

# Toward an Ethics of Detention and Interrogation: Consent and Limits

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## Introduction

Detention and interrogation are ethically troubling activities. Detention deprives a suspect of the right to liberty. Furthermore, successful interrogators must at times rely on deception, incitement, and coercion in ways not normally acceptable to the general public. These means also involve using people in ways they have not agreed to be used, and seem at odds with democratic ideals upholding the dignity and value of human life. Respecting human dignity means giving people the kind of treatment they deserve, but prohibitions against torture, cruel, inhumane, and degrading treatment are based on the idea that there are kinds of treatment no one deserves.

As a result, both domestic and international law place severe restrictions on who may be detained and the kinds of methods interrogators may employ. However, exigencies in the Global War on Terror (GWOT) have stretched the normal moral and legal boundaries associated with detention and interrogation, and the temptation is intense to ignore these constraints entirely. Since detention facilities in

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Guantanamo, Iraq, and Afghanistan hold persons who undoubtedly possess information that can save hundreds, if not thousands, of innocent lives, taking into account ethical considerations that seem to undermine the effectiveness of intelligence gathering does not seem *morally* compelling.

The law of war sharpens this tension by prohibiting “physical or mental torture, [and] any other form of coercion,” inflicted on any enemy prisoner of war (EPW) or civilian to obtain information. Such a bright line makes it difficult for even well-meaning interroga-

tors to avoid pushing even approved techniques, some of which are inherently coercive, beyond the spirit, if not letter, of the law.

This environment of moral uncertainty demands reconsideration of where to draw the line between necessity and obligations to detainees. While moral argument does make room for torture, cruel, inhumane, and degrading treatment under certain restricted circumstances—often referred to as “ticking time-bomb” scenarios—it does not follow that such practices should be adopted as policy. We can, instead, recognize torture and ill-treatment as a choice some must make to avoid a greater harm. In doing so, however, those who cross the line must bear a personal moral cost. Otherwise the opportunity for abuse would undermine the US’s commitment to uphold the dignity of every human being.

## Ethical Foundations of Detention and Interrogation

The ethics of detention and interrogation begin with a theory of rights, namely that by virtue of being human, all people are entitled, at a minimum, to the rights of life and liberty. But rights entail obligations, and if someone has a right to life and liberty, not only are persons themselves responsible for securing life and liberty (by, for instance, performing such life-preserving actions as eating and sleeping), but also *someone else* has an obligation to preserve them. This obligation falls to the state. But if the state is to exercise this responsibility, the state itself must also have rights of its own, namely the right to political sovereignty and territorial integrity. This provides the moral basis for which US forces may kill, destroy, detain, and interrogate citizens of other states in defense of the nation. However, respect for human dignity places moral restrictions on these kinds of actions.

Consent is a central moral criterion for evaluation of our behavior toward others. Murders, thefts, and lies are all recognized as wrong because they are violations of consent. No one consents to be murdered, have his

goods stolen, or be lied to. If one somehow did consent to be the recipient of such acts, they would not be classified as “murder,” “theft,” or “lie” at all. Consent plays such a critical role in moral reasoning because it is the manifestation of the freedom and dignity of the person. Failure to abide by someone else’s consent causes one to treat that person as a non-person, more as a tool than a user, merely a means to one’s ends. However, respect for human freedom and autonomy does not entail that one must always treat people in ways they *prefer*.

Consent *restrains*, as well as *enables*, what human beings may be morally permitted to do to one another. By virtue of one’s actions, one can consent to actions or circumstances that one prefers not happen, as well as to those that would be immoral without that consent. For example, the quarterback on a football team prefers not to be tackled by the other team, but if he is, he has no basis to accuse the other team of assault. Arguably most soldiers prefer not to be shot at, but by virtue of their activities as soldiers, they have accepted that risk. For this reason, although *no* blame is assigned to enemy soldiers for killing friendly ones, it is reasonable to argue that enemy soldiers have taken part in an unjust cause and therefore *are* morally wrong.

Criminals also consent to punishment by virtue of their commission of crimes. By not respecting the rights of others, criminals must expect a society founded on those rights to punish violators. Whether they expect that *they* will be punished is not relevant; it is simply their criminal activity that counts in considering the treatment they should reasonably expect. Criminals *should* reasonably expect that their rights as persons will be respected and that they will be subject to a judicial procedure that will permit them to address their innocence or guilt. But should they be found guilty, they should *expect* to be deprived of their freedom.

Insurgents and terrorists have exposed themselves to being killed, detained, and interrogated. Not only are they a threat, but also, unlike threats posed by quarterbacks, soldiers, and criminals, insurgents and terrorists have also consented to the possibility of detention and interrogation. In fact, they should *expect* to be detained and interrogated. However, insurgents and terrorists have not exposed themselves to unlimited kinds of treatment. I argue that there exist limits to moral permissibility in detention as well in interrogation.

### Limits on Detention

The principle of consent at the outset limits who may be detained. Individuals suspected of insurgent or terrorist activity may be detained for two reasons: 1) to prevent them from conducting further attacks; 2) to gather intelligence in order to prevent other insurgents and terrorists from conducting attacks.

These reasons allow for two classes of persons to be detained and interrogated: 1) persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities; and 2) persons who have incidentally come by information regarding insurgent and terrorist activity, but who are not guilty of associating with such groups. By engaging in such activities, persons in the first category may be detained as criminals or enemies, depending on the context. Persons in the second category may be detained and questioned for specific information, but since they have not, by virtue of their activities, represented a threat, they may be detained only long enough to obtain the relevant information. If those who have incidentally come by information refuse willingly to provide it, they must be released.

### Limits on Interrogation

Most cases for permitting torture and ill-treatment begin with variants of the “ticking time-bomb” scenario. The ingredients of such scenarios are usually an impending loss of innocent life, a suspect who knows how to prevent it—and in most versions the suspect is responsible for the impending loss of innocent life—and a third party who has no humane alternative to obtain the information in the time left. Such cases are compelling, since most people do not want to conclude that *no* form of torture would be permissible, even if torture would not likely yield the desired information. Even those who are uncomfortable with their deliberations, conclude that the “ticking time bomb” scenario morally justifies torture.

Consider the case of the Israeli Supreme Court in rendering its own judgment on the use of torture and ill-treatment. The Court opened its judgment with the statement, “(t)he State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding.” Although it found that forms of interrogation involving physical pressure, as well as cruel, inhumane, and degrading treatment, were prohibited, the Court did allow interrogators to claim a defense of necessity in “ticking time-bomb”-like scenarios. In an example offered by the legal scholar Alan Dershowitz, Israeli agents successfully used torture to find the whereabouts of a kidnapped nineteen-year-old. His mother, according to Dershowitz, rhetorically asks, “Was this man going to reveal this kind of information if they served him tea and played some Mozart?”

Setting aside the false dilemma portrayed in this retort, arguments about respecting the humanity of the suspect and upholding laws prohibiting torture and ill-treatment in such situations would hardly be persuasive to victims and their families who would justly ask why their right to life is trumped by the suspect’s

right not to be tortured. If we accept that there are cases in which torture is morally permissible, Dershowitz reasonably argues, we should then institutionalize it, both in terms of law and practice. However, just because something can be morally permissible it is not self-evident that it should be legally permissible or that intelligence professionals should add it to their list of professional core competencies.

To illustrate this point, it is important to first note that “ticking time-bomb” scenarios are very restrictive. They limit the kinds of suspects whom it is permissible to torture by the following criteria: 1) the interrogator must have strong reasons to believe the suspect possesses the needed information; 2) the information must be necessary for preventing immediate harm to innocents; and 3) there must be no way to prevent the harm otherwise. Further, such scenarios require interrogators to apply a “minimum harm” rule and not inflict more harm than is necessary to get the desired information. Any pain that is inflicted—for instance, after the interrogator has determined that torture will not yield the needed information, or in order to teach a lesson—is morally wrong.

Notably, the criteria above exclude torture or ill-treatment for a population of suspects, even if the interrogator *knows* one of them has information that will prevent harm to innocents. While the utilitarian logic of this practice can be compelling—torture a few so many may live—ultimately, this practice is morally self-defeating because it puts innocent victims of torture in an impossible position. The person undergoing torture cannot prove he does *not* have the information, which presumably is the only thing he can give the interrogator to stop the torture. The only options available to the subject are either to endure the torture or ill-treatment indefinitely, or to give the torturer something he will believe, regardless its falsity. Placing someone in a position where he or she has the choice of pointlessly enduring physical pain or of lying degrades not only the subject and the interrogator, but it also morally diminishes the community that permits the creation of such untenable positions. This same logic precludes torturing a known terrorist on the suspicion that he has useful information. There is no way he can prove he does not.

A complete account of the moral permissibility to apply torture, or cruel, inhumane, or degrading treatment requires discussion of the basis interrogators could claim to know or have strong reasons to believe that a detained terrorist possesses information that could prevent the loss of innocent life. Credible sources or even confessions can be wrong or misinterpreted. Since this is an epistemic rather than a moral question, I will set aside a detailed discussion of what counts as knowledge or “strong reasons.” However, in judging whether or not torture or ill-treatment is permitted, the

due diligence with which interrogators apply analytical standards must be taken into account.

Further, given the severe restrictions on torturing suspects in “ticking time-bomb” scenarios, it is reasonable to ask if institutionalizing the practice of torture is morally worthwhile. Prohibitions against torture are so fundamental to the notions of human dignity upon which liberal democracies are founded, that we ultimately risk doing more harm than good by overriding those fundamental notions. It is one thing to recognize that on a case-by-case basis we must accept the lesser of two evils. It is something else entirely to assert that there are occasions when overriding democratic values is a good thing. The former risks occasional abuses for which the legal and political institutions necessary to address them remain intact. The latter risks undermining fundamental democratic values—and the institutions that preserve them—in such a way that they might no longer exist when the emergency is over.

Institutionalizing torture, cruel, inhumane, and degrading treatment also risk the integrity of the intelligence and military professions. It will require establishing law that sets aside the Geneva Convention and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. While this will be politically difficult and could undermine international and domestic support for the global war on terror, failure to do so will put the associated government agencies in the morally precarious position of training its people to do illegal acts.

Assuming this difficulty is resolved, additional moral costs must be addressed. Institutionalizing torture means that people skilled in the art and science of torture will have to be recruited and trained. A number of studies indicate that this has negative psychological as well as moral consequences, since habituating people to do cruel things risks making them cruel people. If one accepts that information gained from torture is usually unreliable and if one adds this to the cost of institutionalizing torture to professions as well as professionals, it is not so clear, even from the viewpoint of necessity, that ultimately the good obtained from permitting torture outweighs its harms.

A more morally consistent approach would be the recognition that at times violating legal and moral norms is understandable—that is, we can recognize that a good *person* might commit such an act—but not necessarily conclude that the *act* is good. In such cases, someone who committed an act of torture must offer his actions up for review and judgment by a competent authority. An excellent example of how this worked in real life is the case of a 4th Infantry Division Battalion Commander who permitted his men to beat a detainee whom he had good reasons to believe had information about future attacks against his unit.

When the beating did not get the desired results, he fired rounds around the detainee's head. The tactic was apparently successful and US servicemen lives were likely saved. However, his actions clearly violated the Geneva Conventions and he was prosecuted by the Army. He was, however, not punished to the full extent allowed by law, but he was instead fined and allowed to retire.

This resolution permitted the commander to do what he felt certain was the right thing. But it also required him to be certain that the right thing in this case was worth the end of his career. Thus we can recognize good people may be placed in situations where there is no morally good choice, but we do not have to redefine our morality to accommodate it.

### Conclusion

Of course, the tension between necessity and humanity will remain. Because of this tension, military and intelligence professionals must accept that in crises they may find themselves in circumstances where lives will be at stake and the morally appropriate way to preserve those lives will not be obvious. This should not preclude action, but these professionals must be prepared to accept the moral, as well as legal, consequences of torturing or otherwise ill-treating suspects. Failure to recognize and accept this represents the worst kind of careerism, placing the professional's career over the needs of the profession and the nation it serves.

At the same time, because it is indispensable to the state in the fulfillment of its obligation to secure the life and liberty of its citizens, the work of interrogators is a moral obligation. Their methods, however, must reflect this nation's commitment to human dignity. Acting morally does not necessarily mean that states give up obtaining critical information. Acting morally does require that states relinquish certain ways of obtaining information, even if that means that members of the military and intelligence professions must take greater risks.

Sources: On moral principles regarding democratic ideas upholding the dignity and value of human life, see Charles R. Beitz, *Political Theory and International Relations*, second edition (Princeton, Princeton Univ. Press, 1999); also see John Rawls's *Theory of Justice*, revised edition (Boston: Harvard Univ. Press, 1999) and National Strategy for Combating Terrorism, February 2003. On the prohibition against "physical or mental torture . . ." see *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, Part III (Captivity) Section I (Beginning of Captivity) Article 17. In his well-known view of the freedom and dignity of persons, Kant recognized this in one of his formulations of his famous Categorical Imperative: Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end. Immanuel Kant, *Foundations of the Metaphysics of Morals* (1785), translated by Lewis Beck (Indianapolis, Indiana: Bobbs-Merrill Educational Publishing, 1959). For the opening statement of the Israeli Supreme Court, see: *Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, p. 80 quoted in *The Israeli Law Review*, p. 2. [http://unixware.msc.huji.ac.il/~law1/ilr/ilr23\\_2.htm](http://unixware.msc.huji.ac.il/~law1/ilr/ilr23_2.htm). See also <http://62.90.71.124/eng/verdict/framesetSrch.html>. Alan M. Dershowitz, "Stop winking at torture and codify it," *LA Times* (June 13, 2004). On the point that habituating people to do cruel things risks making them cruel people, see Jean Marie Arrigo, "A Consequentialist Argument Against Torture Interrogation of Terrorists," <http://www.usafa.af.mil/jscope03/arrigo03.html>. Deborah Sontag, "How Colonel Risked his Career Menacing Detainee and Lost," *New York Times* (May 27, 2004).

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