

The Meaning of Torture*

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Despite being the subject of much recent scholarly work, torture remains an ambiguous concept. As recent legal arguments have made clear, such vagueness has important and immediate political consequences. This article makes a number of contributions towards resolving this ambiguity. First, it argues that the distinction between physical and psychological abuse is unwarranted. Second, it puts forward a logical basis for the distinction between torture and legally permissible punishments like incarceration. Third, it distinguishes between torture and related concepts like cruelty or sadism by stressing the instrumentality of torture. Ultimately, torture is defined as the systematic and deliberate infliction of severe pain or suffering on a person over whom the actor has physical control, in order to induce a behavioral response from that person.

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Torture is a human practice with a long if ignominious past.¹ Yet even after a spate of new research on the topic following the September 11th attacks and the subsequent controversy over U.S. treatment of detainees at Guantanamo Bay and Abu Ghraib, there is little agreement on what we actually mean by the term *torture*. For some, it is limited to the infliction of severe physical pain for

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1. Malise Ruthven, *Torture: The Grand Conspiracy* (London: Weidenfeld & Nicolson, 1978); Daniel Pratt Mannix, *The History of Torture* (Gloucestershire: Sutton Publishing, 2003). On the institutionalization of torture in the twentieth century, see Alfred W. McCoy, *A Question of Torture: CIA Interrogation, from the Cold War to the War on Terror*, 1st ed. (New York: Metropolitan Books, 2006); Michael Otterman, *American Torture: From the Cold War to Abu Ghraib and Beyond* (Ann Arbor, MI: Pluto Press, 2007); Darius M. Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).

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judicial purposes,² while for others it may include just about any suffering or harm,³ even if it is inflicted unintentionally.⁴ Although a number of well-thought-out conceptual analyses of torture have been published in recent years, as a body of work it lacks coherence; that is to say, the major advantages proffered by some definitions, say, the focus on *control*, are lacking in others, and vice versa.⁵ For reasons I describe below, we should be doubtful that there exists a “true” definition of torture. Still, we can and should attempt to resolve as much of the ambiguity surrounding the concept as possible. It can be argued, indeed, that such conceptual analysis is the very business of philosophy.⁶

Bob Brecher begins his recent monograph on torture by arguing that “we should not be looking for a definition” of torture, because “it is impossible to define real things, such as tables, rivers, kindness or unhappiness, since, as part of the real world, they can change without becoming something else.”⁷ For Brecher, torture is a concept that can only be *described*, not *defined*. Similarly, Peters laments that torture is “virtually impossible to define.”⁸ The apparent elusiveness of agreement on the meaning of torture becomes understandable if we concede that it meets Gallie’s criteria of an essentially contested concept.⁹ It is *internally complex*, with any definition requiring the introduction of a series of further problematic concepts (e.g., pain); the rules of its application are relatively *open* (consider the endless debate over the status of particular actions like waterboarding); and it is *appraisive* (it is always defined either implicitly or explicitly with reference to a value judgment).

While many concepts can be used effectively without a definition,¹⁰ this lack of clarity is problematic where torture is concerned. In this case, *conceptual images*—the total cognitive structures associated with a concept, including “all of

2. John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Régime* (Chicago: University of Chicago Press, 1977); Edward Peters, *Torture*, expanded ed. (Philadelphia: University of Pennsylvania Press, 1996); Lisa Silverman, *Tortured Subjects: Pain, Truth, and the Body in Early Modern France* (Chicago: University of Chicago Press, 2001).

3. Michael Davis, “The Moral Justification of Torture and Other Cruel, Inhuman, or Degrading Treatment,” *The International Journal of Applied Philosophy* 19 (2005): 161–78.

4. Mary R. Jackman, “Violence in Social Life,” *Annual Reviews in Sociology* 28 (2002): 387–415.

5. For example, Seumas Miller, “Is Torture Ever Morally Justifiable?” *International Journal of Applied Philosophy* 19 (2005): 179–92; David Sussman, “Defining Torture,” *Case Western Reserve Journal of International Law* 37 (2005): 225–30; Richard Matthews, *The Absolute Violation: Why Torture Must Be Prohibited* (Montréal: McGill-Queen’s University Press, 2008), ch. 1; Jessica Wolfendale, “The Myth Of ‘Torture Lite,’” *Ethics & International Affairs* 23 (2009): 47–61.

6. Peter Morriss, *Power: A Philosophical Analysis*, 2nd ed. (New York: Manchester University Press, 2002).

7. Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell, 2007), 3.

8. Peters, *Torture*, 154.

9. W. B. Gallie, “Essentially Contested Concepts,” *Proceedings of the Aristotelian Society* 56 (1955): 167–98.

10. David Tall and Shlomo Vinner, “Concept Image and Concept Definition in Mathematics with Particular Reference to Limits and Continuity,” *Educational Studies in Mathematics* 12 (1981): 151–69.

the mental pictures and associated properties and processes,”¹¹—vary too widely to be of much use to ethicists, social scientists, or especially in the context of the current debate, lawyers. The practical implications of this uncertainty were made clear by the now-infamous interpretations of the federal torture statutes that lawyers provided to the Bush administration. These legal guidelines were used to sanction coercive interrogation techniques such as waterboarding, sensory deprivation, and threats of bodily harm or death against terrorist suspects.¹² While we may casually retreat to the notion that “we know torture when we see it,” substantial disagreement still exists over what legally and conceptually counts as torture. Thus, we need not only a concept of torture, but also a better, workable definition. Indeed, Brecher himself is ultimately compelled to adopt what amounts to a definition of torture, even if he prefers to call it something else.¹³ Although some scholars have argued that this very debate lends legitimacy and normalcy to the practice of torture,¹⁴ even absolutists need a clear conceptualization of what they are absolutely against.

But by what criteria could we judge the superiority of one definition over another? A good definition “should explain *all* the meaning that a word has,” and it should “do *only* this and nothing more.”¹⁵ A good definition of torture must therefore grapple with the task of specifying what torture *is* and what it *is not*. For example, a definition of torture should reflect the common sense distinction between incarceration as part of the penal process and intentionally abusive techniques such as forced starvation, exposure to extreme temperatures, or sensory deprivation. Differentiation, however, is only one aspect of a satisfactory definition; a good definition should also aim to reflect our general intuitions, to be parsimonious and internally consistent, to encompass all possible senses of the concept, and to be useful to theorists and empirical researchers.¹⁶

It is worth reflecting on this last point for a moment. While torture has been a concern of human rights advocates and historians for some time, up until the relatively recent revelations regarding the activities of U.S. agents in their execution of the war on terror, it was not a topic of major concern to

11. Tall and Vinner, “Concept Image,” 152.

12. Kate Zernike, “Word for Word / a Fine Line; Defining Torture: Russian Roulette, Yes. Mind-Altering Drugs, Maybe,” *The New York Times*, June 27, 2004; Jack L. Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration*, 1st ed. (New York: W.W. Norton, 2007); Jane Mayer, *The Dark Side: The inside Story of How the War on Terror Turned into a War on American Ideals*, 1st ed. (New York: Doubleday, 2008).

13. Brecher, *Torture and the Ticking Bomb*, 5.

14. Slavoj Žižek, *Welcome to the Desert of the Real!: Five Essays on 11 September and Related Dates* (London: Verso, 2002).

15. Nuel Belnap, “On Rigorous Definitions,” *Philosophical Studies* 72 (1993): 119, emphasis in original.

16. Gerring, “What Makes a Concept Good?”

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contemporary political philosophers; the ethical debate had seemed largely settled. However, since the exposure of this conduct and the publication of the legal arguments made to justify it,¹⁷ scholars and policymakers have been engaged in heated debates over the alleged effectiveness and moral justification of torture. On one side of the debate, typically relying on some form of the ticking bomb hypothetical, several variants of the consequentialist justification of torture have been put forward.¹⁸ On the other side, the use of torture has been opposed on both consequentialist and absolutist grounds.¹⁹ However, the meaning we

17. Comprehensive collections of these documents can be found in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005); Jameel Jaffer and Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond* (New York: Columbia University Press, 2007).

18. Michael Levin, "The Case for Torture," *Newsweek*, June 17, 1982, 7; Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat Responding to the Challenge* (New Haven: Yale University Press, 2002); Jean Bethke Elshtain, "Reflection on the Problem of Dirty Hands," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004); Oren Gross, "The Prohibition of Torture and the Limits of Law," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004); Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton: Princeton University Press, 2004); Miller, "Is Torture Ever Morally Justifiable?" Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (New York: Oxford University Press, 2006); Dorris Schroeder, "A Child's Life or A 'Little Bit of Torture'? State-Sanctioned Violence and Dignity," *Cambridge Quarterly of Healthcare Ethics* 15 (2006): 188–201. Significant non-consequentialist justifications of torture have also been put forward by Stephen Kershnar, "An Argument for the Use of Torture as Public Policy," *Hamline Journal of Public Law and Policy* 19 (1998): 497–528; Fritz Allhoff, "A Defense of Torture: Separation of Cases, Ticking Time-Bombs and Moral Justification," *International Journal of Applied Philosophy* 19 (2005): 243–64; Stephen Kershnar, "For Interrogational Torture," *International Journal of Applied Philosophy* 19 (2005): 223–41; Jeff McMahan, "Torture, Morality, and Law," *Case Western Reserve Journal of International Law* 37 (2005): 241–48; Jeff McMahan, "Torture in Principle and in Practice," *Public Affairs Quarterly* 22 (2008): 111–28.

19. Cesare Beccaria, *On Crimes and Punishments*, trans. David Young (Indianapolis: Hackett Publishing Company, 1986); Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," *University of Pennsylvania Journal of Constitutional Law* 6 (2003): 278–325; Jean Maria Arrigo, "A Utilitarian Argument against Torture Interrogation of Terrorists," *Science and Engineering Ethics* 10 (2004): 543–72; Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review of Books, 2004); Henry Shue, "Torture," in *Torture: A Collection*, ed. Sanford Levinson (New York: Oxford University Press, 2004); Davis, "Moral Justification of Torture"; Kenneth Roth, Minky Worden, and Amy D. Bernstein, eds., *Torture: Does It Make Us Safer? Is It Ever Ok?: A Human Rights Perspective* (New York: New Press, 2005); Henry Shue, "Torture in Dreamland: Disposing of the Ticking Bomb," *Case Western Reserve Journal of International Law* 37 (2005): 231–39; Sussman, "Defining Torture"; David Sussman, "What's Wrong with Torture?" *Philosophy & Public Affairs* 33 (2005): 1–33; Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105 (2005): 1681–750; Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: A Refutation of the Ticking-Bomb Argument," *Journal of Applied Philosophy* 23 (2006): 355–73; David Luban, "Liberalism, Torture, and the Ticking Bomb," in *The Torture Debate in America*, ed. Karen J. Greenberg (New York: Cambridge University Press, 2006); Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006); Nigel S. Rodley, "The Prohibition of Torture: Absolute Means Absolute," *Denver Journal of International Law and Policy* 34 (2006): 145–60; Mark Antaki, "The Politics and Inhumanity of Torture," *Law, Culture, and the Humanities* 3 (2007): 3–17; Brecher, *Torture and the Ticking Bomb*; Goldsmith, *The Terror Presidency*; Yuval Ginbar, *Why Not Torture*

attach to the term has deep, if not always appreciated consequences for this debate.²⁰

A few examples will clarify what I mean. When torture is defined as an action carried out by an agent of the state,²¹ subsequent discussions of the morality of torture cannot be separated from judgments about the ethical validity of the state's claim to the monopoly over the legitimate use of violence more generally. Similarly, although well intended, the conceptualization of torture as "an attack on human dignity" confuses more than it clarifies.²² Dignity, in this sense, refers to the capacity for self-consciousness and practical reason. Dignity, however, raises additional, complex ethical dilemmas where those with diminished mental capacity (e.g., children, the mentally ill) are concerned. A child, even if she does not have the same capacity for self-conscious reflection as an adult, can be expected to display a behavioral response to the infliction of severe pain or suffering, and so can be tortured.²³ Thus, while torture is an attack on dignity for all dignity bearing beings, we should leave open the possibility that non-dignity bearing beings can be tortured. Finally, to assert, as Matthews does, that all torture constitutes a sexual assault,²⁴ simply by virtue of the cognizance of both torturer and victim of their own and each other's gender, is to stretch the concepts of both torture and sexual violence beyond recognition.²⁵ Rape and torture may be equally morally opprobrious, but that does not render the two concepts equivalent.²⁶ Here I put forward a definition to which both opponents and proponents of torture need have no *a priori* objection.

Terrorists? Moral, Practical, and Legal Aspects of the 'Ticking Bomb' Justification for Torture (Oxford: Oxford University Press, 2008); Matthews, *The Absolute Violation*; Jamie Mayerfeld, "In Defense of the Absolute Prohibition of Torture," *Public Affairs Quarterly* 22 (2008): 109–28; Jordan J. Paust, "The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions," *Valparaiso University Law Review* 43 (2009): 1535–75.

20. William E. Connolly, *The Terms of Political Discourse*, 3rd ed. (Oxford: Blackwell, 1993).

21. For example, Paul W. Kahn, *Sacred Violence: Torture, Terror, and Sovereignty* (Ann Arbor: University of Michigan Press, 2008).

22. Matthews, *The Absolute Violation*, 23.

23. This raises the question of whether non-humans can be tortured. The answer, which depends on whether it is logically or practically possible to elicit a behavioral response from a non-human animal through the infliction of severe pain or suffering, would seem, *prima facie*, to be yes. See Peter Singer, *Animal Liberation* (New York: Ecco, 2002); Stephen Macedo and Josiah Ober, eds., *Primates and Philosophers: How Morality Evolved* (Princeton: Princeton University Press, 2006). This question deserves a great deal more thought. However, for the remainder of this article, I will be concerned only with human-human torture.

24. See Matthews, *The Absolute Violation*, 49–51.

25. Sartori, Giovanni, "Concept Misinformation in Comparative Politics," *American Political Science Review* 64 (1970): 1033–55.

26. C.f. Catherine A. MacKinnon, "On Torture: A Feminist Perspective on Human Rights," in *Human Rights in the Twenty-First Century: A Global Challenge*, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht: Martinus Nijhoff, 1993).

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Torture is typically defined by reference to three particular features. The first refers to the *identity* of the torturer; frequently torture is limited to actions carried out by the state or an agent of the state. In the first section, I argue that such a limitation is unwarranted. The second refers to the *purpose* of torture. Torture is defined by what it is done *for*, whether the purpose is information gathering, confession, extortion, or something else. In the second section, I maintain that while purpose is a necessary component to the definition of torture, the tendency to delimit these purposes within the definition itself is unhelpful. Instead, I stress the instrumental nature of torture as one of its defining features, while leaving the specific purpose aside. To get at the meaning of torture, this article emphasizes the third dimension by which torture can be distinguished—the *means*. In addition to its instrumentality, what differentiates torture from similar acts is the specific intent to cause pain or suffering and the nature of control that the torturer has over the tortured. In section three, I discuss the problematic issue of pain and suffering, and in section four I address the importance of control to our understanding of torture. Ultimately, torture is defined as *the systematic and deliberate infliction of severe pain or suffering on a person over whom the actor has physical control, in order to induce a behavioral response from that person*. This definition has two attractive features. First, torture can be carried out by a variety of agents for a variety of purposes. As a consequence, insofar as we would expect there to be different explanations for torture carried out by different actors or for different purposes, torture can be described as consisting of various sub-categories. Second, although this definition is a comprehensive one, it also avoids the pitfall of simply equating torture with evil. While most of us agree that torture is bad, not everything bad is torture. The distinction between torture and non-torture is an important one.

The Identity of the Torturer

There is an uncomfortable tension in much of the theoretical and legal writing on torture. On the one hand, it is often assumed that torture is an act that is carried out exclusively by the state.²⁷ On the other, examples of essentially private violence are adduced as actual, but more often, hypothetical instances of torture, such as whether a parent is justified in torturing a kidnapper to uncover the location of a missing child.²⁸ Thus there is considerable inconsistency in

27. Langbein, *Torture and the Law of Proof*; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, 2nd ed. (New York: Vintage Books, 1995); Peters, *Torture*; Silverman, *Tortured Subjects*; Kahn, *Sacred Violence*.

28. Onora O'Neill, "Which Are the Offers *You* Can't Refuse?" in *Violence, Terrorism, and Justice*, ed. R.G. Frey and Christopher W. Morris (New York: Cambridge University Press, 1991); Schroeder, "A Child's Life or A 'Little Bit of Torture'?"

whether torture is defined by the identity of the torturer or because of either the purpose for which the action is carried out or by the way in which that act is carried out.

Some definitions attempt to resolve this tension by explicitly stating the state's role in torture. The commonly cited UN Convention Against Torture (CAT) defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.²⁹

According to the CAT, as the italicized clause indicates, an act is torture *only* if it is carried out by or on behalf of a representative of the state.³⁰ Historian Edward Peters claims that the one common element to all classical and early modern definitions of torture “is torment inflicted by a *public* authority for ostensibly *public* purposes . . . Torture is thus something that a *public* authority does or condones.”³¹ Even more forcefully, he states that “judicial torture is the *only* kind of torture, whether administered by an official judiciary or by other instruments of the state,” and that “other things sentimentally called ‘torture’ had better be called something else.”³² Darius Rejali, in his impressive history of the practice of torture in the twentieth century, defines torture as “the systematic infliction of physical torment on detained individuals by state officials for police purposes, for confession, for information, or intimidation.” He also considers “the activity of some nonstate actors as torture” if they are acting on the implicit or explicit orders of the state.³³ However, similar actions have been systematically employed by non-state actors as well.³⁴ A complete definition of torture should reflect this fact. Even if torture were believed to be an exclusively public or political

29. United Nations, “United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” (1986), Part 1, Article 1 (1).

30. As a legal definition, it can be argued that comprehensiveness and generality are not required. The above-mentioned actions are simply those tortures which are covered by the treaty, not all tortures which could conceivably exist.

31. Peters, *Torture*, 3, emphasis added.

32. Peters, *Torture*, 7, emphasis in the original.

33. Rejali, *Torture and Democracy*, 35.

34. Davis, “Moral Justification of Torture,” 163.

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phenomenon, we would also have to include the actions of non-state organizations that aspire to rule. For example, throughout the 1970s, 1980s and 1990s, the Irish Republican Army (IRA) is known to have engaged extensively in the use of so-called “punishment beatings” and “kneecapping” punishment for all kinds of “anti-social” behaviors from drug dealing to petty crime,³⁵ as well as violent, coercive interrogations of its own members suspected of treacherous behavior.³⁶ The IRA’s use of selective non-lethal violence meets all of the criteria of the CAT, but for the fact that the IRA is not an arm of the state. This state of affairs would seem especially problematic if paramilitary groups like the Ulster Volunteer Force (a loyalist paramilitary force) engaging in similar activities would have to be considered torturers, simply because they are known to have colluded with the state.³⁷ Rejali ultimately acknowledges that we may prefer to use the terms “public torture” and “private torture” to distinguish between state and non-state torture, but seems to suggest that torture in the truest sense is limited only to the former.³⁸ However, there is no reason that torture as a concept cannot contain within it to two or more related sub-categories.

The Purpose of Torture

The problem of specifying the identity of the torturer would appear to be overcome by Christopher Tindale’s definition of torture as:

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 dehumanizing that person or other persons.³⁹

According to Tindale’s definition there is nothing that would limit torture to the activities of either representatives of the state or of non-state actors that have aspirations to rule. Any person, so long as he deliberately inflicts pain on another person for a specified set of purposes would seem to be capable of torture. In this case, as in most definitions of the concept that have been put forward, torture is

35. Amnesty International, *Voices for Freedom* (London: Amnesty International, 1986).

36. Eamon Collins and Mick McGovern, *Killing Rage* (London: Granta Books, 1997).

37. This would be the case if we accepted Rejali’s definition above. On loyalist collusion with state security forces, see Martin Dillon, *The Dirty War: Covert Strategies and Tactics Used in Political Conflicts* (New York: Routledge, 1999).

38. Rejali, *Torture and Democracy*, 39.

39. Christopher W. Tindale, “The Logic of Torture: A Critical Examination,” *Social Theory & Practice* 22 (1996): 355.

distinguished because of the *purposes* of the act.⁴⁰ It is torture if, and only if, the act is done for the purposes specified within the definition itself.

The assumption that torture is distinguished by its purpose creates at least three difficulties. First, we could follow the definition of Langbein or Peters, and assert that it is only torture if the purpose of the actor is to obtain a confession of a crime in the context of legal proceedings.⁴¹ In *Torture and the Law of Proof* (1977), Langbein writes, “When we speak of ‘judicial torture,’ we are referring to the use of physical coercion by officers of the state in order to gather evidence for judicial proceedings . . . Torture has to be kept separate from the various painful modes of punishment used as sanctions against persons already convicted and condemned. No punishment, no matter how gruesome, should be called torture.”⁴² Indeed, there exists ample evidence to suggest that corporal punishment was neither defined nor perceived as torture in seventeenth-century France despite its widespread use.⁴³ But if torture was limited to this purpose alone, it would exclude cases in which pain was inflicted in order to deter undesired behavior,⁴⁴ to extort money or services,⁴⁵ or to obtain a subject’s conversion.⁴⁶ Indeed, there may be other conceivable (or as yet inconceivable) purposes for torture that could arise sometime in the future. From a phenomenological perspective, there is no reason to exclude these possible motivations. Moreover, torture often seems to entail a degree of punishment on suspicion, no matter what the ostensible other purposes.⁴⁷ Second, having to specify the purpose of torture *a priori* may hamper any efforts we could make toward conducting comparative empirical research on the incidence and effectiveness of torture. Very often, precisely what we want to know is *why* an agency or an individual tortures. But because the above definitions presuppose the ends of the action, the problem is reduced to a tautology. Finally, the kinds of purposes specified within most definitions of torture are themselves value-heavy terms (e.g., punishment, discrimination), most of which have negative

40. Langbein, *Torture and the Law of Proof*; see also Irwin M. Cohen and Raymond R. Corrado, “State Torture in the Contemporary World,” *International Journal of Comparative Sociology* 46 (2003): 103–131; Davis, “Moral Justification of Torture”; Sussman, “What’s Wrong with Torture?”; Marnia Lazreg, *Torture and the Twilight of Empire: From Algiers to Baghdad* (Princeton: Princeton University Press, 2008).

41. Langbein, *Torture and the Law of Proof*; Peters, *Torture*.

42. Langbein, *Torture and the Law of Proof*, 3.

43. Silverman, *Tortured Subjects*.

44. Amnesty International, *Voices for Freedom*; Paul Aussaresses, *The Battle of the Casbah* (New York: Enigma, 2002).

45. Minky Worden, “Torture Spoken Here: Ending Global Torture,” in *Torture: Does It Make Us Safer? Is It Ever OK?: A Human Rights Perspective*, ed. Kenneth Roth and Minky Worden (New York: New Press, 2005).

46. Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985).

47. Roy F Baumeister, *Evil: Inside Human Cruelty and Violence* (New York: W.H. Freeman, 1997), 224.

connotations; by picking and choosing which purposes are included within the definition, the concept of torture is already biased by these prejudgments.

This is not to suggest that a definition of torture is possible without some conception of purpose. Connolly cautions that even apparently objective concepts only make sense because they are defined from the perspective of a set of shared values. He writes, “concepts themselves would not be formed, would not combine within one rubric a set of features, unless there were some point in doing so—unless we shared a moral point of view that these concepts concretize and reflect.”⁴⁸ However, rather than specify the precise aim of torture (i.e., confession, denunciation, punishment, etc.) within the definition, it will suffice to state its purpose in more general terms. For the likes of Davis and Miller, it seems that this general purpose can be framed in terms of breaking the will of the subject.⁴⁹ In this respect, I find useful Amnesty International’s definition of torture as “the systematic and deliberate infliction of acute pain in any form by one person on another or on a third person, in order *to accomplish the purpose of the former against the will of the latter*.”⁵⁰ However, it would be preferable to avoid invocation of the concept of the will. Psychologists and neurologists, as well as philosophers, continue to debate whether the distinction between voluntary and involuntary action has merit.⁵¹ Alternatively, by formulating the purpose of torture in terms of attaining a behavioral response, whether the individual’s actions are merely automatic (reflex) or the result of conscious decisions, now becomes beside the point.⁵² Simply, the performance of additional actions is required. The actions sought often seem to be verbal, or at least gestural, such as the admission of guilt, the identification of an accomplice, or the provision of information pertaining to an impending attack. But there is no reason that torture could not be used to make another person perform a variety of actions; consider the range of duties performed by slaves. In this way, moreover, we could more

48. Connolly, *The Terms of Political Discourse*, 24. It could reasonably be argued that certain mathematical or scientific concepts do not rest on such a “shared moral point of view.” However, this rationale can in turn be countered with the argument that even mathematical and scientific concepts are based on shared metaphysical assumptions, which are no less “moral” in constitution. See also Friedrich W. Nietzsche, *The Gay Science; with a Prelude in Rhymes and an Appendix of Songs*, trans. Walter A. Kaufmann, 1st ed. (New York: Vintage Books, 1974), III, § 111.

49. Davis, “Moral Justification of Torture”; Miller, “Is Torture Ever Morally Justifiable?”

50. Amnesty International, *Report on Torture* (London: Duckworth, 1973), 35, emphasis added.

51. Arthur Prochazka, Francois Clarac, Gerald E. Loeb, John C. Rothwell, and Jonathan R. Wolpaw, “What Do Reflex and Voluntary Mean? Modern Views on an Ancient Debate,” *Experimental Brain Research* 130 (2000): 417–32.

52. The literature on free will is vast; see: Ivan M. Sechenov, *Reflexes of the Brain* (Cambridge: M.I.T. Press, 1965); Julien Offray de La Mettrie, *Man a Machine and Man a Plant* (Hackett Publishing Company, 1994); Robert Kane, *Free Will* (Malden: Blackwell Publishers, 2002); Daniel M. Wegner, *The Illusion of Conscious Will* (Cambridge: M.I.T. Press, 2002); Rene Descartes, *Treatise of Man*, trans. Thomas Steele Hall (New York: Prometheus Books, 2003); Gary Watson, *Free Will*, 2nd ed. (Oxford: Oxford University Press, 2003).

precisely define sub-categories of torture depending on the behavioral response sought, while bearing in mind that they are just that, *sub*-categories. In any case, something beyond a mere change in the sensory state of the subject (being in pain) is wanted by the torturer.

Amnesty International's definition also correctly points out that the infliction of pain or suffering must be deliberate or intentional. Intentionality is, of course, another problematic concept, and its ambiguity is particularly consequential in the case of torture. John Yoo, Jay Bybee, and others have argued in the case of U.S. treatment of prisoners in Guantanamo Bay and Afghanistan that if the infliction of pain is not the "specific intent" of the act, then it is not torture.⁵³ Office of Legal Council lawyer Jay Bybee's memo to U.S. Attorney General Alberto Gonzales on the standards of conduct for interrogations of suspects argued that "the infliction of such pain must be the defendant's precise objective" for the act to constitute torture.⁵⁴ Tragically, in this case, Bybee's interpretation of the Torture Statute is not wholly inaccurate.⁵⁵ Torture is defined in Section 2340 of Title 18 of the U.S. Code as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering . . ." Similarly, the War Crimes statute re-written by the Military Commissions Act of 2006 (Section 3930(11)(A) of the U.S. Code) defines torture as "[t]he act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering . . ."⁵⁶ It is unclear in these statutes what exactly is meant by "specifically intended."

There continues to be a well-justified theoretical debate over whether intentionality refers exclusively to those acts that are primarily intended (the strong sense)⁵⁷ or also to side-effects about which the person acting is aware but over which she has no particular preference (the weak sense).⁵⁸ It seems to be this distinction that Yoo and Bybee are relying on to argue that it is only torture if the infliction of pain is specifically intended. However, their reasoning is erroneous. I cannot imagine much objection to the assertion that the completely

53. Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of Its Enemies since 9/11* (New York: Simon & Schuster, 2006); Jaffer and Singh, *Administration of Torture*; Mayer, *The Dark Side*.

54. Jay S. Bybee, "Memo to Alberto R. Gonzales Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340a," in *The Torture Papers*, ed. Karen J. Greenberg and Joshua L. Dratel (New York: Cambridge University Press, 2002).

55. It is worth pointing out that the Torture Statute was drawn up in 1994 under the Clinton administration; the problem with the legal conceptualization of torture in U.S. statute thus goes beyond one of the prerogatives of particular administrations.

56. I thank an anonymous reviewer for *Polity* for bringing these points to my attention.

57. Alfred R. Mele, "Acting Intentionally: Probing Folk Notions," in *Intentions and Intentionality: Foundations of Social Cognition*, ed. Bertram F. Malle, Louis J. Moses, and Dare Baldwin (Cambridge: M.I.T. Press, 2001).

58. Michael Bratman, "Two Faces of Intention," *The Philosophical Review* 93 (1984): 375–405; Joshua Knobe, "Intentional Action and Side Effects in Ordinary Language," *Analysis* 63 (2003): 190–94.

accidental and unforeseen infliction of severe pain or suffering on another person is not torture. More problematic is the infliction of severe pain as a known side-effect of the action. In a sense, Bybee is correct here. Pain inflicted as a side-effect need not be torture; just think of the pain inflicted by many common medical procedures, even on those who cannot give their consent, like children or the mentally ill. However, the perverse implication of the Yoo-Bybee interpretation of these statutes is that it can *only* be torture if the actor has no purpose *beyond* the infliction of pain. That is to turn the meaning of torture on its head. It would, in practice, tend to equate torture with sadism or cruelty, which is something that most definitions of torture aim to avoid.⁵⁹ Sadistic acts, in which pain is inflicted to enhance the feeling of power the actor has over his subject, are not in themselves torture, but something else, as a behavioral response (other than *being in pain*) is not sought. Sadists intend to *affect* another person through the infliction of pain, but they do not necessarily want to *effect* a particular change in that person.⁶⁰ In other words, while sadists may want to hear their victims scream or beg for mercy or see them writhe, they do not necessarily intend to induce a particular behavioral response. As Rejali has noted, we already possess the vocabulary to describe cruelty, sadism, viciousness and the like; there is no need to muddy the concept of torture to include them. The everyday use of the term to describe the behavior of the sadists, rapists, and madmen of horror films is inappropriate for analytical purposes.⁶¹ In the case of torture, while the infliction of pain on the subject should be intentional, this does not mean that the infliction of pain must be the sole end or even the primary intended goal of the act. Rather, the opposite is true. Torture is defined by its *instrumentality*. It is distinct from sadism or cruelty because it is a means towards some end, other than the infliction of pain for its own sake. Furthermore, unlike the pain inflicted in a medical procedure, which is not simply a side-effect but an undesired one, the pain inflicted on the rack of an interrogation chamber is a necessary and central component of the act. Pain is the means by which the ends (e.g., obtaining a confession) are accomplished. If pain is deliberately inflicted as the means to bring about a secondary consequence, then it is specifically intended, and the act in question is torture.

Following the logic of the doctrine of double effect, this would exclude many instances in which the infliction of pain is incidental to an action, even if the

59. Sussman is an exception, including the “exercise of dominance or sadism simply for its own sake” as a possible purpose of torture; see Sussman, “What’s Wrong with Torture?”

60. “To *affect* something is to alter it in some way (*any way*); to *effect* something is to bring about or accomplish it” Morriss, *Power*, 29, emphasis in original.

61. Rejali, *Torture and Democracy*. See also: Robert D. Stolorow, “The Narcissistic Function of Masochism (and Sadism),” *International Journal of Psycho-Analysis* 56 (1975): 441–48; S.E. Holt, J.R. Meloy, and S. Strack, “Sadism and Psychopathy in Violent and Sexually Violent Offenders,” *Journal of the American Academy of Psychiatry and the Law Online* 27 (1999): 23–32.

action itself is deliberate.⁶² The reason this is so is not because the pain is unintended (in the sense of being completely unforeseen) but because the pain is not instrumental to the goal that is intended. Male and female circumcisions, for example, inflict substantial pain, and the subject rarely has any choice in the matter. Some human rights organizations and scholars have categorized (especially) female circumcision or other ritual mutilation (e.g., the practice of fitting metal rings around the necks of young women among some tribes) as acts of torture.⁶³ However, while a debate can be had on the ethics of ritual mutilations, these acts should not be classified as torture. In these cases the infliction of pain is very much incidental to the ritual, spiritual purpose of the acts. In the cases of ritual mutilation described above, pain is an unpleasant side-effect. If they could be performed in a pain-free way, they would.⁶⁴ One can be *responsible* for producing some outcome (in this case pain or suffering) even if it is not intended (in either the weak or the strong sense).⁶⁵ So, while it can be argued that we should hold people responsible for conducting ritual mutilations, we should not debase the concept of torture in doing so. Just as one cannot accidentally murder (we call this manslaughter), one cannot accidentally torture.

The same logic applies to incarceration. Most definitions, including the CAT, attempt to draw a distinction between torture and incarceration. The CAT includes in its definition an exception for actions that are “inherent in or incidental to lawful sanctions . . .” But rather than resort to an *ad hoc* determination of which types of pain or trauma are legally and morally acceptable or which punishments cause more or less suffering and anguish, we are better served to stress the concepts of intentionality and instrumentality as being jointly necessary with pain or suffering to a definition of torture. While incarceration is likely to inflict suffering, suffering is not essential to the purpose of incarceration. In other words, the penal justice system works whether or not an inmate is traumatized by his experience in prison. In contrast, pain is essential to the torture experience. However, in the case of extended solitary confinement, if the purpose is to induce some kind of behavioral response, the infliction of suffering on the subject is intentional and instrumental. Therefore, in such cases

62. Philippa Foot, “The Problem of Abortion and the Doctrine of Double Effect,” *Oxford Review* 5 (1967): 5–15.

63. Nahid Toubia, “Female Genital Mutilation,” in *Women’s Rights, Human Rights: International Feminist Perspectives*, ed. Julie S. Peters and Andrea Wolper (New York: Routledge, 1995).

64. There can of course be ritual mutilations where the infliction of pain is deliberate. Often in primitive warfare, captured enemies would be forced to run a gauntlet of beatings before being mutilated alive, scalped, and executed in gruesome fashion, whether by impalement on a sharpened pike or immolation by fire; see Lawrence H. Keeley, *War before Civilization* (New York: Oxford University Press, 1996).

65. Morriss, *Power*, 25–28. Note the contrast with Connolly, *The Terms of Political Discourse*, 104–05.

where the individual experiences extreme suffering or trauma, it would have to be categorized as torture.⁶⁶

Acts of pure punishment or retribution will now fall outside of the definition. Instances in which a person is punished, even brutally, but no behavioral response is sought from the subject of the action, should not be classified as torture. Such actions are corporal punishment and demand a different set of sociological and ethical arguments.⁶⁷ This much was recognized by Jeremy Bentham in his treatise on torture.⁶⁸ However, an attempt to induce some kind of behavioral response from an individual undergoing punishment should be classified as torture. In practice then, some acts of corporal punishment can be classified as torture. Often, the purpose of aggravated punishments (even if the subject cannot save herself from further pain or death, as in crucifixion) is to have the individual confess or profess something in public;⁶⁹ thus, a behavioral response is sought, even if it is not always obtained. The nature of the response can vary. Ultimately, although there may or perhaps should be the same legal and moral prohibitions against corporal punishment as there are against torture, the two classes of action are not conceptually equivalent. As I have said, simply because we believe torture to be bad does not mean that any bad act is torture. This distinction between torture and non-torture is not here intended to reflect a moral preference, to argue that one is “less bad”; rather it is intended to reflect the intuition that these different classes of violent action follow a distinct explanatory logic. The reasons to torture are different from the reasons to punish.

Torture and Pain

Torture refers to the deliberate and instrumental application of pain by one person on another. An understanding of pain is therefore essential to any definition of torture. Pain—its totality and its inexpressibility—is the very essence of torture. Pain is a feature of every definition of torture, and rightly so. Scarry writes, “Torture is a process which not only converts but announces the conversion of every conceivable aspect of the event and the environment into an agent of pain.”⁷⁰ But what precisely do we mean by pain? Most dictionary definitions of pain are of little help on the subject, typically defining it in terms of

66. Atul Gawande, “Hellhole: The United States Holds Tens of Thousands of Inmates in Long-Term Solitary Confinement. Is This Torture?” *The New Yorker*, March 30, 2009.

67. Graeme R Newman, *Just and Painful: A Case for the Corporal Punishment of Criminals* (New York: Macmillan, 1983); Kershner, “An Argument for the Use of Torture.”

68. W. L. Twining and P. E. Twining, “Bentham on Torture,” *Northern Ireland Legal Quarterly* 24 (1973): 305–56.

69. Foucault, *Discipline and Punish*.

70. Scarry, *The Body in Pain*, 27–28.

a number of related synonyms such as discomfort, hurt, suffering, sickness, annoyance, or unhappiness. Like torture, pain is a concept that is difficult to put into words. Améry says the following of his experience of the *strappado*, a technique in which the arms are bound together behind the back and raised upwards until they cause unbearable pressure on the joints; in Améry's case it resulted in the dislocation of the shoulders. "The pain was what it was. Beyond that there is nothing to say. Qualities of feeling are as incomparable as they are indescribable. They mark the limit of the capacity of language to communicate."⁷¹

The nature of pain and the related concept of suffering have been at the heart of the recent controversy over the treatment of inmates at U.S. detention facilities in Iraq and Guantanamo Bay.⁷² While intuitively we have the sense that there are degrees of pain, specifying in the abstract what constitutes *severe pain* is an extremely challenging task. Although it is not encapsulated by the Bybee definition of impairment of bodily functions to the point of "organ failure" or "death" expressed in the infamous "torture memo," it is not clear how it should be delineated.⁷³ Moreover, many attempts to define torture continue to separate mental or psychological suffering and physical pain. For example, a U.S. Defense Department Working Group report⁷⁴ and a U.S. Justice Department memorandum⁷⁵ argued for a narrow definition of torture that excludes acts that cause suffering or mental pain in the absence of physical pain. However, medical research on pain indicates that "the victim's experience of pain cannot be separated into a purely physical or mental realm."⁷⁶ Pain expert Ronald Melzack concludes, "It is now recognized that every physiological explanation of pain contains an implicit psychological concept that has a profound impact on both the study and treatment of pain."⁷⁷ Thus, three related problems exist. The first is to determine whether or not pain is a purely somatic or psychological phenomenon (or if such a distinction has any merit); the second is to establish whether mental abuse or humiliating and degrading treatment constitute torture; and the third is to ascertain whether there is a scale by which we can determine the severity of pain.

71. Jean Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities* (Bloomington: Indiana University Press, 1980), 33.

72. Mayer, *The Dark Side*.

73. Bybee, "Memo to Alberto R. Gonzales."

74. U.S. Defense Department, "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations," in *The Torture Papers*, ed. Karen J. Greenberg and Joshua L. Dratel (New York: Cambridge University Press, 2003).

75. U.S. Justice Department, "Memorandum for James B. Comey, Deputy Attorney General, Re: Legal Standards Applicable under 18 USC §§ 2340–2340a" (<http://www.usdoj.gov/olc/dagmemo.pdf>, 2006).

76. Eric Stover and Elena O. Nightingale, *The Breaking of Bodies and Minds: Torture, Psychiatric Abuse, and the Health Professions* (New York: Freeman, 1985), 6.

77. Ronald Melzack, "Neurophysiological Foundations of Pain," in *The Psychology of Pain*, ed. Richard A. Sternbach (New York: Raven Press, 1986), 1.

Mental or Physical Pain?

The word torture comes from the Latin, *torquere*, to twist, in reference to the early mechanical devices of torture in which limbs and joints would be twisted in unnatural angles until they broke. It is thus often taken to refer to the infliction of physical injury or pain. But this focus on the physicality of pain is unjustified. Pain describes an array of psycho-somatic sensations, either in the form of a sharp stinging feeling or a dull throbbing one, which correspond to the two types of nerve receptors in the body.⁷⁸ Put another way, we may say that pain is acute or chronic.⁷⁹ Physiologic correlates of pain include heart rate, blood pressure, electrodermal activity,⁸⁰ electromyographic activity,⁸¹ and cortical evoked potentials.⁸² In most cases, the infliction of an injury to the body elicits a physiological and psychological reaction. This reaction is usually unpleasant and individuals endeavor to avoid pain. The avoidance response is an essential survival mechanism and it is at the heart of the pain experience. The consideration of some anomalies to this general rule makes this clear. In rare cases, such as during a religious ceremony, physical injury can be experienced as contributing to a state of euphoria,⁸³ while masochism is actually a far more common fetish than sadism.⁸⁴ In other, even more uncommon cases, patients exposed to noxious sensory stimuli do not experience pain (known as pain asymbolia). Asymbolics can sense pain but they do not *feel* it as unpleasant, and make no efforts to avoid it.⁸⁵ Other patients, who have experienced no injury, suffer from chronic agony.⁸⁶ Many patients suffering from back pain show no apparent physical signs of injury,⁸⁷ while it has even been controversially suggested that in rare circumstances fear alone can be severe enough to induce death.⁸⁸ Although these conditions are atypical, they threaten “the objectivists’ claim that the feeling of pain is just the awareness of an objective bodily state of affairs: that it is the perception or sensory representation of bodily or tissue

78. Nikola Grahek, *Feeling Pain and Being in Pain*, 2nd ed. (Cambridge: M.I.T. Press, 2007).

79. Richard A. Sternbach, ed., *The Psychology of Pain*, 2nd ed. (New York: Raven Press, 1986).

80. Changes in the skin’s ability to conduct electricity.

81. Changes in the activation signal of muscles.

82. A rather loosely defined class of electrical phenomena in the central nervous system that follow impulse stimulation either of sensory receptors, as by clicks and light flashes, or of the brain itself, electrically.

83. Ronald Melzack, *The Puzzle of Pain* (New York: Basic Books, 1973); Pierre Clastres, *Society against the State: Essays in Political Anthropology* (New York: Zone Books, 1987), 177–88.

84. Baumeister, *Evil*.

85. Grahek, *Feeling Pain*.

86. Melzack, *The Puzzle of Pain*.

87. Ronald Melzack and Patrick D. Wall, *The Challenge of Pain*, rev. ed. (New York: Basic Books, 1983).

88. Walter B Cannon, “Voodoo’ Death,” *Psychosomatic Medicine* 19 (1957): 182–90.

damage.”⁸⁹ Yet these observations also undermine the subjectivists’ claim that the private sensation of pain is sufficient for an individual to be in pain. Pain is a multidimensional experience, of which the sensory is only part. There is thus strong psycho-physiological evidence for rejecting the idea that pain is *purely* physical.

The problem with most measures of pain, whether subjective or objective, is that they assume “that pain is a unidimensional experience that can be measured with a single-item scale,”⁹⁰ specifically, the sensory. Melzack and Torgerson contend that there are at least three dimensions along which we should measure pain: the *sensory qualities* of the experience (stinging, burning, pressure, etc.); the *affective qualities* of the experience (tension, fear, and automatic properties that are part of pain); and the *evaluative* properties that include the subjective, overall intensity of pain.⁹¹ Even if in practice it is difficult to measure all three, there is no reason why we should theoretically privilege one over the others. In fact, pain when stripped of its “affective, cognitive, and behavioral components,” leaving only the sensory aspect intact,

loses all its motivational force. It comes to nothing in the sense that it is no longer a signal of threat or damage for the subject, and doesn’t move (*emotio*) his mind and body in any way. If that is the case, it follows that the basic representational and motivational force of pain should not be sought in its sensory components, but rather in its affective, cognitive, and behavioral components.⁹²

To count only the sensory or physical aspect of pain is to have *pain without painfulness*.⁹³ Thus we should dispense once and for all with the now analytically outdated notion of purely physical pain.

This clarifies the matter somewhat, but not completely. What about the status of actions which attempt to trigger the affective and cognitive components of pain without sensory stimulation? Or what about the threat to torture, for that matter? It has long been recognized that the threat of inflicting pain may be more productive than the actual infliction of pain in obtaining a confession or other information.⁹⁴ Revelations of the use of mock executions and threats to kill or rape family members by CIA interrogators on detainees illustrate the utility that

89. Grahek, *Feeling Pain*, 3.

90. Joel Katz and Ronald Melzack, “Measurement of Pain,” *Surgical Clinics of North America* 79 (1999): 231–52, 235.

91. R. Melzack and W.R. Torgerson, “On the Language of Pain,” *Anesthesiology* 34 (1971): 50–59.

92. Grahek, *Feeling Pain*, 40.

93. Grahek, *Feeling Pain*, 40.

94. Henry Kamen, *The Spanish Inquisition: An Historical Revision* (London: Weidenfeld & Nicolson, 1997).

such techniques are still perceived to have.⁹⁵ Scientific research on pain indicates that “there are some neurons in the brain that respond specifically to visually threatening stimuli.”⁹⁶ The threat of pain or the belief that pain is imminent triggers the same avoidance reaction and emotive response as sensory pain. Curiously, patients with pain asymbolia, that is, who cannot feel pain, also do not display any emotive reaction to threatening behavior.⁹⁷ There are two types of emotional reaction to pain. The first are those “which take the very sensation of pain as their object and depend upon its quality, intensity, location, and duration”; the second are “directed at the *significance* or meaning of the pain, which depend primarily upon the meaning that we attach to the pain that we feel.”⁹⁸ What seems to be so devastating about severe *pain* is the *fear of pain*.⁹⁹ The *point* of pain is to trigger an avoidance response; it is this emotive reaction, especially fear, which the torturer aims to tap.¹⁰⁰ Thus, in the context of torture, there is no great difference between the avoidance of further pain (e.g., the removal of a hot iron from the skin) and the avoidance of initial pain (e.g., preventing the hot iron from touching the skin). Thus, threats to torture are torture.¹⁰¹

Suffering and Humiliating and Degrading Treatment

Suffering and pain are distinct phenomena. “Suffering is a broader state that encompasses more dimensions than pain and has many potential causes, of which pain is only one. Not all pain causes suffering, and not all suffering expressed as pain or, coexisting with pain, stems from pain. In lay terms, suffering connotes enduring something unpleasant and inconvenient, sustaining a loss or damage, or experiencing a disability.”¹⁰² Suffering can be described as “perceived damage to the integrity of the self, which is a psychological construct that represents a subjective sense of identity.”¹⁰³ Again, one can agree to this definition

95. CIA Office of Inspector General, “Counterterrorism Detention and Interrogation Activities” (Available at: http://luxmedia.vo.llnwd.net/o10/clients/aclu/IG_Report.pdf, 2004).

96. Grahek, *Feeling Pain*, 67.

97. Grahek, *Feeling Pain*, 67.

98. Grahek, *Feeling Pain*, 133.

99. Walter Freeman and James W. Watts, *Psychosurgery in the Treatment of Mental Disorders and Intractable Pain*, 2nd ed. (Springfield, IL: C.C. Thomas, 1950).

100. Tony Lagouranis and Allen Mikaelian, *Fear up Harsh: An Army Interrogator's Dark Journey through Iraq* (New York: NAL Caliber, 2007).

101. It should be obvious that I am referring only to “credible” threats to torture, where the person being threatened is under the physical control of the person threatening. I discuss the issue of control in the following section.

102. C. Richard Chapman and Jonathan Gavrin, “Suffering: Contributions of Persistent Pain,” *Lancet* 353 (1999), 2233.

103. Chapman and Gavrin, “Suffering,” 2233.

of suffering whether one accepts the idea of human dignity or not. Suffering in this sense could apply to non-human animals, which possess the requisite self-awareness.¹⁰⁴ Suffering may arise from negative physiological stressors, which include “traumatic injury, blood loss, toxic effects, starvation, and exposure to temperature extremes,” or negative psychological stressors, which include “loss of control over one’s circumstances, lack of predictability in the environment, and loss of feedback from the environment. Cognitions such as negative beliefs, expectations, and attributions, whether accurate or erroneous, can act as stressors.”¹⁰⁵ Suffering, however produced, can in turn lead to feedback effects that people experience as sickness, depression, and reduced cognitive abilities.

Whether or not suffering should be included within a definition of torture is a subject of much contention. On the one hand, scholars and lawyers contend that torture as it has been historically understood refers to the infliction of pain only and that to include suffering is to anachronistically read back a contemporary moral perspective into history.¹⁰⁶ On the other hand, theorists and activists contend that “humiliation and offensiveness are, in our times, to be viewed as no less important indices of extreme suffering and thus as criteria of what is to count as torture.”¹⁰⁷ As Amnesty International notes, “[T]he moral impropriety of these techniques principally derives not from their physical effects at all, but from the fact that they constitute a grave assault on the human mind.”¹⁰⁸ While the inclusion of suffering in the definition of torture is to reflect a particular value judgment, it should be stressed that to exclude it expresses no less of a value judgment. The reason to exclude suffering from the definition stems from a belief that pain and suffering are subject to utilitarian calculus. There is an implicit assumption that not only are these experiences *qualitatively* different, but that they are *quantitatively* different. Actions that are deemed to be abusive but not torture are said not to *rise* to the level of the latter. Experientially, however, there is no reason to privilege pain over suffering. It is worth quoting at length the results from a recent psychiatric study of the subjects of torture and other cruel, inhuman, and degrading treatment:

The present study results suggest that psychological stressors cannot be easily distinguished from physical torture in terms of their relative psychological impact. Although physical torture methods were rated as somewhat more distressing than some stressors that did not involve severe physical pain,

104. Singer, *Animal Liberation*.

105. Chapman and Gavrin, “Suffering,” 2235.

106. Langbein, *Torture and the Law of Proof*; Peters, *Torture*; Silverman, *Tortured Subjects*; Rejali, *Torture and Democracy*.

107. Steven Lukes, “Liberal Democratic Torture,” *British Journal of Political Science* 36 (2005), 11.

108. Amnesty International, *Voices for Freedom*, 42.

certain other stressors, such as sham executions, threats of rape, sexual advances, threats against self or family, witnessing the torture of others, humiliating treatment, isolation, deprivation of urination/defecation, blind-folding, sleep deprivation, and certain forced stress positions, seemed to be as distressing as most physical torture stressors. These findings suggest that physical pain *per se* is not the most important determinant of traumatic stress in survivors of torture. The fact that physical torture did not contribute to long-term psychological outcome over and above the effects of nonphysical stressors further supports this point.¹⁰⁹

Finally, there is the issue of suffering stemming from the infliction of pain on a third person, such as a situation in which a child is abused in front of a parent in order to elicit a behavioral response, not from the child herself, but from the parent. While witnessing the abuse of an unrelated child or an individual unknown to the subject would likely induce some displeasure or discomfort, in most individuals this will not rise to the level of severe suffering. Yet being forced to witness the physical abuse of one's own child or possibly a parent, sibling, or spouse seems to qualify as a special case of severe empathic pain or suffering. Pain in its affective and motivational aspects, but without its sensory component, can indeed be experienced vicariously.¹¹⁰ In such cases, it is the witness to the act who is the victim of torture, as she experiences extreme suffering and even painfulness (albeit without its sensory component). The person being physically abused is not being tortured, as no behavioral response is sought from that person. This therefore excludes the idea of a whole community being "tortured" by the public abuse or mutilation of one individual. While it is true to argue that many (or even most) members of a social group suffer collectively as a result of systemic state torture programs,¹¹¹ it is not the case that all of those individuals who suffered experienced torture.

The Severity of Pain

A well-established literature in neuroscience and psychology has developed survey techniques that subjects can use to score and rank the level of pain they experience.¹¹² This research suggests that it may be possible to differentiate

109. Metin Basoglu, Maria Livanou, and Cvetana Crnobaric, "Torture vs Other Cruel, Inhuman, and Degrading Treatment: Is the Distinction Real or Apparent?" *Archives of General Psychiatry* 64 (2007): 283.

110. Tania Singer, Ben Seymour, John O'Doherty, Holger Kaube, Raymond J. Dolan, and Chris D. Frith, "Empathy for Pain Involves the Affective but Not Sensory Components of Pain," *Science* 303 (2004): 1157–62.

111. Matthews, *The Absolute Violation*.

112. Ronald Melzack, "The McGill Pain Questionnaire: Major Properties and Scoring Methods," *Pain* 1 (1975): 277–99; Mark P. Jensen, Paul Karoly, and Sanford Braver, "The Measurement of Clinical Pain

systematically between moderate and severe pain.¹¹³ Scales have a series of categories, rising in intensity from mild, discomforting, and distressing to horrible and excruciating.¹¹⁴ Moreover, pain seems to be a quality universal to the normal human experience. There is a high degree of correlation in the experience of pain across cultural, socioeconomic, and educational backgrounds, while there is even a “remarkable consistency. . . in the choice of words by patients suffering the same or similar pain syndromes.”¹¹⁵ That said, sensitivity to pain varies from individual to individual. This could be because pain intensity and pain tolerance are determined more by the affective-motivational aspects of pain than they are by the sensory aspect.¹¹⁶

Moving from clinical settings to real-world experiences, we could say with little dispute that the individuals detained by U.S. forces in Afghanistan and Iraq who were electrocuted, had their hands set on fire, had lit cigarettes put in their ears, or were subjected to hanging by the arms and strangulation experienced severe pain. Other cases, however, are less clear.¹¹⁷ What is the status of so-called passive techniques like forced standing, forced exercise, sleep deprivation, sensory deprivation, denial of adequate nutrition or medical care, and isolation? The so-called “Five Techniques,” or sensory deprivation techniques, were applied to IRA prisoners held in Northern Ireland in the 1970s.¹¹⁸ While the European Court of Human Rights found that the prisoners had been the victims of “inhuman and degrading treatment” rather than *torture*, the experience of the victims was not limited to suffering or anguish.¹¹⁹ It entailed substantial pain.¹²⁰ Indeed, one of the victims in this case was able to describe to me, some thirty-five years after the event, the enormous pain (and suffering) that he experienced at the time and that he continues to experience to this day.¹²¹

Although it is often held that these techniques are psychological, the effect on the body of a technique as “passive” as sleep deprivation is severe; if taken to

Intensity: A Comparison of Six Methods,” *Pain* 27 (1986): 117–26; Else Kristine Breivik, Gudmunder A. Björnsson, and Eva Skovlund, “A Comparison of Pain Rating Scales by Sampling from Clinical Trial Data,” *The Clinical Journal of Pain* 16 (2000): 22–28.

113. Sally L. Collins, R. Andrew Moore, and Henry J. McQuay, “The Visual Analogue Pain Intensity Scale: What Is Moderate Pain in Millimetres?” *Pain* 72 (1997): 95–97.

114. Katz and Melzack, “Measurement of Pain,” 237.

115. Katz and Melzack, “Measurement of Pain,” 240.

116. Joel D. Greenspan, Roland R. Lee, and Fred A. Lenz, “Pain Sensitivity Alterations as a Function of Lesion Location in the Parasympathetic Cortex,” *Pain* 81 (1999): 273–82.

117. Jaffer and Singh, *Administration of Torture*.

118. John McGuffin, *The Guineapigs* (Harmondsworth: Penguin Books, 1974); Peter Taylor, *Beating the Terrorists?: Interrogation at Omagh, Gough and Castlereagh* (Harmondsworth: Penguin, 1980).

119. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, 1st ed. (New York: Knopf, 2000).

120. Amnesty International, *Report of an Amnesty International Mission to Northern Ireland, 28 November–6 December 1977* (London: Amnesty International Publications, 1978).

121. Author interview, Northern Ireland, 2007.

extremes, it can result in organ failure or permanent psychosis.¹²² Likewise, standing for 18–24 hours can produce “excruciating pain, as ankles double in size, skin becomes tense and intensely painful, blisters erupt oozing watery serum, heart rates soar, kidneys shut down, and delusions deepen.”¹²³ In 2004, a U.S.-held prisoner may have died as a result of being doused with cold water and then confined in freezing cold conditions.¹²⁴ Another prisoner who was forced to perform strenuous exercises for about 20 minutes in 150 degree Fahrenheit heat collapsed on several occasions and vomited repeatedly when attempting to rehydrate.¹²⁵ Accordingly, such techniques, especially when performed together, entail the infliction of severe pain and suffering. That said, as Brecher observes, “there are cases which indubitably count [as torture], even if there are others which remain unclear or undecidable.”¹²⁶ Therefore, a single, objective definition of what constitutes *severe* pain or suffering may not be appropriate, both spatially and especially temporally.¹²⁷ By definition, some degree of subjectivity is inherent where pain and suffering are concerned.

Control

If we accept that torture entails the deliberate and instrumental infliction of pain or suffering for the purpose of eliciting a behavioral response from another person, we still face the challenge of distinguishing it from other concepts like violence or power.¹²⁸ Such definitions of torture as the “separate intent to cause intense physical pain”¹²⁹ or “the systematic and deliberate infliction of acute pain in any form by one person on another”¹³⁰ are too ambiguous for our purposes. As I have said, torture can and should be distinguished from sadism or cruelty *per se*. *Purpose* remains necessary to a good definition. Necessary, too, is the notion of *control*. A professional boxer deliberately inflicts pain on his opponent in a systematic manner, but we believe this not to be torture. Both boxers, we assume, are there of their own free will; or at least, like soldiers in battle, have the capacity and freedom of agency to defend themselves, or to

122. Rejali, *Torture and Democracy*.

123. Mayer, *The Dark Side*, 168.

124. Brig. Gen. Richard P. Formica, “Article 15–6 Investigation of CJSOFTF-AP and 5th SF Group Detention Operations,” in *Administration of Torture: A Documentary Record from Washington to Abu Ghraib and Beyond*, ed. Jameel Jaffer and Amrit Singh (New York: Columbia University Press, 2004).

125. Jaffer and Singh, *Administration of Torture*, 32.

126. Brecher, *Torture and the Ticking Bomb*, 5.

127. Melzack, *The Puzzle of Pain*.

128. Hannah Arendt, *On Violence* (New York: Harcourt, 1970).

129. Found in Oregon Law, cited in Rejali, *Torture and Democracy*, 39.

130. William Twining and Barrie Paskins, “Torture and Philosophy,” *Proceedings of the Aristotelian Society, Supplementary Volumes* 52 (1978): 138.

surrender and end their suffering.¹³¹ In contrast, as Rejali observes, “In torture, soldiers or other state officials act upon individuals who are helpless.”¹³² Shue writes that torture is

[n]ot analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenseless. In combat the other person one kills is still a threat when killed and is killed in part for the sake of one’s own survival. The torturer inflicts pain and damage upon another person who, by virtue of being within his or her power, is no longer a threat and is entirely at the torturer’s mercy.¹³³

Control, in this context, means to have physical power or command over another person’s body. Control is meant here in a time-specific rather than a generic sense.¹³⁴ That is, control over another person is something that one has at a particular moment (however long that may be in fact), not a general property or disposition that one person possesses. As a consequence, I want to stress that merely having a psychological or mental dominance over another person does not satisfy the control requirement of the definition. Of course, the physical control to which I am referring may also entail a kind of psychological captivity, but this additional element is neither necessary nor sufficient. Control may describe the physical dominance that a rapist has over a kidnapped victim or it may equally describe the authority of the police interrogator over the captured terrorist. The victim of torture has no freedom to leave. For Sussman, “A victim of torture must be unable to shield herself in any significant way, and must be unable to effectively evade or fight back against her tormenter.”¹³⁵

It is this notion of control that distinguishes torture from other types of coercive violence or abuse. While some maintain that domestic abuse should be classified as torture,¹³⁶ according to the definition provided here, in most cases, it will not. Even though in many societies, especially traditional ones, it may be financially and socially impractical for women to leave abusive husbands, this does not satisfy the kind of physical control that the above definition stipulates. For torture to occur, escape must be impossible, not just impractical. While the nature of control can vary, it is important to distinguish torture from the infliction of pain on a person over whom the actor does not have control. This

131. Shue, “Torture.”

132. Rejali, *Torture and Democracy*, 37.

133. Shue, “Torture,” 51.

134. Morriss, *Power*, 49.

135. Sussman, “Defining Torture,” 227.

136. Rhonda Copelon, “Intimate Terror: Understanding Domestic Violence as Torture,” in *Human Rights of Women: National and International Perspectives*, ed. Rebecca J. Cook (Philadelphia: University of Pennsylvania Press, 1994).

conceptual distinction would seem to be essential in forming answers to critical ethical questions. Kahn asks, "If we will kill, why not torture?"¹³⁷ But Kahn's question is a misspecification of the dilemma. One soldier killing another on the battlefield or a policeman killing an armed bank robber is not the same as the deliberate execution of an unarmed and defenseless civilian. We call the latter a war crime or a murder, against which there are absolute legal and moral prohibitions. Even though, as Kahn notes, in warfare each side aims at an overwhelming advantage in power, there is (almost) always the possibility of surrender in war.¹³⁸ When there is not, as in the case of genocide or ethnic cleansing, we rightly put these actions beyond the bounds of *jus in bello*.¹³⁹ A good definition of torture must therefore incorporate the notion of asymmetry of power. Lazreg writes, "It is the powerlessness of the victim, the inability to defend herself and her absolute vulnerability to the torture that captures the specific character of torture."¹⁴⁰ Sussman argues that torture constitutes a particular kind of moral wrong because of the way in which this total control compels the victim to be complicit in her own agony through a kind of "forced passivity."¹⁴¹ For Scarry, in torture the body is turned into a weapon against the mind.¹⁴² Although I am dubious of this dualist perspective, for whatever reason it does seem that part of the immense suffering experienced by victims of torture stems from the desperation that a total loss of control implies.

Conclusion

Now we have all of the elements we need to form a definition of torture: *Torture is the systematic and deliberate infliction of severe pain or suffering on a person over whom the actor has physical control, in order to induce a behavioral response from that person.* This definition is useful for a number of reasons. First, it dispenses with the artificial distinction between physical and mental pain and suffering. It makes clear that both passive techniques, such as sensory deprivation or forced starvation, and intimidating techniques, including threats to torture, should be classified as torture. Second, it avoids a conflation of practice and purpose. While the deliberate infliction of pain or suffering is necessary to the definition of torture, it is not sufficient. Here we qualified the concept by

137. Kahn, *Sacred Violence*, 89.

138. Kahn, *Sacred Violence*, 89.

139. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed. (New York: Basic Books, 1992).

140. Lazreg, *Torture and the Twilight of Empire*, 6.

141. Sussman, "Defining Torture," 227.

142. Scarry, *The Body in Pain*.

incorporating the need for a behavioral response. This conveys the notion that while the infliction of pain or suffering upon a subject is intentional, it must be inflicted as a means to some end other than itself (instrumentality).

According to this definition, torture mostly describes what scholars have variously defined as public or political torture. The definition rules out the infliction of severe pain for its own ends, as in the case of purely private sadism or other cruelty. Torture will therefore predominantly be used to describe the actions of state or state-like actors, including representatives of religions or cults (e.g., the Inquisition); however, it can also describe the actions of the father who beats information from his daughter's kidnapper. Because the definition is not restricted by the purpose of the act, we can look across time and space for its incidence without first having to prejudge its purpose. This should make for much richer and more interesting comparative research on torture. For example, one might want to compare the use of torture as a tool in the institution of slavery with its use as a method of judicial inquiry.

Moreover, if we make an investigation of the *purpose* of individual cases of torture part of our research, we can also make advances in judging the effectiveness of torture. This has particular implications for the ongoing ethical and policy debate over the use of torture.¹⁴³ It has been suspected for some time that although torture makes subjects talk, it does not make them tell the truth. However, torture may be *effective* (if morally objectionable) for other purposes, even counterinsurgency. For instance, the purpose of the torturer may not be to obtain true information but instead confessions *en masse*, as was the case for the French in Algeria.¹⁴⁴ In the current context, one would have to have to consider the possibility that the alleged utility of torture derives not from the information it procures directly, but from other unstated purposes. As much of the discussion of the moral propriety of torture revolves around the application of consequentialist ethics, this kind of evidentiary basis would seem absolutely necessary. Moral absolutists can also benefit from this reconceptualization. By clarifying the distinction between torture and more nebulous concepts like state repression on the one hand and sadism or cruelty on the other, the action can be judged on its own terms.

143. Sanford Levinson, ed., *Torture: A Collection* (New York: Oxford University Press, 2004); Karen J. Greenberg, ed., *The Torture Debate in America* (New York: Cambridge University Press, 2006).

144. Aoussas, *The Battle of the Casbah*; Alistair Horne, *A Savage War of Peace: Algeria, 1954–1962* (New York: New York Review of Books, 2006).