

EVIDENCE GAINED FROM TORTURE:
WISHFUL THINKING, CHECKABILITY,
AND EXTREME CIRCUMSTANCES

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I. INTRODUCTION

“Does torture work?” is a factual rather than ethical or legal question. But legal and ethical discussions of torture should be informed by knowledge of the answer to the factual question of the reliability of torture as an interrogation technique. The question as to whether torture works should be asked before that of its legal admissibility—if it is not useful to interrogators, there is no point considering its legality in court.

The inquiry is: does torture applied by experienced interrogators lead, often or sometimes, to reliable information being extracted? The context of interrogation is not that of a criminal trial, so clarification is needed on what it means to say that evidence gathered from torture is “reliable.” It does not mean “beyond reasonable doubt” or anything similar. It means “quite probably true,” and thus is worth adding to other evidence to create a full intelligence picture.

It will be argued in some circumstances that the answer is “yes.” The frequently used argument that torture is generally unreliable because an interrogee will confess to anything is incorrect when the information confessed to can be independently checked.

II. ETHICAL VERSUS FACTUAL ISSUES: WISHFUL THINKING

This question of whether torture works involves a good deal of wishful thinking on both sides of the debate over torture, often without much reference to actual experience. Supporters of torture are inclined to regard it as obvious that it is a quick way to break interrogees’ resistance to telling the truth, while opponents of torture often rely heavily on the argument that evidence extracted under torture must be unreliable because the person being

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tortured will confess to anything that the interrogator suggests.¹ There is a suspiciously high correlation between the belief that torture is ethical and the belief that torture is effective—those who believe torture is unethical usually believe it is ineffective as an interrogation device. It would be more convincing to hear experts who either believed torture was useful but not permitted, or that torture was permitted but useless. Such people would not have their belief on the factual question of effectiveness contaminated by their ethical views. There are very few such people.

David Hume was right: “Is” and “ought” are logically quite distinct, and mixing the two is a recipe for confusion. To evaluate questions of fact, such as “Does torture actually work?” it is essential to keep ethical and legal questions temporarily off the table.

But with such an issue as torture, the factual questions *are* subordinate to the moral ones, so some preliminary comments on the ethical context as it relates to the reliability of torture are desirable. Discussion of this question has been advanced by two excellent books on torture published in 2008, which take opposite sides on the ethical question, but are both well-informed on the factual and ethical issues. One is Yuval Ginbar’s *Why Not Torture Terrorists?* Ginbar is against any form of torture, but, as Justice Learned Hand said of Justice Benjamin Cardozo, “he would often begin by stating the other side better than its advocate had stated it himself.”² The other book is Philip Bobbitt’s *Terror and Consent*, which defends the use of torture in extreme circumstances, though disagreeing with much of what Western intelligence agencies have done in recent years.

Torture is abhorrent because any procedure rightly called torture is extremely painful, beyond what can be imagined by someone free of pain, and is grossly inhuman and degrading. Unfortunately the permissibility of torture in extreme circum-

¹ A January 24, 2009 *New York Times* article reports General Cullen, a prime mover in President Obama’s change of policy to renounce torture and close Guantanamo Bay and CIA detention centers who was present in the Oval Office for the signing of the president’s executive order effectuating this change, as arguing that torturing a suspected terrorist would not save lives because “an actual terrorist could steer his interrogators wrong, or because people under intense pressure will say anything to make it stop.” Jim Dwyer, *An Honor Guard Comes Out For Obama’s Ban on Torture*, N.Y. TIMES, Jan. 24, 2009, at A16.

² Learned Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 362 (1939).

stances has to remain discussable,³ as the deaths of victims that might be averted by interrogation under torture are also abhorrent and the rights of those victims must be addressed. We in Western countries stand in the problematic moral position of being “fortunate heirs” of torture: our ability to hold free discussions on torture is a result of the Western victory in the Cold War and partial victory in the “War on Terror,” both of which were partly based on the extensive use of torture by the C.I.A. and other entities.⁴ Even if it is argued that those wars would have been won more effectively without torture, nevertheless, in the actual world our survival and freedom result partly from torture. That is not in itself a reason for favoring torture, but a reason for feeling uncomfortable about opposing it without first hearing the arguments for it.

The widespread use of torture also implies that part of the ethical debate is out of contact with reality. Some writers wring their hands about the slippery slope that would follow if even minimal torture were allowed, suggesting that it would undermine the United States’ position on the defense of human rights. That is also wishful thinking and it comes too late. The Russians and Chinese are already, very understandably, cynical about the United States’ double standard in criticizing human rights abuses in Russia and China while the United States has practiced rendition on a large scale.⁵ While the United States has a solid record in general of supporting human rights internationally, on the particular matter of torture of suspects, its practice has been far removed from its rhetoric. As Philip Bobbitt argues,

[R]endition—the market approach—outsources our crimes, which puts us at the mercy of anyone who can expose us, makes us dependent on some of the world’s most unsavoury actors, and abandons accountability. It is an approach we associate with crime families, not with great nations.⁶

³ Raimond Gaita, *Torture: Thinking the Unthinkable*, THE AGE, May 21, 2005, available at <http://www.theage.com.au/news/Opinion/Torture-thinking-of-the-unthinkable/2005/05/20/1116533536896.html>.

⁴ See ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION FROM THE COLD WAR TO THE WAR ON TERROR* (2006).

⁵ For example, Edward Cody, *China, Others Criticize U.S. Report on Rights: Double Standard at State Dept. Alleged*, WASH. POST, Mar. 4, 2005, at A14.

⁶ PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 388 (2008); See, e.g., JOHN T. PARRY, *The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees*, 6 MELB. J. INT’L L. 516-33 (2005); STEPHEN GREY, *GHOST PLANE: THE TRUE STORY OF THE CIA TORTURE PROGRAM* (2006).

These actions appear to have been permitted because United States law has a doctrine that “the Commander-in-Chief can do no wrong.” Ginbar argues that a doctrine of Presidential unaccountability (when acting as Commander-in-Chief) is clear from a Department of Justice memorandum on torture from August 2002, which claimed that “[a]ny effort to apply section 2340A [of Title 18 of the United States Code] in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants thus would be unconstitutional.”⁷ Although that memo is superseded, the status of the doctrine of unaccountability remains unresolved.⁸ In any case, these assaults on foreign nationals have remained essentially beyond judicial review. The doctrine of the Commander-in-Chief’s unaccountability has been specifically denied by Eric Holder, the Attorney General of the Obama administration.⁹ It is unsatisfactory that the discussion of such an important legal matter has to proceed using such “authorities” as departmental memorandums and press statements, but the claims have not been tested.

III. EARLIER HISTORY

There has been some useful evidence pertaining to whether torture is effective in the long history of Western law. The law of the Dark Age Germanic tribes, from which Anglo-Saxon law and, to a lesser extent, continental law developed, did not permit torture, nor did the Bible. Medieval continental law, but not English law, adopted torture as a technique of judicial interrogation from Roman law when Roman law was rediscovered. Torture was, in theory, restricted to situations where evidence was already strong. A suspect in a serious case against whom there was “half-proof,” such as the deposition of one witness, might be tortured to extract

⁷ Memorandum for Alberto R. Gonzales, Counsel to the President, U.S. Dep’t of Justice, Office of Legal Counsel (Aug. 1, 2002), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_Gonz_.pdf - search=“bybee memo pdf”; See Christopher L. Kutz, *Torture, Necessity and Existential Politics*, 95 CAL. L. REV. 235, 249 (2005) (discussing legal and philosophical comments on Presidential claims of “unitary executive” powers); See also Harold Hongju Koh, *Can the President be Torturer in Chief?*, 81 IND. L.J. 1155 (2006) (discussing some relevant legal considerations).

⁸ YUVAL GINBAR, *WHY NOT TORTURE TERRORISTS? MORAL, PRACTICAL AND LEGAL ASPECTS OF THE “TICKING BOMB” JUSTIFICATION FOR TORTURE* 235, 247-48 (2008).

⁹ Josh Meyer, *Eric Holder: Waterboarding is Torture*, CHI. TRIB., Jan. 16, 2009, available at http://www.chicagotribune.com/news/nationworld/chi-holder_16jan16,0,7316121.story.

the other half, normally a confession. The medieval jurists were not sufficiently aware of the problem of false confessions, but they were far from being unaware of it. They had a solution to the problem, one which is still applicable today—that the judge should *confirm* the facts confessed to. For example, if the accused confessed to burying the murder weapon under a certain tree, the judge should send someone to dig it up.¹⁰ This is essentially the correct answer to the argument that evidence under torture must be unreliable because those tortured will confess to anything—if the interrogator ensures that the facts confessed to are checkable and the torture only stops if the confessions are found to be true when independently checked, then the evidence extracted will tend to be reliable.

Of course, such a system did not work out that way in practice. Late Medieval and Renaissance continental Europe suffered an epidemic of torture. Torture was mainly applied to crimes that were regarded as heinous but in which the evidence was not checkable, or only “checkable” by the confessions under torture of alleged associates—crimes like rape, treason, heresy, and witchcraft. Witchcraft is especially significant for evaluating the reliability of the technique, since, although there were real rapists, traitors and heretics, there were no real witches.¹¹ The tens of thousands who died in the European witch hunts remain a grim warning on the perils of relying on poorly-confirmed evidence from torture.¹²

IV. CASES OF TORTURE REVEALING THE TRUTH

The recent debate on torture for interrogation, especially that part of the debate focusing on the moral aspects, has largely proceeded on the basis of hypothetical, rather than real, cases. Few real cases have been put forward in the debate. However, it is essential to consider reality if the question concerns the actual effectiveness of torture.

It is certainly counterintuitive to maintain that torture rarely reveals the truth. Both interrogators and the groups facing them

¹⁰ See JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* 26-27 (2001) (the example from pseudo-Cicero, *Rhetorica ad Herennium* II.vii.10).

¹¹ There were no doubt a few people who believed they were witches and could cast spells, but the witch inquisitors write as if they had discovered witches in real contact with dark forces.

¹² *Id.* at 47-58.

presume, as a matter of course, that interrogees will generally “break” and that what they say will very likely be the truth, if not the first time then soon after. Still, this intuition could well be wrong, just as it would be unsound to rely heavily on arguments of the same logical form as “surely thousands of astrologers can’t be wrong.” So it is desirable to find arguments based more definitively on hard evidence.

First, one might ask for properly conducted statistical studies on the reliability of evidence gathered under torture, but it may be difficult to gain ethical approval for such an endeavor. A recent, extensive review of techniques of “educing information” (read: interrogation and debriefing) by the Intelligence Science Board of the National Defense Intelligence College concluded that there were no available studies on the reliability of torture or of any similar interrogation technique, at least none that were publicly available.¹³

Therefore, one must rely on an examination of individual cases. What follows is an account of several cases available in the relevant literature. It is not possible to add much theory, given the primitive state of the question.

Ideally, one might prefer cases of interrogees admitting later, after being freed, that they had given up the truth unwillingly under torture. Such cases are very rare, but America’s most famous interrogee, John McCain, mentions in his autobiography that he gave up more information than he intended to his North Vietnamese torturers.¹⁴ Thus, one must resort to accounts by the torturers and those who authorized them, which may add to the suspicion that the information released is selective. The number of recent cases available for scrutiny is small. This is especially true of very recent Western cases, where operational demands still require secrecy. But, some largely convincing cases do exist.

One such case is the Israeli interrogation carried out in the attempt to save Sergeant Nachshon Wachsman. Wachsman, a nineteen year-old commando in the Israeli army, was abducted by Hamas on October 9, 1994. Hamas broadcasted a videotape of Wachsman, which included a threat to kill him on October 14 un-

¹³ INTELLIGENCE SCIENCE BOARD, *EDUCING INFORMATION: INTERROGATION, SCIENCE AND ART* (National Defense Intelligence College Press (2006). available at <http://www.911investigations.net/IMG/pdf/doc-1413.pdf>).

¹⁴ JOHN MCCAIN WITH MARK SALTER, *FAITH OF MY FATHERS: A FAMILY MEMOIR* 194, 198 (1999).

less various demands were met. Israeli intelligence captured and interrogated the driver of the car in which Wachsman had been abducted and learned the location where he was held. The Israeli military raided the location shortly before the ultimatum was to expire. Wachsman and three terrorists died in the raid. Yitzhak Rabin, who authorized the raid, said in an interview, "If the security services had acted according to the Landau guidelines in interrogating Hamas members, they wouldn't have reached the place where the kidnappers of Nachshon Wachsman were found."¹⁵ Since the Landau model already allowed some degree of torture, Rabin's comment implied that the interrogee was tortured severely. Unless there is something missing from the story, this seems to be a clear case in which torture was successfully applied to extract verifiable information.

Another case, not exactly of torture, but of truth confessed under extreme duress (hence logically very similar), is from operations against the Tamil Tigers. It involved a literal ticking bomb scenario: a security forces unit apprehended three terrorists who it suspected of planting a bomb somewhere in a city. They were brought before the officer in charge:

He asked them where the bomb was. The terrorists—highly dedicated and steeled to resist interrogation—remained silent. [He] asked the question again, advising them that if they did not tell him what he wanted to know, he would kill them. They were unmoved. So [he] took his pistol from his gun belt, pointed it at the forehead of one of them, and shot him dead. The other two, he said, talked immediately; the bomb, which had been placed in a crowded railway station and set to explode during the evening rush hour, was found and defused, and countless lives were saved.¹⁶

Al Qaeda terrorist Jamal Beghal was arrested at the Dubai airport in October 2001. After some weeks in captivity, during which his lawyer claimed Beghal was beaten, he gave up a "wealth of information" that was said to have thwarted a planned bombing of the United States Embassy in Paris and "could have prevented"

¹⁵ GINBAR, *supra* note 8, at 276 (quoting HAARETZ, Oct. 20, 1994).

¹⁶ Bruce Hoffman, *A Nasty Business*, ATLANTIC MONTHLY, Jan. 2002, at 52 (quoted in BOBBITT, *supra* note 6, at 380).

the attacks of September 11, 2001 if the interrogation had come earlier.¹⁷

There are other significant cases connected with al-Qaeda, although information about them is not as complete as one would wish. They include the cases of Khalid Sheikh Mohammed, Abu Zubaydah, and José Padilla. Due to the lack of complete public knowledge in those cases, a controversy remains about their importance, the role of torture in their confessions, and whether everything they confessed to is true. Yet, in general, taking into account the whole picture, there is a good deal of credibility in the claims of a 2006 speech by President Bush, where he stated that:

Once captured, these men [Abu Zubaydah, Ramzi Binalshibh, and Khalid Sheikh Mohammed] were taken into custody of the Central Intelligence Agency. The questioning of these and other suspected terrorists provided information that helped us protect the American people. They helped us break up a cell of Southeast Asian terrorist operatives that had been groomed for attacks inside the United States. They helped us disrupt an al Qaeda operation to develop anthrax for terrorist attacks. They helped us stop a planned strike on a U.S. Marine camp in Djibouti, and to prevent a planned attack on the U.S. Consulate in Karachi, and to foil a plot to hijack passenger planes and to fly them into Heathrow Airport and London's Canary Wharf.¹⁸

Certainly, contemporary torture cannot be discussed without seriously considering the claim that it has saved many lives in those cases.

It is true that, if we were attempting to do an accounting of total lives saved or an accounting of total lives lost, we would also need to consider the role of a policy of torture in creating new enemies and hence new victims; but the scope of this article is limited to the reliability of the evidence gained from torture.

A good deal of concrete information is available from Algeria, where there has been time for facts to come to light through the memoirs written by the torturers in their old age. Paul Aussaresses, who is still alive at the age of ninety, wrote a book, *The Battle of the Casbah*, detailing his hands-on role in the Battle of

¹⁷ Jerome H. Skolnick, *American Interrogation: From Torture To Trickery*, 105-27, at 111, in Sanford Levinson, ed., *TORTURE: A COLLECTION* (Sanford Levinson ed., 2004).

¹⁸ President George W. Bush, Remarks by the President on the Global War on Terror (Sept. 29, 2006), available at <http://www.gop.com/news/NewsRead.aspx?Guid=4fbf6d8e-3b8f-47d8-9916-ad4e54b3fecd>.

Algiers in 1957. He describes and defends his large-scale use of torture, detailing such techniques as the use of electrodes on testicles. He mentions the need to go out and check the information gained from interrogees before shooting them. He also claims, unconvincingly in view of the high number of victims involved, never to have tortured anyone innocent.¹⁹ His revelations are confirmed by his associate Roger Trinquier, author of a manual of counterinsurgency much studied in U.S. military circles.²⁰ Neither gives many details of what they learned in particular cases of torture, but they convincingly argue that their use of true information gained from their widespread use of torture was instrumental in the elimination of terrorist groups from Algiers.

Torture is not restricted to operations against terrorists; it is also resorted to in more mundane police work. In *Leon v. Wainwright*, the Eleventh Circuit considered a case where the police apprehended one of two kidnappers of a taxi driver while the kidnapper was collecting ransom. The court found that when [the kidnapper] refused to tell them [the police] the location, he was set upon by several of the officers . . . [T]hey threatened and physically abused him by twisting his arm and choking him until he revealed where [the taxi driver] was being held.²¹ The court held these actions to be reasonable given the “immediate necessity” to save the driver’s life. The important point is that the information confessed turned out to be true.²²

It is possible to find, on the other hand, cases in which information gained under torture by experienced interrogators turned out to be false. A case that proved significant for the intelligence failures in the lead-up to the Iraq War is that of Ibn al-Shaykh al-Libi, a Libyan al-Qaeda operative captured while fleeing Afghanistan around the end of 2001. Al-Libi later claimed that, under torture, he fabricated evidence that Iraq had provided chemical and biological warfare training to al-Qaeda. This evidence appears to have been a main source of false claims by President Bush that there were links between Iraq and al-Qaeda. Based on the incom-

¹⁹ PAUL AUSSARESSES, *THE BATTLE OF THE CASBAH: COUNTERTERRORISM IN ALGERIA 1955-1957*, 121, 129 (2002).

²⁰ See ROGER TRINQUIER, *MODERN WARFARE: A FRENCH VIEW OF COUNTERINSURGENCY* ch. 4 (1963), available at <http://www-cgsc.army.mil/carl/resources/csi/trinquier/trinquier.asp>. Aussaresses also gave lessons at Fort Bragg, North Carolina.

²¹ *Leon v. Wainwright*, 734 F.2d 770, 771 (7th Cir. 1984).

²² PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 388 (2008) (quoting *Leon v. Wainwright*, 734 F.2d at 771).

plete evidence available, it appears that al-Libi did fabricate such evidence under torture or the threat of torture. However, it is unclear whether he did so to avoid torture, as in the classic scenario of a tortured interrogee telling the interrogator anything he wants to hear, or whether he did so deliberately to encourage the United States to invade Iraq and thus radicalize the Arab world.²³ Despite the fragmentary nature of these cases, they suggest, when taken as a whole, that the reliability of evidence gained from torture should not be dismissed on the basis that an interrogee will confess to anything.

V. CONCLUSION

President Obama's prioritizing of the issue of torture and renditions in his first days in office has given the issues a high profile. His decisions to close Guantanamo Bay and C.I.A. detention centers have understandably gained wide praise and increased the moral standing of his government and country. The potential costs of the policy have been discussed less but have the potential to emerge later.

In an era when terrorism on a large scale is possible through unexpected scientific and engineering advances—acts of mass destruction with potential casualties up to six orders of magnitude greater than those on September 11—the potential costs of failing to gain reliable evidence from torture could be very large. It is desirable to discuss the question openly, in the light of the best evidence available, and reach a clear decision on what to do before a truly horrendous emergency scenario arises.

²³ GEORGE TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 353-54 (2007); *see generally* "OMAR NASIRI," *INSIDE THE JIHAD: MY LIFE WITH AL QAEDA, A SPY'S STORY* (2006).