

## On the permissibility of torture

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### Editor's note

*In this paper Gary Jones shows through both counter-example and hypothesis that there may be a case for permitting torture on utilitarian grounds. The arguments of Jonsen and Sagan in their essay 'Torture and the ethics of medicine',<sup>1</sup> fail to prove conclusively that torture is impermissible.*

### Introduction

The issue of torture in its relation to medical ethics has recently been raised, in part because of the general concern expressed over the ethical character of the application of medical technologies. Torture would seem to be of much interest in the context of medical ethics, for modern medical technology could accomplish the ends of torture more efficiently and more humanely than in the past.

In their essay 'Torture and the Ethics of Medicine', A Jonsen and L Sagan discuss the consequences of adopting the following rule which would, on utilitarian grounds, justify the limited use of torture: 'It is right to use torture in those very desperate situations where no milder means of interrogation seem likely to produce information which will with high probability, save many lives'.<sup>1</sup> The authors contend that the proposed rule is unacceptable. In order to justify their claim, Jonsen and Sagan proffer the following arguments:

- a) The good effect sought by performing torture is hardly certain;
- b) The scope of application of the rule is by no means clear. Information may be extracted from the perpetrators of a terrorist plot or from those who may know the perpetrators. The category of victims ripples out into the society catching 'not only the terrorists but their friends, their neighbours, even strangers whose political views are remotely similar';
- c) If torture should prove effective in gaining vital information, it might prove even more effective in discouraging interest in and support of revolutionary movements.
- d) In desperate situations punishment for terrorist crimes can often become retaliation, readily inflicted by acts of torture.

On the basis of these arguments, the authors conclude that torture is unacceptable, even on utilitarian grounds. This would constitute a decisive argument against the use of torture, for it is presumably on utilitarian grounds that it would derive most of its plausibility. In what follows, however, it will be argued that even though the use of torture may be unacceptable, the arguments proffered by Jonsen and Sagan fail to prove that it is so.

### Instrumental and sadistic motives

It is worthwhile to first consider two features of this issue that Jonsen and Sagan overlook. The concept of torture can include instrumental applications as well as those which involve purely sadistic motives, for example the infliction of pain for the sole purpose of causing pain. For the sake of discussion I will assume that all forms of torture are impermissible except those from which there is a good likelihood that information will be obtained that is beneficial in the specified sense. One more restriction, however, is needed. The extent and manner of torture must be restricted. It cannot involve death, and must utilise the most advanced medical techniques available so as not to cause needless psychological or physical harm. Only the minimal amount of pain necessary to obtain the information would be inflicted.

Given the above limitations, it is important to scrutinise the details of Jonsen and Sagan's claim that the use of torture is impermissible. Presumably, what the authors have in mind in the first argument is that it is entirely possible that torturing the perpetrators of a terrorist plot may do no good and may even tend to harden their attitude. Further, the persons tortured may actually be innocent and thus would undergo needless suffering. The fact that torture may fail to be successful is certainly not peculiar to that enterprise, however. Most public policies fall short of their objective, especially if their objectives are as ambitiously beneficial as that of torture, that is, to save a number of lives that are in imminent danger.

### 'Rehabilitation'

Also, the fact that torture may not only fail to obtain the required information and may traumatise

guilty and innocent victims alike is paralleled by the effect of prison systems all over the world. Although such systems are intended to 'rehabilitate' prisoners, it is now widely recognised that this goal is rarely, if ever, attained. The possible response that the prison system only stands in need of reform can be matched by the response that the application of methods of torture need only to be refined in order to alleviate their excesses, rather than prohibited as Jonsen and Sagan would maintain. If, on the other hand, it is maintained that torture should for the above reason be prohibited, there is *prima facie* reason to abolish prison systems as well.

### The cost-benefit ratio

At this point, two responses could be made: both torture and the prison system should be abolished; or what the authors mean by stating that the effects of torture are hardly certain is that the likelihood of good effects resulting from the use of torture is low, whereas the likelihood of pain eventuating is high. Thus the cost-benefit ratio, when weighted by the relevant probabilities, militates against the use of torture.

In regard to the first response, it seems just as reasonable to claim that what both the use of torture as well as the prison system need is intelligent design and implementation, not abolition. It would only be reasonable to conclude that they should be abolished after every scientific and humane attempt has been made to perfect them. After all, society at large would have much to gain if these institutions were successful.

Secondly, if Jonsen and Sagan are taken to mean that torture is, on balance, a poor investment it could be rejoined that by hypothesis the cases under discussion are those which promise significant results. Further, even if torture presently has a disappointing cost-benefit ratio, this fact alone cannot be sufficient to dismiss its use. Consider, for example, solar energy. It presently suffers from the same poor cost-benefit ratio as the use of torture allegedly does. However the promise of future benefits from the use of solar energy, along with the assumption that the cost-benefit ratio will improve, are sufficient grounds for many to conclude that its use should be promoted. Analogously, it could be argued that technical improvements in the methods used to extract information in as humane a way as possible will improve the cost-benefit ratio of the use of torture. The great benefit that the use of torture could precipitate in certain cases could provide strong motivation for seriously investigating the scientific and humane use of torture.

The third and fourth arguments in effect claim that what can happen will happen. If, that is, torture should prove effective as a means of getting information regarding terrorist intentions, it might prove even more effective in discouraging revolu-

tionary activities. The implicit conclusion is that torture might very well eventually be applied indiscriminantly, to anyone even remotely suspected of entertaining the idea of a terrorist activity.

However it seems that the same remarks could be applied to incarceration. If it well served its intention, deterrence, then locking up potential, and even merely possible, criminals, may be even more effective. Hence, on parallel argument, we should presumably discard the system of incarcerating criminals. In both arguments from the fact that a possibility could, given certain initial conditions, eventuate, it is concluded that it will eventually. However that conclusion does not follow, in either the case of incarceration or of torture; such abuse can be prevented. Therefore Jonsen and Sagan need to bolster their argument in order to render it convincing. Jonsen and Sagan could claim that torture is not simply capable of being abused; it is easily abused. Presumably, this would constitute grounds for not permitting the use of torture. However the fact that torture can be easily abused cannot be taken as grounds to dismiss its use. The right to bear arms and indeed, even the right to free speech can easily be abused. A decision to abolish these policies is only one alternative however, and it is not necessarily the most reasonable alternative.

### Abuse of torture

At this point Jonsen and Sagan could reply that past experience shows that torture has been often abused. Indeed, they cite cases of torture from Nazi Germany, Northern Ireland, Russia, Chile, Uruguay, and Algeria which could well support this thesis. They claim that the use, or rather, misuse of torture in these cases shows the practice to have a broad and deep destructive effect upon a society. However it is at least arguable that the misuse of torture is not the cause of a disrupted society but is merely symptomatic of a larger, more basic corruption. This corruption manifests itself in the abuse of many forms of governmental power: torture, incarceration, media censorship, etc. If this is the case, there is reason to conclude that no basis has been provided upon which to disallow the use of torture. All that has been shown is that a government uses of power should be closely monitored. The examples of Nazi Germany, Uruguay, etc. thus do not constitute sufficient grounds for abolishing the use of all government powers in proper circumstances. The exception, that is, does not disprove the general applicability of the rule. If this be the case, it seems that the practice of torture in appropriate circumstances cannot be justifiably prohibited on the basis of the examples cited. Indeed, the fact that a rational debate regarding the permissibility of torture can take place indicates that a society such as ours may

well be a proper setting for the practice of torture, for it is in such an open society that application of torture or of any other governmental power can be properly monitored. Therefore the sort of examples the authors cite should not necessarily indicate the general impermissibility of torture, or of any other form of governmental power.

In response to the second argument it could be replied that the scope of the application of the proposed rule is in a sense quite clear; we should perform torture only when the resultant information will probably be useful in the saving of many lives. The scope of the application of the rule is therefore subject to the ability of the government to discern who possesses relevant information. This enterprise may be difficult, but it is common to many projects which seem worthwhile. For instance, the practice of surveillance, to be effective, presupposes that some distinction be made between individuals who possess relevant information and those who do not. The fact that distinguishing between individuals on this basis may be difficult does not make the practice doomed to failure, however. Similarly, the practice of granting medical aid to the aged or the economically underprivileged presumes that some determination can be made as to the proper membership of these groups. This determination is difficult, but that fact may only imply that great care be used in making the determination. Again, the notion of a quarantine would be useless if Jonsen and Sagan's argument were generally sound; it would be pointless to attempt to separate infected individuals from healthy ones, for no justifiable determination could be made. Everyone who could have been infected would be considered to be infected, regardless of the actual likelihood of their being infected. However this possibility, of course, need not obtain. Quarantines, as well as the other practices mentioned above, can function even though their application may require careful judgement in particular cases.

### Criminal trials

It could be argued that the overall utility of the goal involved makes the difficulty in application of these policies allowable. Consider in this regard criminal trials. Often such trials continue for a great length of time and incur a great expense to the tax-paying public even in regard to relatively trivial offenses. However the benefit derived from such practices may require that procedures designed to disclose the truth are carried out. Further, that the criminal system is not infallible is suggested by the elaborate system of appeals that can be made in relation to court decisions. The proper conclusion is not, however, that the system should be discarded. Rather, refinements in the application of the system are called for. In the application of torture as well, what may be most appropriate is to strive for more efficiency and equity in application rather than a

rejection of the policy. It is therefore plausible to maintain that the good achievable through torture, *ie* the saving of innocent lives, could justify or even require the use of torture even though its application may be beset by the difficulty discussed above.

### 'Humane' torture

If the counter arguments presented have not been mistaken, Jonsen and Sagan have not shown the proper application of torture to be impermissible on utilitarian grounds. Moreover, it is instructive to consider what would be the intuitively appropriate course of action in the following case. Suppose the following is true. A group of terrorists has planted a nuclear bomb beneath a city of 100,000. There is not enough time to search for and defuse the bomb. Only if the terrorists divulge the location of the bomb can it be found in time. We have in custody one of the terrorists who admits to having planted the bomb, but who smugly refuses to reveal its location. The state of technology is such that we can stimulate certain centres of the brain such that we can inflict pain upon an individual without physical abuse or physical side effects. Also, much is understood about thresholds of pain tolerance and pleasure orientation such that only the necessary amount of pain need be administered in accordance with pleasurable stimulation, effecting great disparity.

Given the possibility of 'humane' torture envisaged above, one must balance the morality of torturing the terrorist against that of allowing the murder of many innocent persons. It could be reasonably conjectured that it is by no means clear that the terrorist should not be forced to divulge the location of the bomb. If so, then the use of torture is not always impermissible.

Further, a consideration of this example may indicate that Jonsen and Sagan's arguments derive what plausibility they have in relation to a general rule governing the use of torture. It may seem counter intuitive to institutionalise the use of torture by formulating such a rule. In terms of a utilitarian analysis of the justifiability of individual acts such as that suggested in the above example, however, the use of torture may seem more plausible. Given that even if justifiable, the use of torture would be limited to a very small number of acts, it is reasonable to claim that a utilitarian analysis of the use of torture in terms of the merit of individual acts is at least as appropriate as an analysis in terms of general rules. If so, I conjecture that the use of torture would seem to be permissible in certain cases.

### Reference

<sup>1</sup>Jonsen, A and Sagan, L (1978). *Man and medicine*, 3, 1.