

# Journal of Ethical Urban Living

## The (Non-Consequentialist) Ethics of Defensive Torture

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### **Publication Details**

*Journal of Ethical Urban Living* (ISSN: 2470-2641). May, 2018. Volume 1, Issue 2.

### **Citation**

Rose-Barry, Peter Brian. 2018. "The (Non-Consequentialist) Ethics of Defensive Torture." *Journal of Ethical Urban Living* 1 (2): 1–22.

# The (Non-Consequentialist) Ethics of Defensive Torture

Peter Brian Rose-Barry

## Abstract

It might seem that debates about the morality of torture are dominated by non-consequentialist absolutists about torture and consequentialist rivals, especially given the frequency with which ticking-bomb scenarios are discussed. However, opponents of absolutism about torture are not limited to invoking consequentialist justifications of torture. Any number of non-consequentialist arguments purporting to justify defensive torture—that is, torture in defense of self or others—are available as well. In particular, some critics of absolutism argue that defensive torture is sometimes justified if defensive killing is, that the right to torture is either violable or alienable and therefore not an absolute obstacle to morally permissible torture, or that torture can be justified if not required on Kantian grounds. I consider various versions of these arguments that defensive torture can be justified on non-consequentialist grounds, including arguments offered by Frances Kamm, Uwe Steinhoff, and Stephen Kershner, and I argue that they all fail.

## Keywords

Torture, Self-Defense, Deontology, Kantian Ethics, Human Rights

## The (Non-Consequentialist) Ethics of Defensive Torture

An awful lot of philosophizing about the ethics of torture turns on the so-called ticking-bomb scenario, a scenario that is ubiquitous in debates about torture if not in real-life. The fury with which absolutists dispute the reality of the ticking-bomb scenario (Brecher 2007; Luban 2005; Mayerfeld 2008) is odd if only because conceding its possibility doesn't yield much of consequence (Barry 2013). Answering the question "Are ticking-bomb scenarios possible?" in the affirmative is to answer a *modal* question. It does not follow that the *moral* question "Is it morally permissible to torture in a ticking-bomb scenario?" must be answered affirmatively. Unless ticking-bomb scenarios are mere intuition pumps, some further ethical assumptions must be operative.

What ethical assumptions underlie the conviction that torture is morally permissible in a ticking-bomb scenario? Perhaps many. One scholar contends that "everyone thinks that torture is permitted in this [ticking-bomb] case, perhaps excepting those pesky Kantians" (Allhoff 2015, 246) although even Kantians might have to allow that torture is sometimes morally permissible (Barry 2015). But certainly, a straightforward

act-consequentialist argument implies that torture is sometimes morally permissible. At least, it is difficult to demonstrate that there is *no* conceivable scenario in which the consequences of torturing are superior to the consequences of non-torturous responses. Given this concession, I am especially interested in non-consequentialist arguments that purport to show that defensive torture—that is, torture performed to defend oneself or others against an unjust attack—is sometimes morally permissible. The conclusions that I defend are modest: I do not purport to show that defensive torture is never morally permissible, only that the non-consequentialist arguments offered by some of the most ardent defenders of defensive torture fail.

### **From Defensive Killing to Defensive Torture**

In a seminal paper, Henry Shue considers “One of the general contentions that keeps coming to the surface”—namely, the thought that “since killing is worse than torture, and killing is sometimes permitted... we ought sometimes to permit torture” (Shue 1978, 125). Shue suggests a rationale for rejecting any connection between defensive killing and defensive torture since, unlike a healthy and armed adversary, the victim of torture has “exhausted all means and is powerless”; so, Shue argues, “In this respect torture is indeed not analogous to the killing in battle of a healthy and well-armed foe; it is a cruel assault upon the defenseless” insofar as the victim of torture is “no longer a threat” (Shue 1978, 130). But some of Shue’s critics deny that victims of torture must have been rendered toothless upon being captured and restrained especially if the attack that they have initiated is ongoing and will continue unless the victim puts an end to that attack (Steinhoff 2013) and whether “defenselessness” is necessary or sufficient to distinguish a person from a combatant has been disputed (Allhoff 2012; Kamm 2011). Further, at least some state actors seem to take seriously the thought that state-sponsored torture in response to acts of enemies of the state is, or is sufficiently akin to, self-defense; in the so-called “Torture Memos,” U.S. Deputy Assistant Attorney General John C. Yoo contended that appealing to self-defense could justify the torture of suspected terrorists consistent with human rights obligations as outlined, for example, in the United Nations Convention against Torture. For better or for worse, the argument that the moral permissibility of defensive killing entails the moral permissibility of defensive torture has been neither defeated nor silenced.

There is probably no one single version of the appeal to self-defense alluded to above that is supposed to defeat an absolutist position about torture so it will be instructive to consider some of the more redoubtable particular versions of this

argument below. Frances Kamm offers an especially nuanced version of this argument here:

[I]f it is permissible to kill someone against his will as he attacks, for example, on grounds of other-defense, and this permissible act would have been done, then it may also be permissible to torture that person for the same purpose, on the grounds that at least some ways of torturing a person are much less bad for him than the killing that would have taken place. (Kamm 2011, 22)

Importantly, morally permissible torture is “much less bad for him than the killing that would have taken place” in the scenario that Kamm imagines. But that means that defensive is permissible only in a pretty narrow range of circumstances: when the victim of torture will either be a) tortured or b) killed in some sufficiently heinous manner that makes a) “much less bad” for him. But are there *ever* circumstances in which a) or b) *and only a) or b)* are live possibilities? Absent some latent determinist assumption, it is always possible to refrain from both torturing and killing; we could simply let the fellow go. We might talk as though our victim has only two options just as the mugger might talk as though you have but two options, but here too there will always be other options: the mugger could just walk away. If there is no scenario in which a) or b) and only a) or b) are live possibilities, Kamm has not yet located any scenario in which defensive torture is morally permissible.

Uwe Steinhoff too holds that “if injuring or killing a person in self-defense can be morally justified” then “the same is true for torture” (Steinhoff 2013, 17).<sup>1</sup> At greater length:

Human beings have a right to self-defensive torture against culpable aggressors. ...since people have a right to *kill* a culpable aggressor if under the circumstances this is a proportionate and necessary means of self-defense against an imminent threat, and since most forms of torture are not as bad as killing, people must also have a right to torture a culpable aggressor if this is under the circumstances

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1. Steinhoff sometimes speaks as though his argument turns on the right of self-defense (Steinhoff 2013, 79) but his frequent references to the Daschner case suggests he understands the right to defensive torture to be more expansive. So, I suppose that what Steinhoff says here about self-defensive torture applies *mutatis mutandis* to defensive torture generally.

a proportionate and necessary means of self-defense against an imminent threat. (Steinhoff 2013, 53)

There are at least two crucial premises implicit in Steinhoff's argument: first, defensive torture is compatible with familiar moral side-constraints that also govern defensive killing—say, those involving proportionality and necessity; second, most forms of torture are not as bad as killing.

Are these two premises correct? Consider the second premise first. There are innumerable torturous acts. Why think that most of them are not as bad as killing? Steinhoff has two arguments. First, he contends that killing is often more *gruesome* than torture; for example, blowing someone's brains out or chopping off their head are clearly more gruesome than, say, drilling a tooth without anesthesia for fifteen minutes (Steinhoff 2013, 18). Some care needs to be taken with examples; while surely painful, it is far from clear that having a tooth drilled for fifteen minutes without anesthesia really counts as torture on either legal or conceptual grounds.<sup>2</sup> Knowing that there is a definite and brief period of time during which I will undergo painful treatment arguably falls short of torture *just because* it is definite and brief. But that aside, why does the fact that one practice is less gruesome entail that it is *less bad*? Suffering a compound fracture of the tibia is more gruesome than permanent and progressive dementia, but the former strikes me as less bad all-things considered. The property of *being gruesome* is just one morally relevant property relevant to guiding estimations of what is worse, not a necessary or sufficient condition.

Still, gruesomeness may settle what we would prefer to undergo such that—and this Steinhoff's second argument—"most people would, no doubt, prefer being a victim" of having a tooth drilled sans anesthesia to having their brains blown out or to having their head chopped off (Steinhoff 2013, 19). Indeed, Steinhoff assures us, "nearly all people fear death more than some forms of torture" (Steinhoff 2013, 113). Accordingly, Steinhoff infers that "Death is *worse* than (most forms of) extreme physical suffering" just because "most people prefer extreme physical suffering to death" (Steinhoff 2013, 19). We aren't given much empirical evidence about what

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2. 18 U.S. Code § 2340 is that part of the United States Code that speaks to the legal prohibition of torture. In its definitions, 'torture' is defined as an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." In turn, it explains that the meaning of 'severe physical or mental pain and suffering' involves, *inter alia*, "*prolonged mental harm*" (emphasis added).

most people prefer, although I confess to preferring having a tooth drilled for fifteen minutes without anesthesia to having my head chopped off or having my brains blown out; I similarly prefer to be placed a stress position for an hour, to having three of my fingernails pulled out, and so forth. But it's hard to know what follows from all of this. Part of the problem is, again, that some of Steinhoff's examples of extreme physical suffering aren't clearly examples of *torture*. More importantly, if we tinker with the details of Steinhoff's examples, the supposed consensus will go away. Even if most or nearly all people prefer having a tooth drilled without anesthesia for fifteen minutes, surely most or nearly all people prefer a quick and painless death to having multiple parts of their body drilled without anesthesia for months or years. Here is the best that Steinhoff can hope for: many, perhaps most, people will prefer *some* token instances of torture to *some* token instances of gruesome death. That modest result does not entail the proposition that Steinhoff wants—again: "most forms of torture are not as bad as killing."

What about the first premise: defensive torture is compatible with the familiar moral side-constraints that govern defensive killing? Perhaps defensive torture is, at least sometimes, a necessary and proportionate response, but these are not the only side constraints that govern defensive killing and defensive torture. While it is variously formulated, something like the right to be free from torture is a widely asserted right claim and must be considered as a side-constraint governing the moral permissibility of torture. Rights theory has an obvious home in non-consequentialist ethics. How does the right to be free from torture inform the ethics of defensive torture?

### **On the Inviolability of the Right to be Free from Torture**

A particular right might be either *inviolable* or *inalienable*, both, or neither. To say that a right is inviolable is to say that it is absolute—that it is never morally permissible to invade it. Different absolutists about torture formulate the details differently: some self-identified absolutists claim that there are no *actual* circumstances in which the right to be free from torture may be invaded; others claim there are no *conceivable* such circumstances; still others insist that there are no logically possible such worlds, and so forth (Barry 2013). But the key to the absolutist's position involves the *inviolability* of said right: so long as its bearer has that right, it is wrong to invade it.

Is the right to be free from torture inviolable? At least some philosophers argue that it is not. Steinhoff recognizes "a liberty to produce an evil in order to prevent a very much larger one from happening provided there are no other reasonable means"

(Steinhoff 2013, x). Officially, Steinhoff endorses *threshold deontology*: the position that “deontological norms govern up to a point despite adverse consequences; but when the consequences become so dire that they cross the stipulated threshold, consequentialism takes over” (Steinhoff 2013, 44). Alternatively, when the overall bad consequences of not transgressing are great enough, a right can be justly overridden (Kamm 2011). A threshold deontologist need not deny that people have the right to be free from torture, only that the right is absolute. In typical or even dire circumstances, invading the right to be free from torture is wrong, but when circumstances are especially grave that right is violable.

The suggestion that the right to be free from torture can be overridden should be especially troubling to the absolutist opponent of torture since ticking bomb scenarios are usually envisioned as involving especially grave circumstances. Again, one could argue that ticking-bomb scenarios are neither conceivable nor possible, but a better strategy is to challenge the plausibility of threshold deontology, especially in the context of non-consequentialist ethics. Arguably, threshold deontology cannot be distinguished from sophisticated versions of rule-consequentialism (Brandt 1979; Hooker 2000) or otherwise collapses into consequentialism (Sen 1979). Such matters won’t be settled here. But note that there are at least two reasons to be skeptical about trying to ground the moral permissibility of torture in threshold deontology, one that is parochial to Steinhoff’s position and one that should trouble non-consequentialists generally.

It is somewhat surprising that Steinhoff endorses threshold deontology given his frequent invocation of the real-life Daschner case in which a German police officer threatened a child kidnapper with torture in order to rescue the child<sup>3</sup> mostly because it is far from clear that threshold deontology would permit torture in that case. No one doubts that the kidnapping and threat of a child’s death is a terrible thing, but, again, threshold deontology has it that a right can be justly overridden only when the overall bad consequences of not transgressing are sufficiently grave—say, in cases of supreme emergency. If threshold deontology is going to have any teeth, the relevant threshold must be high enough that some terrible consequences must be regrettably tolerated. In the case of defensive torture, if threshold deontology is going to supply side-constraints governing its practice, it probably cannot license torture in Daschner-style cases.

There is another serious problem associated with threshold deontology: it licenses the torture of innocents. If the overall bad consequences of not transgressing the right to be free from torture are great enough, then it can be justly overridden even if the

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3. Steinhoff’s index includes ten separate references to the Daschner case (Steinhoff 2013, 188).

bearer of that right has done nothing wrong. Philosophers inclined to some stripe of consequentialism may well tolerate this result (Allhoff 2012) but at least some non-consequentialists, like Kamm, will reject threshold deontology precisely it permits the torture of innocents (Kamm 2011). In a similar vein, recall that both Michael Walzer and John Rawls allow for a “supreme emergency exemption” to principles in just war theory that rule out the deliberate targeting of noncombatants (Rawls 1999; Walzer 1992) and that no shortage of criticism has been leveled at each for making this allowance (Orend 2001; Toner 2005). It is at least difficult for philosophers with avowedly anti-consequentialist sympathies to drop the prohibition of targeting innocents while maintaining that “the destruction of the innocent, whatever its purposes, is a kind of blasphemy against our deepest moral commitments” (Walzer 1992, 262) and that “Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override” (Rawls 1971, 3).

The non-consequentialist disinclined to endorse threshold deontology has another option open to her. She might allow that it is wrong to invade the right to be free from torture only *so long as its bearer possesses it*. The right to be free from torture, even if inviolable, need not also be inalienable.

### **On the Inalienability of the Right to be Free from Torture**

It probably matters that in typical ticking-bomb scenarios, we are not asked to contemplate the torture of an innocent but an unjust aggressor. Arguably, while innocents retain their right to be free from torture even in morally complex and tragic scenarios, unjust aggressors do not just because “People have a right to defend themselves or others against wrongful aggression” especially when such aggression is life-threatening (Steinhoff 2013, 11). For example, Kamm considers a series of examples—her “Killer” cases—in which an unjust aggressor targets an innocent and only temporary non-lethal torture will suspend his attack. She concludes that:

[W]hile there may be a human right not to be tortured in the sense that one has only to be a human being (or a person) in order to come to have such a right, one might, through one’s acts, come to lose or weaken the force of this right. (Kamm 2011, 30)

In a similar vein, Stephen Kershner offers an argument—an argument endorsed by Steinhoff 2013)—that a terrorist forfeits his right not to be tortured because he is culpable for a lethal threat that can only be prevented by torturing him (Kershner 2005).

I will refer to the argument alluded to above as *the alienability argument* and it is consistent with supposing that the right to be free from torture really is inviolable. Accordingly, the alienability argument improves on the weaknesses plaguing threshold deontology. First, it is consistent with an absolute prohibition of the torture of the innocent since the innocent do not lose or forfeit their rights, even when they pose a threat to others. Second, it arguably permits the defensive torture of the terrorist in the ticking-bomb scenario and the kidnapper in Daschner-style examples supposing that each has, by virtue of their unjust aggression, weakened or lost or forfeited their right to be free from torture. To that extent, the alienability argument is a superior gambit to justify defensive torture on non-consequentialist grounds.

Still, there is a complexity here that needs to be tended to. I take it that the unjust aggressor forfeits his right to be free from torture because something like the following “forfeiture principle” is true: if *P* violates *Q*’s right to *X*, then *P* forfeits *P*’s own right to *X* (or some equivalent right or set of rights) (Boonin 2008, 166). The “some equivalent right or set of rights” clause is crucial here, since the terrorist in the typical ticking-bomb scenario doesn’t actually torture his victims and the kidnapper in the Daschner case doesn’t torture the child. So, if an unjust aggressor loses his right to be free from torture, that loss must result from the fact that his right to be free from torture is equivalent to the right or rights that the unjust aggressor violates. This is not an entirely trivial matter: if the right to be free from torture is equivalent to too many other rights, then torture will become a morally permissible response to rather more than was perhaps anticipated. Is the right to be free from torture on a par with the right to be free from battery and violent assault? Does that mean that punitive torture is a permissible punishment for rapists and soccer hooligans? If so, the alienability argument will justify a torrent of torturous practices, a result that might constitute its *reductio*.

Suppose that we do have a good grip on what sort of rights are equivalent to the right to be free from torture. It would not necessarily follow that the right to be free from torture is alienable since the precise scope of the forfeiture principle is debatable. Here is Kamm speaking of human rights quite generally:

There are at least two ways in which the claim that there are... human rights can be understood: (1) All that is needed in order to come to have certain rights is that one be a human person. (2) All that is needed in order to *come to have and continue to have* certain rights is that one be a human person. (Kamm 2007, 238)

Rights that satisfy (1) are alienable; rights that satisfy (2) are inalienable and, therefore, fall outside the scope of the forfeiture principle since they cannot be forfeit. Does the right to be free from torture satisfy (1) or (2)? It is far from clear that human rights per se are inalienable since, as Kamm notes, at least many rights regarded as human rights satisfy (1) and not (2) including the right to free movement, the rights to free speech and association, and the right to not be killed but can be justly weakened or lost or forfeit (Kamm 2007). However, any number of human rights organizations—including Amnesty International, the Human Rights Education Associates, and the Equality and Human Rights Commission—contend that the right to be free from torture is different in this regard. Is there any reason to think that the right to be free from torture is alienable?

Kershnar offers a series of arguments that there is. Here is one such argument:

[I]t intuitively seems a person can forfeit rights against harsh punishment and if he can forfeit rights against punishment, he should also be able to forfeit them against defensive force. (Kershnar 2005, 231)

This argument is problematic for a number of reasons. It is not at all clear just what “harsh punishment” and “defensive force” refer to here: some varieties of punishments commonly regarded as harsh—say, solitary confinement, especially long prison sentences, and capital punishment—are not obviously examples of torture insofar as they are familiar mechanisms of exercising defensive force. More importantly, the argument is pretty clearly question begging. One might allow that the right to be free from harsh punishment is alienable without allowing that the right to be free from torture is. This seems to be the position of the Supreme Court of the United States (SCOTUS) which has held, at least since the nineteenth century, that torturous punishments violate the Eighth Amendment of the United States Constitution’s prohibition of cruel and unusual punishment but not harsh punishment per se. Obviously, court rulings don’t settle philosophical questions, but if torture isn’t simply identified with harsh treatment generally, the possibility of forfeiting one’s right to be free from harsh treatment just doesn’t entail the possibility of forfeiting one’s right to be free from torture.

Kershnar offers another, similar argument that is not grounded in a rights-forfeiture justification of punishment:

[I]f a person can waive a moral right, then he can also forfeit it... Since persons can waive their right against the intentional imposition of suffering (e.g., by volunteering for medical experimentation or the Marine Corps), they can therefore forfeit that right. (Kershnar 2005, 231)

Here too, Kershnar's token examples aren't clearly torture. More importantly, it is far from clear why the possibility of forfeiting the right to be free from the intentional imposition of suffering entails the possibility of forfeiting the right to be free from torture if torture isn't simply equated with the intentional imposition of suffering. And Kershnar himself offers a rationale for doubting that the two can be equated: one can consent to the intentional imposition of suffering but not to torture if, as Kershnar suggests, one person tortures another only if the person being tortured "neither willingly accepts it nor validly consents to it" (Kershnar 2005, 224). So, by Kershnar's own lights, if someone willingly accepts or validly consents to some piece of harsh treatment, she is not being tortured however harsh that treatment is. She *can't* be, if torture is inconsistent with willing acceptance and valid consent (Wiznewski 2010). So, even if it is true that waiving a right entails the possibility of forfeiting it, if the right to be free from tortured can't be waived, given the nature of torture, then this argument never gets started.

However, there are arguably some reasons to doubt that persons cannot consent to torture (Barry 2015). So, suppose that torture does not preclude consent. That would presumably mean that the right to be free from torture can be waived.<sup>4</sup> Does it follow, therefore, that the right to be free from torture can be forfeit? It's hard to see why. Presumably, waiving a right involves a fairly robust kind of consent that forfeiting a right need not. Kershnar's own examples of volunteering for medical experiments or for the Marine Corps presumably involve informed and explicit consent in a way that, say, forfeiting one's right to free movement does not even if it is true that criminals implicitly consent to punishment. If waiving a right involves a robust kind of explicit informed consent in a way that forfeiting that right does not, then the possibility of waiving a right does not entail the possibility of forfeiting it.

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4. Note that the possibility of waiving one's right to be free from torture would imply that right is alienable, this would not clearly show that *defensive* torture is morally permissible even if it would show, say, someone could agree to be tortured by a rich sadist who compensates his willing victims.

Kershnar offers still another argument that the right to be free from torture is alienable. In particular, he argues that supposing that the right to be free from torture is inalienable “misconstrues the nature of rights that are grounded by autonomy”:

Autonomy includes a person’s reflexive choice over whether to continue to be autonomous and, if so, the degree to continue to be autonomous. As a result, autonomy grounds the moral standing by which a person may control the shape and continuation of his autonomous life. In other words, self-determination permits a being to decide whether to continue to be self-determining and, if so, the degree of self-determination he shall have in the future. Since autonomy-grounded rights protect the choice whether to retain these rights, the rights protecting autonomy may be alienated. (Kershnar 2005, 222-223)

There is a missing premise here: it would follow that the right to be free from torture is alienable because autonomy-grounded rights generally are alienable only if the right to be free from torture is an autonomy-grounded right. But it is far from clear that the right to be free from torture *is* an autonomy-grounded right—as opposed to, say, a human right possessed by all human beings whether they are autonomous or not. And it is at least debatable whether all autonomy-grounded rights are alienable; recall that John Stuart Mill famously defends laws prohibiting someone from selling himself into slavery on the grounds that “It is not freedom to be allowed to alienate his freedom” (Mill 2007, 103). If free beings may not alienate their freedom, perhaps autonomous being are similarly disallowed from alienating their autonomy.

Perhaps. I have suggested some reasons for being skeptical that the right to be free from torture is alienable, but suppose that skepticism is unwarranted. What follows? I contend that the alienability of the right to be free from torture need not imply that defensive torture is ever morally permissible. To see this, consider a debate about the ethics of voluntary slavery—the very institution that Mill opposes, as noted above.

Libertarian philosophers disagree about how unowned resources may be appropriated, but all libertarians endorse, at least, a very strong right of full self-ownership. The right of full self-ownership implies that each person is the rightful owner of herself such that she possesses, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right, and that she is entitled, morally speaking, to dispose of herself in the way that a slaveholder is entitled, legally speaking, to dispose of a slave (Cohen 1995, 68). Accordingly, it

would seem that self-owners can, as a matter of moral right, abdicate their right of full self-ownership just as they can, as a matter of legal right, abdicate their rights over a chattel slave. On this basis, some libertarians have concluded, *pace* Mill, that voluntary slavery is morally permissible (Nozick 1974; Otsuka 2003; Steiner 1984).

Suppose that the right of self-ownership can be abdicated. Would the permissibility of voluntary slavery follow? Not clearly. In an insightful discussion, G. A. Cohen rejects the following argument purporting to establish a right of full self-ownership: (1) if we are not full-self owners, then we are (partial) slaves; (2) we are not (partial) slaves; therefore (3) we are full self-owners. Cohen convincingly argues that the first premise of this argument is false: even if we lack (some of) the rights constitutive of full self-ownership, it does not follow that anyone else may take even partial ownership of us (Cohen 1995, 231-233). It is perfectly coherent to suppose that my right of full self-ownership empowers me to consensually transfer my rights to anyone who has the power to receive them *and* that no one is so empowered (Vallentyne 2000). The obstacle to voluntary slavery need not be an inability to abdicate the right of full-self ownership; it might be the inability of everyone else to acquire what can be abdicated.

The general lesson to be drawn from the above discussion is that abdicating a right need not thereby empower anyone else to do what was previously forbidden. So, even if the right to be free from torture is alienable, the moral permissibility of torture does not immediately follow.

However, the rights theorist might object that things are moving too quickly. On the Hohfeldian analytic system of rights, A has a claim that B  $\phi$  if and only if B has a duty to A to  $\phi$ . In the present case, I have an *in rem* claim that everyone is to refrain from torturing me if and only if everyone has a duty to refrain from torturing me: if I have no claim against you, then you have no such duty. But it is equally true on the Hohfeldian system that B has a liberty to  $\phi$  if and only if B has no duty not to  $\phi$ : if you have no duty to refrain from torturing me then you have the liberty to do so. Absent any claim against you, your token act of torture would, therefore, be morally permissible. So, on this line of reasoning, if I have forfeit or otherwise abdicated my right to be free from torture, I would have no claim against you, you would have no corresponding duty to refrain from torturing me, and my torture would, therefore, be morally permissible. Why doesn't this line of reasoning secure the moral permissibility of torture? The error lies in supposing that if I abdicate my right to be free from torture then neither I nor anyone else has any claim against you that would entail that you have a duty to refrain from torturing me. It is a mistake to suppose that the *only* possible claim here is an *in rem* human right to be free from torture.

What claim could there be that would entail that you have a duty to refrain from torturing me once I have abdicated my right to be free from torture? The rights theorist can complain that her opponent is begging the question if we simply stipulate that there are *other* moral obligations in play here apart from the right to be free from torture. Accordingly, I shall try to respond to the rights theorist on her own terms to make the case that some further claim may be in play even if I have abdicated my right to be free from torture.

What has come to be called the Lockean Proviso is a bugbear for libertarian philosophers who want to understand libertarianism's distinctive thesis as involving a full right of self-ownership: a full-right of self-ownership confers a maximal set of property rights over oneself and one's body analogous to the maximal set of property rights one possesses in more familiar examples, especially the right to do and dispose of our property as we see fit. In his *Second Treatise of Government*, John Locke famously holds that the acquisition of unowned resources is morally legitimate only if acquiring them does not show "any prejudice to any other man" although so long as my acquisition leaves "enough, and as good, in common for others" no such prejudice will be shown and the acquisition is permissible. This later quote—the demand to leave "enough, and as good, in common for others"—is the Lockean proviso. Importantly, *any* version of the Lockean Proviso is going to place some limits on the maximal set of rights associated with self-ownership since some ways of exercising that right will ensure that I do not leave "enough, and as good in common for others." Unowned resources might be unowned because they have never been acquired or because they were transferred or abandoned by their rightful owners. So, I take it that the Lockean proviso includes in its scope the acquisition of resources that a previous owner has abdicated.

The Lockean Proviso is supposed to govern acquisition of unowned resources. Is it relevant presently? Generally, side-constraints on the acquisition of resources are supposed to be justified on the grounds that the offending acquisition worsens the position of others (Nozick 1974). But arguably, permitting torture similarly worsens the position of others. Shue argues that torture has a "metastatic tendency"—that once the bar to torture's practice is lifted, it will be practiced more and more often and not only in cases of supreme emergency involving clearly guilty terrorists (Shue 1978, 143). If so, then permitting the torture of one person increases the likelihood that others not similarly situated will be tortured too. If restrictions on the acquisition of unowned resources are justified by the fact that they protect innocents from being made worse off, then restricting the acquisition of a liberty to torture is similarly justified to protect

innocents from being made worse off, even if the right to be free from torture can be abdicated. If cogent, this Lockean argument suggests another source of the claim against others to be free from torture: even if the right to be free from torture can be abdicated, no one need be empowered to acquire the liberty to torture if innocents are thereby made worse off.

Thus far, I have argued that appealing to the right to defensive killing does not clearly entail that defensive torture is morally permissible, and neither does appealing to the violability or alienability of the right to be free from torture. Still another source of non-consequentialist ethics suggests that defensive torture is, at least sometimes, morally permissible, albeit a source that will surprise many: Kantian ethics.

### **Kantian Ethics and Defensive Torture**

There exists a near consensus that Kantians should oppose torture absolutely. However, this near consensus has dissenters: Steinhoff, for example, suggests a number of reasons for thinking that torture is compatible with Kantian ethics. Here is one:

Kant thought that the categorical imperative (and thus this [humanity] formulation of it too) is compatible with punishing the guilty, with waging war, and, most important for our purposes, with self-defense. But since some instances of torture *are* instances of self-defense, they must be compatible with the categorical imperative. (Steinhoff 2013, 109)

The moral permissibility of defensive torture “logically follows” from Kant’s account of self-defense, apparently (Steinhoff 2013, 112). Relatedly, Steinhoff argues that Kant’s conception of self-defense entails that an unjust aggressor loses any moral claim against the unjustly attacked person, the absence of which makes torture permissible:

...Kant makes it very clear that the unjustly attacked person owes his attacker *nothing*. He does *not* owe it to him not to use excessive means in his self-defense—for instance, he does not owe it to him not to kill or to torture him if he could also save himself by simply knocking the attacker out. Moderation—to do only what is necessary for self-defense, but no more—might be owed to humanity or to himself, but not to the aggressor. (Steinhoff 2013, 134)

If I really owe an aggressor nothing, then I do him no wrong by torturing him defensively. Finally, Steinhoff argues that defensive torture is not merely compatible with the Categorical Imperative but sometimes required by it:

...according to Kant unjust attacks treat people as mere means. Since we have a *duty* not to allow others to treat them as mere means, they have a duty, owed to humanity in their own person, to defend themselves against unjust attacks. (Steinhoff 2013, 134)

Failing to torture in some circumstances—say, in Daschner-style cases—would violate the dignity of humanity and is therefore an obligatory response to unjust aggression.

It will be helpful to isolate three different ostensibly Kantian theses in play here. Corresponding to the above arguments, Steinhoff attributes to the Kantian the following theses:

*The Humanity Thesis:* Since both punishing the guilty and self-defense are consistent with the humanity formulation of the Categorical Imperative, defensive torture is similarly consistent and therefore is morally permissible.

*The Absent-Claim Thesis:* An unjust aggressor has no moral claim against his victim; in particular, an unjust aggressor has no moral claim that would make it wrong for his victim to respond with defensive torture. Absent such a claim, defensive torture is morally permissible.

*The Obligation Thesis:* It is, at least sometimes, morally wrong to fail to defensively torture in response to an unjust aggressor; therefore, in at least some circumstances, defensive torture is morally permissible.

If *any* of these theses are correct, then defensive torture is sometimes morally permissible and absolutist opponents of torture appeal to Kant “in vain” (Steinhoff 2013, 108). However, there is good reason to doubt that any of these theses have a basis in Kantian ethics.

First, consider the Humanity Thesis. Again, the compatibility of defensive torture and the humanity formulation is supposed to be grounded in the fact that punishment and self-defense are compatible with it, even harsh and garish varieties of punishment

and self-defense. Kant's remarks about both have made some Kantian faithful cringe—say, his remarks concerning capital punishment and his proposal that castration is the appropriate penalty for rape and pederasty (Kant 1996, 130), a proposal that Steinhoff counts as textual evidence in favor of the Humanity Thesis (Steinhoff 2013). Still, Kant is clear that “To inflict whatever punishments one chooses for these crimes would be literally contrary to the concept of punitive justice” (Kant 1996, 130).<sup>5</sup> So Kant can hardly be read as claiming that just any sort of punishment is morally permissible. Indeed, he explicitly condemns some kinds of punitive torture:

...there can be no disgraceful punishments that dishonor humanity itself (such as quartering a man, having him torn by dogs, cutting off his nose and ears). Not only are such punishments more painful than loss of possessions and life to one who loves honor... they also make a spectator blush with shame at belonging to the species that can be treated this way. (Kant 1996, 210)

So, while Kant undoubtedly supposes that *some* instances of punishment are compatible with the humanity formulation, no fair reading yields the result that any punishment in response to unjust aggression is consistent with it.

Kant's remarks concerning self-defense have similarly surprised some Kantians. For example, he denies that a death sentence is appropriate for someone who “shoves another, whose life is equally in danger, off a plank on which he had saved himself,” since such an offense is “unpunishable” (Kant 1996, 28). But Kant regards defensive killing in these particular circumstances as unpunishable only because he thinks that no incentive could outweigh the fear of certain death. Kant holds that “there can be no *penal law* that would assign the death penalty” since “A penal law of this sort could not have the effect intended”—that is, to deter the prohibited conduct: the fear of drowning will outweigh the fear of an uncertain judicial pronouncement (Kant 1996, 28). Kant makes it clear that this act “is not to be judged *inculpable (inculpabile)* but only *unpunishable (impunibile)*” (Kant 1996, 28). So, the alleged impossibility of punishing defensive killing does not license its moral permissibility.

Still, Kant's theory of self-defense is worrisome for Kantians as evidenced by the fact that some of our best Kantian commentators have worried about it: for example, Christine Korsgaard worries that Kant's moral philosophy “seems to imply that our moral obligations leave us powerless in the face of evil” (Korsgaard 1996, 133) and

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5. This comes a mere two sentences after Kant's remarks about castration.

Barbara Herman laments that “Self-defense is particularly difficult in Kantian ethics” (Herman 1993, 128). In her helpful explanation of Kant’s theory of self-defense, Herman distinguishes violence and coercion: both involve an attack on agency, but coercion’s attack is more direct since “Its intent is to subvert and control the will of another” (Herman 1993, 126). An aggressor who aims to coerce me adopts a coercive maxim and aims to use me or take my life for his purposes. What earns me the right to defend myself against an unjust aggressor is not that he threatens my death but the fact that he threatens my death as a means to his purposes: insofar as I cannot assent to abandoning my humanity, I cannot assent to be the victim of coercion. But assenting to the unjust aggressor does not require my deliberate consent; passively acquiescing to him amounts to abandoning my humanity as well. So if I can neither go along with his demands nor passively acquiesce, I am left with only one option: active resistance. If active, violent resistance is my only option then I have the right to defend myself against coercion with violence. So understood, the Kantian basis of self-defense is respect for humanity (Herman 1993).

Note that Herman’s interpretation of Kant arguably implies that the victim of coercion is not merely permitted but obligated to defend herself: by “stopping aggression with force” I assert my status as a rational agent and engage in an “act of self-respect” (Herman 1993, 130). Note too that it permits the violent defense of others: since the point of responding to coercion is to resist “the misuse of a life or body as the life or body of a rational agent” Herman concedes that “it is not clear what difference it makes if the self I protect is not mine” (Herman 1993, 131).

However, Herman makes it clear that since the Kantian basis of self-defense is respect for humanity, not just any response to violent coercion is permissible:

The [Kantian] justification of self-defense does not devalue the aggressor because he is guilty of aggression. He forfeits no moral title; I have no claim of moral superiority. If I may act with violence against aggression, I must do so without ignoring the fact that the object of my action is an aggressing *agent*. (Herman 1993, 130)

If I am committed to respecting humanity, I am committed to respecting the humanity of the aggressor, and to the extent that I am committed to respecting his humanity, my responses to him are constrained. As Herman says, “in limiting my action where possible, I demonstrate the moral regard he is still owed” (Herman 1993, 130). Herman’s reading of Kant is supported by what Kant says about our treatment of the unjust generally:

To be *contemptuous* of others—that is, to deny them the respect owed to human beings in general—is in every case contrary to duty; for they are human beings. ...I cannot deny all respect to even a vicious man as a human being; I cannot withdraw at least the respect that belongs to him in his quality as a human being, even though by his deeds he makes himself unworthy of it. (Kant 1996, 210)

There are at least two consequences to all this.

First, it should be clear that the moral permissibility of defensive torture just doesn't follow from Kant's remarks concerning punishment and self-defense as promised. Since Kant clearly recognizes moral limits on both punishment and self-defense, even in response to unjust aggression, it is misleading to assert that the humanity formulation is compatible with both. At best, Kant holds that some instances of using violence in defense of self or others in response to unjust aggression are compatible with the humanity formulation. But even if all instances of defensive torture are instances of using violence in response to unjust aggression, it would be fallacious to infer that defensive torture is therefore compatible with the humanity formulation.

Second, the Absent-Claim Thesis is false—or, at least, neither Kant nor Kantians are committed to it. If there are ways of responding to violent aggressors that are contrary to duty, as Kant contends, then not just any way of responding to them is consistent with the humanity formulation. Since Kant declares that I am not free to withdraw the respect owed to a human being, violent aggressors do not forfeit their right to be treated with the respect owed to humanity generally. But that means that they do have a moral claim against those who resist their aggression.

What of the Obligation Thesis? At first glance, it appears to be the weakest of Steinhoff's Kantian theses. The problem is not just that there are limits on what we can do even to unjust aggressors on Kantian ethics, as noted above, although recall that on a popular interpretation of Kant I cannot even *lie* in defense of others. The graver problem is that the duty to come to the assistance of others in need is an imperfect duty—that is, a duty that can be expressed by a proposition with the form "One must sometimes and to some extent  $\phi$  in *C*." Imperfect duties do not require that we always do some particular thing to live up to that duty. For example, the imperfect duty to develop our talents demands that we take some measures at some moments to better ourselves, but no particular measure is demanded of us at any particular time. Similarly, the imperfect duty to come to the assistance of others in need can at best entail that

we must sometimes and to some extent come to the aid of those in peril. That is a far cry from what the Obligation Thesis requires.

Steinhoff complains that absolutist opponents have not even tried to respond to his Kantian arguments for defensive torture (Steinhoff 2013). That complaint is now moot.

### **Conclusion**

For better or worse, debates about the moral permissibility of torture often seem dominated by consequentialist concerns, perhaps because it strikes many as obvious that defensive torture in ticking-bomb scenarios can be justified on consequentialist grounds. For those unmoved by consequentialist arguments or tired of the ticking-bomb scenario there is still much to discuss. That said, my contention is that none of the non-consequentialist arguments considered above demonstrate that defensive torture is morally permissible. This is a fairly limited result. Nothing I have said suggests that moral absolutism about torture is correct, that the right to be free from torture is either inviolable or inalienable, that there must be some sufficiently robust side-constraint that will always make defensive torture morally impermissible, and so forth. Indeed it is incumbent upon non-consequentialist ethicists who are opposed to torture to develop these arguments in rather more detail—say, to secure the conclusion that the right to be free from torture is inviolable or inalienable, to explain exactly why torture must run afoul of the humanity formulation of the categorical imperative, and so forth. This would least be a refreshing change in debates about the ethics of torture and an important application of non-deontological ethical theory.

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