference to the 'trolley problem' as a relevant comparison shows that he is really arguing for the justifiability of the act, not just of the legal institutionalisation. So, Brecher takes his proper targets to be (i) the argument that interrogational torture is morally justified in the ticking bomb case, and (ii) the argument that the introduction of legislation permitting torture would be morally justified.

Regarding (i) he argues that the scenario or thought experiment is nothing more than a fantasy; no real-life case could be like it. For example, how could we know the detainee is the right person; if time is pressing, it is unlikely that an untrained torturer would be as efficacious as the scenario imagines and it is unlikely that a trained torturer would be on the spot at the right moment; and if time were not that pressing, then there will be ways of saving life that do not involve torture, such as evacuating people from the target area. If any real case were anything like the fantasy, it would already be too late for torture to be effective. To draw conclusions about real-life cases from the ticking bomb case is misleading, and dangerous.

Regarding (ii), he argues that a proper consideration of consequences leads to the conclusion that institutionalisation of torture would lead to more harm than good. For example, there are no good grounds to think that legalisation would limit the cases of torture; there is the worrying possibility of third-party torture; other countries would probably follow the legal precedent; it would have the potential to incite more rather than fewer acts of terrorism; and it would lead to the creation of a torturous society, with the prospect of professional torturers.

The final element of his case against Dershowitz is that to avoid hypocrisy, rather than legalise torture, stop doing it.

Now, in Chapter 1 Brecher engages with the question 'What is Torture?'. He avoids using a definition on two grounds. First, like other real things, it cannot be defined

(real things can change, without becoming something else (3)). Second, attempts at definitions are dangerous; a prohibition on torture with an accompanying definition can have the effect of legitimising ‘harsh interrogation’ which does not precisely meet the chosen definition. Furthermore, he says, there is no need to define, because there are clear indubitable cases and these can be described. This description can then serve as a sufficient condition for torture, but not a necessary condition, since new methods will always develop. His chosen description is borrowed from Christopher Tindale (who takes it to be a definition):

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from that person or a third person information or confession, punishing that person for an act committed or suspected to have been committed, or intimidating or dehumanising that person or other persons. (5)

However, it is not the case that if an act meets this definition, then that is sufficient for it to be an act of torture. For example, the dropping of the atomic bomb on Hiroshima was an act that intentionally inflicted severe pain and suffering on some persons for the purpose of intimidating other persons and so fits his definition, but was not an act of torture.

A more serious criticism is Brecher’s failure to engage with Dershowitz’s pluralism with respect to the formulation of public rules. Dershowitz says that straightforward utilitarian justifications of interrogational torture ultimately fail because ‘other principles of morality’ place limits on how we can treat persons (50). Brecher claims that this is incoherent – it is nonsense to argue that certain types of action can be justifiable on utilitarian grounds, but some other non-utilitarian principles place limits on that action.

But, this argument appears not in the context of the justifiability of torture, but in Brecher’s arguments concerning the justifiability of legalisation. And it is not incoherent or nonsense to claim that in institutional design, and more specifically in the formulation of action-governing public rules, one ought to take account of a plurality of moral principles. If that is right then it raises the possibility of those considering the justifiability of legalising interrogational torture to consider individual acts of torture wrongful (on deontological grounds – as does Brecher) and count that as a reason for not legalising, but also to be aware that if the benefits of legalisation sufficiently outweighed the harms, then that would be a reason to legalise.

Of course, if we agree with Brecher about the consequences of legalisation, then this line of argument would lead to the same conclusion – that torture ought to remain illegal. But including this point would have been desirable, because it would have provided a response to the pro-legalisation argument as Dershowitz sees it, in addition

to the response to the pro-legalisation argument as Brecher sees it.

Finally, Brecher does not address the issue of a situation where interrogational torture would lead to the best overall consequences. He does consider the possibility of a situation where torture really would be necessary to avoid a catastrophe (86) and argues that on consequentialist grounds, either torture or legalisation of torture even under these conditions would not be justified. This is illustrated by a comparison: we could eliminate all road accidents, but choose not to because of the undesirable consequences so doing. Similarly, the very occasional catastrophe is a price worth paying for society not accepting interrogational torture.

However, here he is merely repeating what he has said earlier, that torture or its legalisation would lead to greater harm than good. We ought to press Brecher further on this point. On the consequentialist argument in which he is framing his case, what about the situation where torture really would be necessary to avoid a catastrophe, and the harms of so doing really would not outweigh the benefits (either because of the enormity of the catastrophe, or because the act of torture would not in this case be the start of a ‘slippery slope’, or both)? When the argument is grounded in utilitarianism, as Brecher claims his is, the conclusion that torture would be justifiable in this case is unavoidable. Then his opposition to the utilitarian argument for interrogational torture would have to fall back on the first claim, that this scenario is a fantasy and never is, nor ever would be encountered in real life. Hence, in fact, interrogational torture is never morally justified.

There are reasons for not addressing this hypothetical scenario. Brecher argues that intellectuals ought to be more aware that while thought experiments can inform us about the limits of philosophical theories, they tell us nothing about the real world; and the problem is that politicians etc seize on these thought experiments and act on them. And from what he says about the ticking bomb argument, Brecher would consider the scenario I suggest as just such a dangerously misleading thought experiment.

Nonetheless, in Chapter 1 he gives two reasons for writing on torture and risking legitimisation of the debate, rather than remain silent; these are the current normalisation of use of torture by ‘civilised’ states, and the academic background of writers, particularly lawyers, advocating the legal permission of torture. And surely for his project of thoroughly refuting their arguments he ought not to ‘keep out of sight the difficulties of the subject... the difficulties thus concealed in exposition are liable to

reappear in controversy: and then they appear not carefully limited, but magnified for polemic purposes'.¹

¹ Sidgwick, H. (7th edn. 1907) *The Methods of Ethics*. Macmillan, London, 13