

On the Evils of Torture and Its Permissibility: A Discussion Centered on Kramer's View of Torture

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Abstract: *In the legal and philosophical study of torture, two major problems arise: Why is torture evil (Problem 1)? And is there a form of permissible torture (Problem 2)? The key issue in Problem 1 is demonstrating the uniqueness of the evils of torture, while Problem 2 aims to find a suitable theory to balance the “intuitive rejection” and “intuition of exceptional cases” in the ticking bomb scenario. Existing mainstream approaches have generally failed to resolve these issues. However, Matthew Kramer’s view of torture addresses both aspects of these problems. For Problem 1, Kramer adopts a perpetrator-centered viewpoint, arguing that torture undermines the moral integrity of the perpetrator. Regarding Problem 2, he suggests that the situation we face is a moral conflict in which the use of torture is morally wrong but might be the best action in a given context, granting it a weaker form of permissibility. However, in terms of the evils of torture, Kramer fails to explain its uniqueness. His theory cannot apply to all types of torture, and his perpetrator-centered argument contains logical flaws. Regarding the permissibility of torture, while Kramer’s overall approach is correct, he does not provide a reasonable explanation of the moral obligation to “forbid torture” or the prima facie surrounding it. A correct view of torture should adhere to an inmate-centered viewpoint, understanding the evils of torture in an additive manner in Problem 1, and acknowledging the existence of moral conflict in Problem 2. It should not only demonstrate that, in some situations, the use of torture may be the morally best option, but also show that the moral obligation to prohibit torture is simply outweighed under these circumstances.*

Keywords: torture ♦ inquisition by torture ♦ Matthew Kramer ♦ evil of torture ♦ permissibility of torture

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I. Introduction: Two Perpetually Vexing Moral Problems

In the philosophical and legal studies concerning torture, a series of perplexing problems persist. For instance, why is it permissible to use capital punishment or life imprisonment, which inflicts greater harm than torture, in punitive scenarios, yet torture itself, which is equally commensurate with the crime, is not allowed? International law seems to hold an absolute prohibition against torture,¹ but does this stance remain steadfast even when torture could avert a great disaster? This is particularly challenged with the ticking bomb scenario. If a terrorist, after hiding and activating a nuclear bomb capable of destroying a large city, is captured, and the only effective means to prevent the city from falling into peril is through inquisition by torture (a form of torture), is such disaster-preventive inquisition by torture permissible?² Can legitimate self-

¹For instance, Article 2 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (commonly known as the *United Nations Convention against Torture*) explicitly states: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. An order from a superior officer or a public authority may not be invoked as a justification of torture.” Article 3 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (known as the *First Geneva Convention*) and Article 3 of the *Geneva Convention Relative to the Treatment of Prisoners of War* (known as the *Third Geneva Convention*) both clearly state: “Persons taking no active part in the hostilities, in all circumstances, shall be treated humanely, without any adverse distinction. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, in particular humiliating and degrading treatment.” Article 17 of the *Third Geneva Convention* further directly addresses the issue of inquisition by torture: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.” Article 5 of the *Universal Declaration of Human Rights*, Article 7 of the *International Covenant on Civil and Political Rights*, and Article 3 of the *European Convention on Human Rights* all advocate the same principle: No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.

² Some may argue that the ticking bomb scenario is an unrealistic thought experiment, and we cannot base any claims on it. Firstly, thought experiments serve as tools for reflecting on and balancing theories or conclusions. Many seemingly indisputable viewpoints may clash with our intuition during such experiments, and we cannot ignore this dissonance. Secondly, the ticking bomb scenario might appear to be the most unrealistic among similar cases. When we shift the scene to rescuing a kidnapped hostage in imminent danger, the situation feels much closer to home. For instance, consider the kidnapping case that occurred in Frankfurt, Germany, on September 27, 2002. A man named Gäßgen kidnapped the 11-year-old son of a banker and demanded a large ransom. Although Gäßgen was apprehended by the police on September 30 when he collected the ransom, the whereabouts of the kidnapped child remained unknown, as Gäßgen persistently refused to disclose the child’s location during interrogation. After exhausting numerous methods to no avail, and given the potential danger the child faced due to a lack of essential water and food resources, Police Vice

defense be used for torture in similar situations? If we can kill or grievously injure an assailant in legitimate self-defense, why is the less harmful torture not permitted?³ Can torture be used on innocents to prevent a disaster? If disaster-preventive torture is permissible, can torture be employed as a means to intimidate potential wrongdoers for the sake of social stability? Similar questions abound.

These conundrums can be distilled into two moral major problems: Problem 1 — What is the uniqueness of evils of torture? — and Problem 2 — Is there permissible torture? The resolution of Problem 1 is pivotal to addressing Problem 2, as understanding the moral permissibility of torture necessitates comprehension of the evils of torture itself. In the analysis of these two problems, there are two moral intuitions that cannot be overlooked. The first is the “intuition of exceptional cases,” which suggests that torture should possess uniqueness compared to most physical harm or killing. It should not merely be compared based on the degree of harm but should also consider the differences in the forms of harm. The uniqueness of evils of torture warrants its stricter prohibition, as reflected in current international legal practices. The second intuition is the “intuitive rejection.” In thought experiments, considering the ineffectiveness of other means and the self-defensive nature of torture, refusing to employ torture in such scenarios implies allowing the death of innocents. In such situations, the relevant parties should reject allowing the death of innocents. These two intuitions will serve as benchmarks in this discourse: this does not imply that only theories aligning with both intuitions are correct, but rather that theories compatible with and coherent with these intuitions hold an advantage over those that contradict them.

President Daschner decided to intimidate and physically coerce Gäfen. During the inquisition by torture, Gäfen finally revealed the child’s location, but tragically, the child had already been killed on the night of the kidnapping. Similar cases have occurred in the United States (*Leon v. Wainwright*), sparking widespread discussion in both domestic and international academic circles. For a legal doctrinal analysis of this case, see Wang Gang, “Torture for Rescue Purposes and Legitimate Self-Defense — An Analysis of the Most Controversial Criminal Law Issue in Post-War Germany,” *Tsinghua University Law Journal* 2 (2010).

³This perspective can be termed the “Comparative Harm Theory”: taking a life results in total destruction, whereas inquisition by torturing an individual leads only to partial or temporary destruction. Thus, killing someone is considered worse than inquisition by torture on them. Given that there are morally justified scenarios for killing — such as on the battlefield in accordance with the laws of war — there should also be circumstances where the inquisition by torture is permissible. Scholars who hold this view include Stephen Kershnar, “For Interrogational Torture,” 19 *International Journal of Applied Philosophy* 2 (2005): 231; Uwe Steinhoff, “Torture—The Case for Dirty Harry and against Alan Der-showitz,” 23 *Journal of Applied Philosophy* 3 (2006): 337–53; Eric Posner and Adrian Vermeule, “Should Coercive Interrogation be Legal?” 104 *Michigan Law Review* 4 (2006): 671–707; Eric Posner and Adrian Ver-meule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford: Oxford University Press, 2007), 183-215; F. M. Kamm, *Ethics for Enemies: Terror, Torture, and War* (Oxford: Oxford University Press, 2011), 3-4 and 15-26.

In the domestic legal academia, the study of torture exhibits two distinct characteristics: Firstly, there is a lack of specialized research on Problem 1, with scholars often preferring to define the evils of torture using highly ambiguous and contentious concepts such as “dignity” or “human rights.” Secondly, discussions on Problem 2 are primarily concentrated on the application of law, particularly the application of criminal law and international law, with scant consideration from the perspective of legal philosophy.⁴ This paper believes that without providing an explanation for the permissibility of torture at the philosophical level, discussions at the level of legal application remain fundamentally insufficient.

In contrast, the discourse within the international academic community regarding the two major problems appears more mature. Concerning Problem 1, most scholars endeavor to analyze the evils of torture through its inherent impact on the inmate, yet their responses fail to distinguish torture from other forms of harm, unable to capture the uniqueness of torture. Regarding Problem 2, mainstream responses are divided into two camps: the absolute prohibition theory and the strong permissibility theory. The absolute prohibition theory posits that torture should be banned under all circumstances. In contrast, the

⁴ Wang Gang, “Torture for Rescue Purposes and Justifiable Defense: An Analysis of the Most Controversial Criminal Law Issues in Post-War Germany,” *Tsinghua University Law Journal* 2 (2010); Gong Renren, “U.S. Government Policy on Torture After September 11th and Its Impact,” *Social Sciences in China* 8 (2012); Yang Chunran and Ren Peiliang, “Preventive Torture: Blocking Illegality or Blocking Responsibility? — Also Discussing the Fate of Torture,” *Chinese Criminal Science* 3 (2013); Gong Renren, “Torture: From the Legitimate Means to Acknowledged Crimes,” *Journal of Comparative Law* 1 (2014); Ji Fang, “Prohibition of Torture as a Non-derogable Principle of International Law — A Review of U.S. Policy on Torture after 9-11,” *Global Law Review* 5 (2014); Xu Shuang and Jiang Wan, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Landmark of the Civilization in Legal System,” *Human Rights* 1 (2016); Zhao Boyang, “Fighting Evil with Evil: On the Legalization of Anti-Terror Interrogation,” *Jinling Law Review* 1 (2016); Gong Renren, “The Implementation of the Convention Against Torture in China,” *Peking University Law Journal* 4 (2016); Cheng Long, “Rescue Torture in Terrorist Crimes: Justification and Limits,” *Tribune of Political Science and Law* 5 (2020). Currently, the most comprehensive philosophical discussion on these two moral problems in China’s academia is found in the article “Why Torture is Evil: A Moral Philosophical Analysis of Torture.” The author introduces foreign responses to these two major problems while also presenting their own views. Regarding Problem 1, the author agrees with the answer provided by David Sussman, which will be mentioned later. For Problem 2, the author holds the position that torture should be absolutely prohibited, based on two main reasons: (1) Torture is a great evil and should be prohibited in all scenarios; (2) inquisition through torture during interrogation is generally ineffective, thus torture should not be used. The author’s first reason is insufficient, as the relationship between “great evil” and “should be absolutely prohibited” still requires justification. The second reason is not valid. For one thing, this reason requires empirical evidence, which the author does not provide. For another, the second reason cannot prove absolute prohibition, because if evidence shows that torture is effective in inquisition in a current case, it would lose its opposing force. See Li Jian, “Why Torture is Evil: A Moral Philosophical Analysis of Torture,” *Philosophical Trends* 12 (2016).

strong permissibility theory asserts that in certain situations, the use of torture is unequivocally justified, claiming that it neither infringes upon rights nor violates obligations. The most compelling argument for the strong permissibility theory categorizes disaster-preventive torture as a form of legitimate self-defense. However, both theories encounter insurmountable challenges when faced with scenarios such as the ticking bomb scenario: the absolute prohibition theory not only contains inherent flaws but also fails to address the challenge of the “intuitive rejection,” while the strong permissibility theory cannot adequately respond to the challenge of the “intuition of exceptional cases.”

Professor Matthew H. Kramer’s view of torture harmonizes two intuitions, offering new hope for overcoming the two major problems. Regarding Problem 1, he analyzes the evils of torture from the perpetrator’s viewpoint, arguing that the uniqueness of torture lies in its severe damage to the moral integrity of the perpetrator, a harm not present in other forms of injury. Concerning Problem 2, he posits that the ticking bomb scenario and others are essentially moral conflict dilemmas: in such cases, there are two conflicting moral obligations, and the actor must fulfill the morally best duty (using torture to save innocents) while violating another obligation (the prohibition of torture). Since Kramer’s view of torture opts for its use, he aligns with the intuitive rejection. Furthermore, because he acknowledges that the moral obligation to “prohibit torture” cannot be overridden — but be overtopped — *prima facie* moral duty, and that violating this duty is always morally wrong, his stance also accommodates the intuition of exceptional cases. However, this does not imply that Kramer’s view of torture is the best solution; his theory still has some flaws. This article will examine his approach and propose a correct way to resolve the issue.

The focus of this paper is to provide a structured and introductory exploration. It presents various significant scholarly responses to two moral problems, while primarily examining and critiquing Kramer’s view of torture. In the concluding section, this paper will tentatively propose a view of torture: a correct view of torture should maintain an inmate-centered approach, understanding the evils of torture in Problem 1 through a cumulative manner, and acknowledging the existence of moral conflict dilemmas in Problem 2. It should demonstrate that using torture is, in certain circumstances, the morally best choice, while also proving that the obligation to prohibit torture is merely outweighed in such instances. However, a detailed argument for this view of torture will be reserved for another paper.

II. Why Does Torture Cause Evils?

The discussion of the evils of torture revolves around the intrinsic harm it causes, necessitating an examination of the key elements of the concept of

torture.⁵ In the first section, we identify two moral evils inherent in the concept of torture, which serve as foundational elements for analyzing the evils of torture: unbearable pain and an extreme asymmetry of power. The second section analyzes a mainstream view of torture, which is inmate-centered. Scholars of this view either equate these two evils with the evils of torture or combine them in a transformative manner, asserting that the newly generated evils (such as “harm to dignity”) constitute the evils of torture. However, these approaches fail to demonstrate the uniqueness of the evils of torture. Witnessing the failure of mainstream approaches, Kramer opts to analyze the evils of torture from the perspective of the perpetrator. The third section presents Kramer’s viewpoint. Kramer argues that the uniqueness of the evils of torture lies in its capacity to inflate the perpetrator’s ego, thereby corrupting their moral integrity. During a torture session, the perpetrator typically maintains a hostile or indifferent attitude towards the inmate’s physical and mental well-being and must exploit the inmate’s sensitivity to pain and vulnerability as a means to achieve their own ends. Such a state of dominance over the inmate contradicts the basic humility required by the moral integrity of an ethical agent. However, his theory also has numerous flaws. The fourth section offers a critical examination of Kramer’s approach, highlighting its inability to explain the uniqueness of the evils of torture, its in-applicability to all forms of torture, and the logical flaws in its perpetrator-centered argumentation.

A. Key elements of the concept of torture

In the English language, the term “torture” is used to discuss the concept of inflicting severe pain or suffering. However, in Chinese, this term encompasses meanings such as torture, inquisition by torture, and abuse. In Chinese discourse, this paper posits that the primary meaning of the term should be viewed as a generic concept. By combining it with different specific variations, various concrete forms of torture concepts are formed. Common forms include “interrogational torture,” “intimidatory torture,” and “punitive torture.”⁶ Given the complexity of torture’s various forms, the best way to explore the key elements of the concept of torture is to first identify the foundational key elements of torture as a generic concept. On this basis, the unique key elements of each specific form of torture can then be supplemented.

⁵An action is deemed morally evil primarily because it is accompanied by or will result in certain moral harm. We can generally distinguish moral harm into two types: intrinsic harms and extrinsic harms. The former refers to moral harm inherent in the nature of the action itself, which arises alongside the action; if these harms did not exist, the action would not exist either. Extrinsic harms, on the other hand, are not inherent to the action but are the potential harms that the action may cause. See Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (Chicago: The University of Chicago Press, 2012), 77.

⁶ For a more detailed discussion on the forms of torture, See Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 56-104.

There exist two foundational key elements: the perpetrator's deliberate infliction of pain or suffering upon the inmate, and the inmate's inability to defend themselves. The most prominent characteristic of torture is the perpetrator's intentional imposition of pain or suffering on the inmate, which encompasses two noteworthy aspects. Firstly, the degree of pain or suffering must be such that it is intolerable and should not be endured by an ordinary person.⁷ This pain or suffering can manifest physically or target the mental or psychological realm. Secondly, torture must be predicated on the perpetrator's subjective intent to inflict pain or suffering on the inmate, thus excluding any accidental or negligent acts of torture.⁸ The notion of "intent" here includes two scenarios. The first scenario — where pain or suffering is the objective — refers to the perpetrator's intention to use the pain or suffering experienced by the inmate as a means to achieve their own ends, with the hope that the inmate genuinely feels the pain. The second scenario — where pain or suffering is a foreseeable consequence — refers to the perpetrator inflicting severe pain or suffering on the inmate with the intention of using torture as a means to achieve their goals, yet maintaining an indifferent attitude towards whether the inmate actually feels the pain (the perpetrator might even prefer that the inmate does not feel pain).⁹ Although these two scenarios differ in terms of whether the perpetrator intends for the inmate to "feel" the pain or suffering, they both involve the perpetrator's intent to "inflict" pain on the inmate.

The condition of "the inmate lacking the ability to defend themselves"¹⁰ is often overlooked. This inability is primarily manifested in the inmate's

⁷To what extent should pain be considered torture? I believe we should primarily adopt an "ordinary person standard," meaning the level of pain should be such that an ordinary person would find it unbearable or should not be expected to endure it. The reason for using "primarily" is that we also need to consider two other standards: the objective medical standard and the individual standard. Considering the objective medical standard means that when the perpetrator, due to a misunderstanding of medical knowledge, believes their actions will cause pain to the inmate, such non-harmful actions do not constitute torture. We should also acknowledge the individual differences of the inmates; after all, the standards for torturing Monkey King and Monk Tang in *The Journey to the West* should differ. In practice, we can determine the ordinary person standard from the perspective of the perpetrator. From the perpetrator's viewpoint, there is no reason for the methods of torture to be mild, so the methods used are likely to be brutal, even extremely brutal. Therefore, in the inquisition by torture, the perpetrator must inflict pain on the inmate that an ordinary person would find unbearable and should not endure. In other words, we can consider the vast majority of pain inflicted by perpetrators on inmates to meet the standards of torture. The standard of suffering in psychological torture is similar.

⁸ David Sussman, "What's Wrong with Torture?," 33 *Philosophy and Public Affairs* 1 (2005): 5.

⁹ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 39-42.

¹⁰ Henry Shue, "Torture," 7 *Philosophy and Public Affairs* 2 (1978): 127-130; David Sussman, "What's Wrong with Torture?," 33 *Philosophy and Public Affairs* 1 (2005): 6.

incapacity to effectively defend, evade, or retaliate.¹¹ This marks a crucial distinction between torture and activities like sports fighting or mutual combat, where participants not only engage in mutual aggression but also possess the ability to defend against or flee from attacks. There exists a misguided notion that since the inmate in the inquisition by torture can end the ordeal by divulging information during the inquisition by torture, they possess a form of defense capability, provided they know the information. Thus, it is argued that the lack of defensive ability is not a key element of torture.¹² This perspective is flawed because it confuses “surrender” with “escape.” According to Henry Shue, the fact that the inmate holds information and the ability to fulfill the perpetrator’s demands is not a capability to evade the inquisition by torture but rather the reason for their subjection to it. Therefore, the act of “divulging information” by an inmate is not an “escape” under defensive conditions but a surrender and submission to the perpetrator, a form of betrayal. In reality, the inmate cannot cooperate with the adversary without denying their own values, and this denial constitutes a “betrayal,” signifying the perpetrator’s victory and the inmate’s defeat. True escape capability is never about “choosing the lesser of two evils”; if we considered accepting the lesser harm in a predicament as an escape, then situations where escape is impossible would be exceedingly rare.¹³

Building upon this foundation, various forms of torture have developed their own unique constituent elements. This paper uses the following forms of torture as examples, as they are the most frequently discussed and controversial in the field of torture. The distinctive element of “intimidatory torture” is that it is inflicted with the purpose of intimidating the inmate into compliance.¹⁴ The most typical scenario is the torture used by governments practicing white terror. This type of torture is often public, and the perpetrator does not necessarily intend for the inmate to take specific actions, but rather hopes that the inmate and those affected by the torture will remain docile or welcome the rulers.¹⁵ The distinctive key element of “punitive torture” is that it is inflicted with the purpose

¹¹ It is important to note that Sussman employs the relationship of “or” in the article. Additionally, some argue that the inquisition by torture in the ticking bomb scenario may not meet this condition. For instance, some believe that the explosion of the ticking bomb would destroy the entire city while also killing the police, thereby terminating the inquisition by torture, which constitutes a form of “retaliation” against the police or an “escape” from the inquisition by torture. In such a situation, the inmate still cannot be deemed to possess defensive capability, as the police are acutely aware of the specific temporal and spatial domain in which they hold absolute control, and having such absolute control within this specific time and space is sufficient.

¹² Henry Shue, “Torture,” 7 *Philosophy and Public Affairs* 2 (1978): 130-131.

¹³ Henry Shue, “Torture,” 7 *Philosophy and Public Affairs* 2 (1978): 135-136.

¹⁴ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 66-67.

¹⁵ Mark P. Donnelly and Daniel Diehl, *The Big Book of Pain: Torture & Punishment Through History*, translated by Zhang Hengjie (Beijing: China Friendship Publishing Company, 2018), 4.

of punishing criminals.¹⁶ This form of torture usually does not require the inmate to act or refrain from acting. “Abusive torture” is inflicted with the purpose of satisfying the perpetrator’s perverse desires by inflicting pain on the inmate.¹⁷ The actions of the U.S. military at Guantanamo Bay are an example of this type of torture.

“Inquisition by torture” — commonly known as the interrogation — aims to obtain specific information, with its unique key element being the “compulsion of the inmate to divulge information.” It is important to note that “divulging information” constitutes an act by the inmate. This paper adopts Jonathan Bennett’s criteria for distinguishing between an act and an omission. According to Kramer’s refinement of Bennett’s theory, this standard can be expressed as follows: (1) At a particular moment, if the majority of a person P’s actions do not lead to effect E, while a minority do, then the minority actions are considered acts; (2) If the majority of P’s actions lead to E, while a minority can prevent E, then the majority actions are omissions.¹⁸ When we apply this standard to the scenario ticking bomb scenario, the terrorist’s E is the bomb explosion. The act that can prevent E is divulging the bomb information to the police within a reasonable time, while acts that achieve E include all others, such as remaining silent, divulging false information, or speaking nonsense. Comparatively, the acts that can prevent E constitute a smaller proportion of the terrorist’s possible acts, thus making the divulging of information an act. Therefore, we can consider the inquisition by torture and “coercive action torture” as essentially the same. Coercive action torture aims to force the inmate to perform acts other than divulging information under extreme asymmetrical conditions through means of torment.¹⁹ Let us consider “Bomb Case 1” as an example. A terrorist has activated a powerful bomb, set to explode one minute after the activation button is pressed, causing massive casualties. The only way for the police to avert disaster is to use a stun gun to force the terrorist to press the cancel button. The terrorist is defenseless, unable to retaliate or evade the stun gun attack.²⁰ In addition to using torture to compel the inmate to act, torture can also be used to compel the inmate to refrain from acting, known as “coercive omission torture.” In “Bomb Case 2,” a terrorist attempts to detonate a powerful bomb, which would cause massive casualties, but the detonation requires the terrorist to continuously hold the activation button for one minute. The only way for the police to prevent the bomb from exploding is to use a stun gun to inflict

¹⁶ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 69-72.

¹⁷ *Ibid.*, 72.

¹⁸ *Ibid.*, 78-80.

¹⁹ *Ibid.*, 68-69.

²⁰ *Ibid.*

pain on the terrorist, forcing them to decide to remove their hand from the button, while the terrorist is defenseless against the police.

B. On the evils of torture from an inmate-centered perspective

By examining the two foundational key elements in the concept of torture, we can identify two intrinsic moral evils: pain (suffering) and an extreme asymmetrical relationship. Beyond these, various forms of torture introduce their own unique evils. For instance, the inquisition by torture and the coercive action torture adds the element of “severe disruption of autonomy.” Currently, the predominant academic view of torture centers on the inmate, focusing on the harm inflicted upon them. This inmate-centered argument can be divided into two approaches: one emphasizes one of the two intrinsic evils within the concept of torture, asserting that the evils of torture lie in that particular category; the other combines the two evils into a new form of harm, positing that the evils of torture reside in this harm.

If one considers the evils of torture to be merely pain or suffering, then why are pain and suffering deemed evils? Many scholars focus their research on the consequences that pain or suffering may produce. For instance, Jeremy Waldron, in his study of “inhumane treatment,” posits that inflicting “a level of suffering that no human can reasonably be expected to endure” constitutes inhumane treatment. This is because such a degree of suffering undermines the fundamental elements of human functionality. Those subjected to such agony may lose basic self-control, the ability to think rationally, to care for themselves, to speak, and so forth.²¹ Experience tells us that torture reduces the inmate to a state where they cannot think or engage in discourse, but only scream, express fear, or even lose control of their bodily functions, thus forfeiting their rational capacities.²² Proponents of this view can cite examples to demonstrate the impact of such destruction.²³ Many philosophers typically focus on the harm that the consequences of pain in torture inflict on autonomy. Cesare Beccaria referred to it as “the tyranny over the mind of man,”²⁴ while David Luban argued that the pain of torture forcibly severs our attention from external matters, narrowing our focus solely to the harm we feel, rendering us incapable of attending to anything else.²⁵ David Sussman described the harm to the inmate’s autonomy as “self-betrayal.” In Sussman’s view, because the inmate cannot control the pain within their body, and the perpetrator is the initiator and regulator of this pain’s intensity,

²¹ Jeremy Waldron, “The Inhuman and Degrading Treatment: The Words Themselves,” 23 *Canadian Journal of Law and Jurisprudence* 2 (2010): 280.

²² Jeffrie Murphy, *Retribution, Justice, and Therapy* (Dordrecht: D. Reidel Publishing, 1979), 233.

²³ Jeremy Wisniewski, *Understanding Torture* (Edinburgh: Edinburgh University Press, 2010), 72-91.

²⁴ Cesare Beccaria, *On Crimes and Punishments*, translated by Huang Feng (Beijing: Peking University Press, 2008), 40.

²⁵ David Luban, “Liberalism, Torture, and the Ticking Bomb,” 91 *Virginia Law Review* 6 (2005): 1430-1431.

the inmate's own body's sensitivity and vulnerability to pain become accomplices to the perpetrator, continuously conveying the perpetrator's voice and commands within the inmate's body, thus betraying the inmate's own will.²⁶

Moreover, we must not overlook the following fact: pain is inherently an evil experience, intrinsically linked to the pain itself. We can substantiate this assertion with two examples. For instance, even when we disregard the detrimental impact of pain on fundamental human functions — such as in the case of infants, individuals with severe mental illness, or those in a vegetative state who can only perceive pain — pain remains exceedingly dreadful. We would still describe the act of inflicting suffering on such individuals as “cruel” or “brutal.” Furthermore, if we compare the infliction of intense pain with the induction of intense pleasure as means of disrupting basic human functions, the former is undoubtedly worse, simply because it causes the inmate more “pain” in the process of undermining their essential functions. In summary, we must acknowledge that the experience of pain and suffering is, in itself, a profoundly negative evil.

However, such a perspective does not lead to the conclusion that the evils of torture possess a nature of particularity. This is because most actions involving bodily harm also entail pain, such as fighting, sports combat, and retaliatory actions in legitimate self-defense. If we consider only the consequences of pain and the pain itself, we fail to discern the difference between torture and these actions. Yet, we do not regard these actions as morally akin to torture.

Some scholars may approach the discussion of the evils of torture from the perspective of the inmate's lack of defensive capability. In such situations, there exists an extreme asymmetry between the two parties: the dominant party wields absolute power over the vulnerable one. Although the dominant party is subject to certain constraints (such as not causing the inmate's death or mental breakdown during inquisition by torture, as this would thwart their objectives), they can generally inflict harm on the weaker party with impunity. The inmate is entirely exposed to the arbitrary will of the perpetrator, unaware of how they will be treated, and devoid of the ability to evade, defend, or resist, leaving their body as vulnerable as a punching bag before the perpetrator. However, this still fails to capture the unique malevolence of torture. If we merely observe the extreme asymmetry between the parties, we can find similar situations in many non-torture contexts, such as the management of prisoners by guards or certain excessive paternalistic behaviors, yet we do not classify these as akin to torture.

There exists another view that does not equate the evils of torture with the evils within the concept of torture itself, yet still focuses on the harm inflicted upon the inmate. Proponents of this view often employ terms like “human rights”

²⁶ David Sussman, “What's Wrong with Torture?,” 33 *Philosophy and Public Affairs* 1 (2005): 21-22.

or “dignity” in their rhetoric. We can understand this view as follows: the various evils inherent in the concept of torture combine in a transformative manner, creating a new form of evil, namely, the evil of harming dignity or human rights. However, this view offers the most vulnerable explanation of the evil of torture. Firstly, we still lack a compelling argument regarding the concept and essence of dignity or human rights; in other words, there is no consensus on what they truly are. Some scholars might argue that the foundation of dignity or human rights is the normative agency, which torture precisely undermines.²⁷ Yet, grounding human rights in the normative agency is in itself contentious, and the notion that torture violates the inmate’s normative agency is unreasonable, as torture does not necessarily entail such a violation. For one thing, not all forms of torture involve the destruction of normative agency; for another, proponents of this argument overly emphasize the role of reflective or deliberative agency in the evil of torture. Beings without normative agency — infants, the mentally ill, or even animals — can also fall victim to torture.²⁸ Furthermore, this view still fails to address the particularity of the evil of torture: if the evil of torture lies in the destruction of the agent’s normative agency, then the evil of torture is essentially no different from the moral evil of killing a person, differing only in degree, with the moral evil of killing being greater. Secondly, even if we arrive at a definition of the essence of dignity, it is difficult to claim that this is an evil particularly present in torture; in reality, we would apply the harm to dignity in many situations. Certain acts that damage dignity and violate human rights may not involve pain or asymmetrical relationships at all.

As this section draws to a close, it seems inevitable to reach the following conclusion: if we cannot identify a new form of evil inherent in the concept of torture, or discover a novel combination of evils within it, then arguing the evils of torture from the perspective of the inmate fails to demonstrate that torture is a unique form of harm, possessing a distinct moral evil. If we still insist on considering torture as a unique harm, we should abandon the inmate-centered approach to argumentation.

C. On the evils of torture from the perspective of the perpetrator

Kramer is a proponent of the aforementioned conclusion. In Kramer’s view, previous work has already informed us that it is challenging to derive a conclusion from the perspective of the tortured that the “forms” of evils inherent in torture possess uniqueness. Similarly, it is difficult to conclude from the perspective of the inmate that the “degree” of evils inherent in torture is unique, as the extent of harm caused by torture is not necessarily greater than that of

²⁷ James Griffin, *On Human Rights*, translated by Xu Xiangdong and Liu Ming (Nanjing: Yilin Press, 2015), 51.

²⁸ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 149-150.

death or severe injury. More importantly, Kramer believes that the moral significance of sparing a heinous terrorist from torture is negligible.²⁹ Kramer attempts to illustrate the insignificance of the moral benefit of sparing a morally depraved terrorist from excruciating pain by comparing two scenarios. He envisions two parallel worlds: in World A, a murderer will endure extreme pain due to purely natural causes in a location far removed from any medical resources; in World B, he will not experience any extreme pain. In Kramer's view, since World A is more desirable than World B, the benefit of sparing the murderer from suffering is insignificant. Because a perspective centered on the inmate is founded on the interests or inviolability of the inmate, and since these interests or inviolability sometimes lack moral significance, this perspective alone cannot explain why torturing terrorists is morally wrong.³⁰ In fact, we can equate Kramer's viewpoint here with the core stance of the theory of rights forfeiture mentioned later: due to the murderer's atrocities, the benefit of sparing him from suffering lacks moral significance, which is his just deserts. However, Kramer does not consequently conclude that torture is strongly permissible; in his view, even if the murderer's rights are forfeited, we still face an obligation to prohibit the use of torture based on the interests of the perpetrator.

To analyze the evils of torture from the perspective of the perpetrator is to focus on the harm inflicted upon the inmate.³¹ According to Kramer, the uniqueness of the evils of torture lies in its capacity to inflate the perpetrator's ego, thereby corrupting their moral integrity. During an act of torture, the perpetrator typically maintains a hostile or indifferent attitude towards the physical and mental well-being of the inmate. They must exploit the inmate's sensitivity to pain and vulnerability as a means to achieve their own ends — whether it be inquisition, intimidating certain groups, exacting revenge on the inmate, or satisfying their own perverse desires. Consequently, the inmate becomes merely a tool for the perpetrator's personal objectives. Once this "end-means" relationship is established between the perpetrator and inmate, the perpetrator inevitably assumes a position of superiority over the inmate, which contradicts the elementary humility expected of a moral agent. Elementary humility demands that even the most heinous terrorists be treated with basic

²⁹ Ibid., 187-189.

³⁰ Ibid., 187-188.

³¹ Although Kramer experienced a shift in perspective regarding the exploration of the evils of torture, he does not consider the inmate-centered viewpoint to be useless. He advocates for the two perspectives to complement each other. This complementary relationship is reflected in two aspects: firstly, in the vast majority of cases, focusing solely on the harm inflicted on the inmate is sufficient to explain the evils of torture and why it should be prohibited; secondly, even when adopting a perpetrator-centered perspective, one cannot overlook the inmate's ordeal in the context of torture, as the latter forms the foundation of the former.

concern. This basic concern is not shown because of the importance of the inmate's interests, but because its absence signifies a loss of elementary humility. Such a loss indicates that the perpetrator, through an act of self-aggrandizing, is tarnishing their own moral integrity.³²

Kramer is not the only scholar who holds a perpetrator-centered perspective. David Rodin posits that the rejection of torture is a shared collective communal value commitment: our community is dedicated to certain values that ought to be cherished, including the prohibition of torture. These values impose limitations on the exercise of power by governments and officials, and governmental actions must reflect and be constrained by these values. Any actions that breach these value constraints are a violation of the virtues of communal commitment. This value shall be absolutely recognized and adhered to, even at the cost it may entail — such as the life loss of innocent citizens at the hands of terrorists.³³ This viewpoint was once expressed more plainly by U.S. Senator John McCain: Despite that we are combating terrorists who do not respect human life and rights, that we are better than the terrorists, and that we will ultimately triumph over evil, we cannot employ evil means to combat evil; this is not about who they are, but about who we are — it is precisely these values concerning good and evil that distinguish us from our enemies.³⁴ Xia Yong believes that even if the perpetrator can justify their actions in the name of the state or a sacred mission, the act of torture still results in the degradation of their own morality, inflicting deeper and more lasting harm on the perpetrator themselves.³⁵

However, why does rising above a terrorist contradict one's elementary humility? In Kramer's view, it is because a terrorist remains a human being. Acts such as torture, which exploit the capacity of independent and sentient beings to feel pain and vulnerability, do not regard the inmate as a person but rather as a tool, turning them into a puppet. Yet, according to Kramer, the issue is not about the terrorist's interests. When terrorists choose to lead a morally reprehensible life, their interests lose moral significance. This fundamental concern arises from the moral integrity required of ethical agents: as long as the interaction between the perpetrator and the inmate is a legitimate moral interaction, the perpetrator must acknowledge the inmate as a human being and cannot elevate themselves

³² Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 189-192.

³³ David Rodin, "Torture, Rights, and Values: Why the Prohibition of Torture is Absolute," Carnegie Council, accessed April 30, 2023, https://www.carnegiecouncil.org/studio/multimedia/20080626_torture-rights-and-values-why-the-prohibition-of-torture-is-absolute.

³⁴ John McCain, "It's About Us," 33 *Human Rights* 1 (2006): 20-22.

³⁵ Xia Yong, *The Philosophy of Civil Rights in China* (Beijing: SDX Joint Publishing Company, 2004), 303-304.

to a position of overweening dominance relative to the inmate — and thus relative to “humanity.” Such a position of excessive dominance, in Kramer’s view, is akin to a god-like status, inevitably leading to the moral inflation and corruption of the perpetrator.³⁶

D. Examination of Kramer’s approach

We shall evaluate Kramer’s view of the evils of torture through three criteria: first, whether the argument contains any logical flaws; second, whether it can elucidate the uniqueness of torture; and third, whether it is applicable to all forms of torture.

Regarding the first criterion, there are significant flaws in Kramer’s argumentative logic that compel us to abandon a perpetrator-centered argument. In essence, Kramer’s assertion that torture undermines the moral integrity of the perpetrator is fundamentally based on the premise that the inmate has rights and that their interest in being free from torture still holds moral significance. We might question Kramer: Why does torture compromise the perpetrator’s moral integrity? Kramer might argue that it is because the moral status of the inmate as a human being is at play: the act of attempting to degrade another is an affront to their moral status as a person, and thus the perpetrator fails to maintain basic decency, leading to the erosion of their moral integrity. In other words, Kramer’s argument presupposes that the inmate remains a human being and should be treated as such. This explanation is essentially still an inmate-centered stance: precisely because the inmate’s moral status as a human is significant, the perpetrator’s elevation of themselves above the inmate’s status is detrimental to their own moral character, making the act of undermining the inmate’s human status wrong. In reality, any argument concerning torture that appeals to a perpetrator-centered perspective is destined to face similar layers of inquiry, and the responses to these inquiries inevitably lead back to an inmate-centered position. This is because the notion that torture undermines the perpetrator’s moral integrity is merely a consequence, not the reason why torture is inherently wrong.³⁷

Regarding the second criterion, Kramer’s approach also seems to struggle to provide an answer to the uniqueness of the evils of torture. Why is it that only torture places the perpetrator in a position of excessive arrogance? In practice, many victims of intentional homicide and assault are often defenseless, with the perpetrator wielding absolute power, relishing in the act of harming others. Such acts of killing and injury are also likely to lead to the criminal’s self-aggrandizement. It is so unless Kramer can demonstrate that the moral

³⁶ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 192.

³⁷ F. M. Kamm, *Ethics for Enemies: Terror, Torture, and War* (Oxford: Oxford University Press, 2011), 50-51.

corruption inflicted upon the perpetrator is uniquely distinct, he has not succeeded in doing so.

Regarding the third criterion, Kramer's approach can account for most forms of torture, yet it still fails to encompass certain forms. Although this is an intentional outcome by Kramer, this paper shall demonstrate that a proper theory of the evils of torture should encompass all forms of torture. Furthermore, Kramer's view that some forms of torture do not share the evils of torture is mistaken.

Among the forms of torture that can be included, the most comprehensible are intimidatory torture and abusive torture. The torment inflicted to deter or satisfy one's own desire for violence exploits the inmate's vulnerability to pain, instrumentalizing their capacity to feel suffering.³⁸ Thus, we can assert that the perpetrator does not regard the inmate as "a person," but rather exploits them, thereby assuming a morally inflated position.

When considering punitive torture — torture not intended as a deterrent — Kramer requires a more nuanced explanation, one that is based on a moral integrity slightly different from the basic moral integrity previously discussed. One might ask: when a heinous criminal — such as one who tortures innocents — awaits sentencing, wouldn't it be best to impose torture as punishment based on the principles of retributivism? Retributivism demands proportionality between the severity of the punishment and the gravity of the crime, as well as between the wrongful nature of the crime and the restorative nature of the punishment. Moreover, the principle of minimal harm seems to suggest that torture, rather than the death penalty or liberty penalty, should be inflicted on the criminal, as it causes less harm from the perspective of the criminal's personal interests. In response to this dilemma, Kramer argues that we must first understand the purpose of just punishment and the purpose of using torture as a punitive measure. The aim of just punishment is "retribution," not "revenge." Retributivism seeks to achieve morally valuable goals through the implementation of punishment: upholding the victims of crime, maintaining the moral order of the community, and counteracting the self-indulgence of criminals in their moral decline. Retributivism does not demand the execution of revenge or the satisfaction of vengeful impulses; it is not an ideology of tit-for-tat vengeance. If retributivism were about revenge and vengeance, it could not provide a moral justification for punishment and would not be one of the foundations of a righteous system of governance. So, is the purpose of punishment through torture retribution or revenge? In Kramer's view, the purpose of torture is to exact revenge on the criminal: if it were for retributive

³⁸ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 203-204 and 210-212.

purposes, torture would not be the sole option, as those responsible for prescribing or executing punishment could also choose fines, imprisonment, or humane execution. Given this, a judge's decision to impose brutal torture on a criminal is an act of revenge, otherwise, such a verdict cannot be reasonably explained. Moreover, such a verdict would directly cater to the public's vengeful impulses, especially those who have suffered directly from the criminal's actions. If the aim of a criminal justice system is to exact revenge on criminals, then the moral integrity of the rule-makers and perpetrators within this system, as well as the society that uses punishment as a means of revenge, would be tainted. Therefore, if legal officials employ torture as a punitive measure, they transform their just punitive endeavor into a tool for pursuing the pleasure of revenge, crudely pandering to sadistic vengeful instincts, thereby stripping the system of its moral justice.³⁹

However, does the use of capital punishment or imprisonment in punishment not encounter such issues? According to Kramer, it does not. Firstly, we need not consider capital punishment and imprisonment from the perspective of the degree of harm, as the interests of the punished are not of importance. Secondly, capital punishment and imprisonment do not involve the moral corruption of the executor. The purpose of capital punishment is not to exert control over the criminal, but to terminate a life that, if allowed to continue, would constitute a prolonged affront to humanity. Any such execution carried out in the most humane manner technically feasible does not intentionally exploit a person's vulnerability during intense pain, nor does it deliberately cater to a desire for vengeance. Therefore, the execution of capital punishment does not involve the degradation of the executor's moral integrity.⁴⁰ If this holds true for capital punishment, the same applies to imprisonment.

Kramer posits that according to the concept of inquisition by torture, the perpetrator exploits an asymmetrical relationship and inflicts pain to coerce the inmate into compliance, thereby achieving more minute control over the inmate. This dynamic reduces the inmate to a mere puppet or tool at the perpetrator's disposal, elevating the perpetrator to a god-like position of dominance. Such a level of control is beyond what a human should possess, and it undermines a crucial quality of the perpetrator's moral integrity — maintaining elementary humility.⁴¹ The act of "divulging information" is merely a specific form within the broader concept of "an act." If there is no significant difference in content between divulging information and other forms of acts⁴², then there is no moral

³⁹ Ibid., 204-209.

⁴⁰ Ibid., 198-199.

⁴¹ Ibid., 192-196.

⁴² The moral nature of actions is influenced by the specifics of the acts and the information divulged. Coercing someone to divulge personal information through the inquisition by torture, or forcing someone to provide

distinction between them. Therefore, the analysis of the moral evil and permissibility of inquisition by torture equally applies to coercive action torture.

However, Kramer contends that the evils of torture do not extend to coercive omission torture. Beyond the aforementioned Bomb Case 2, there are numerous instances in police practice that can be classified as this form of torture. For example, police often employ pain — such as twisting a suspect's arm behind their back and forcing them to the ground — to compel a suspect to relinquish a weapon (this is coercing the suspect into an omission). This method is not only permissible but also a duty of the police. By intuitive and practical standards, such actions are clearly distinct from typical torture, and we do not perceive the police as placing themselves in a position beyond human morality or compromising their moral integrity. Kramer supports this view, thus his approach is to acknowledge these actions as torture but deny that they inherently carry the evils of torture, considering them rare exceptions within the category of torture. Kramer argues that the essential distinction between coercive action torture, inquisition by torture, and coercive omission torture lies in whether the coerced action is an act or an omission. This fundamental difference can explain why the moral integrity of the police in Bomb Case 2 remains unaffected.⁴³ In Bomb Case 1, the police action aims to elicit an active behavior, thereby narrowing the inmate's choices, so the coercive action torture and the inquisition by torture exert a more refined control over the inmate. In Bomb Case 2, the police action seeks to have the terrorist abandon a small set of actions, which Kramer believes does not imply an overly arrogant dominion, as it does not reduce the inmate to an object or puppet, but merely prevents them from engaging in certain egregiously wrongful acts.⁴⁴ Indeed, the set of actions to which the inmate is driven is significant, and the number itself should hold moral weight. Consider the difference between preventing someone from playing football and allowing them only to play football; these represent different degrees of control over a person, with distinct moral implications, the former being a more minute control. Since coercive omission torture does not constitute refined control over a person, the moral integrity of the perpetrator remains untainted, and thus coercive omission torture does not inherently carry the evil

sexual services under duress, is morally reprehensible. However, in a ticking bomb scenario, the information divulged and the actions in Bomb Case 1 pertain to external matters and public affairs, which do not exacerbate the inquisition by torture and the torture.

⁴³Kramer acknowledges that both are similar in the following aspects: (1) the perpetrators act to prevent extremely serious criminal activities; (2) the perpetrators are indifferent to the physical and psychological well-being of the inmates; (3) the perpetrators exploit the inmates' sensitivity and vulnerability to pain; (4) both lead to the inmates' self-betrayal. See Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 192.

⁴⁴ *Ibid.*, 192-194.

of torture.

Although Kramer astutely captures the uniqueness of coercive omission torture, his explanation is fraught with severe issues. On one hand, the distinction Kramer makes between coercive omission torture and coercive action torture is difficult to discern from the perspective of the perpetrator. While there is a difference in control between coercive omission torture and coercive action torture, this difference should manifest as varying degrees of harm to the autonomy of the inmate, rather than concluding that such torture does not compromise the moral integrity of the perpetrator. In other words, whether the inmate is driven into narrower or broader behavioral choices merely affects the inmate differently. However, for the perpetrator, both forms involve disregarding the inmate's interests and achieving their own goals in a domineering manner, making it challenging to see how torture affects the moral character of the perpetrator differently. Kramer needs to draw a clear line regarding the impact of coercive action and coercive omission torture on moral integrity, but the boundary he provides is vague. Moreover, and most critically, even if Kramer's distinction between the two forms of torture holds from the perpetrator's perspective, his view on the evils of torture still fails. If Kramer claims that the evils of torture he discusses are the inherent moral harm of torture, then it should be a characteristic that necessarily accompanies all forms of torture. This characteristic might be justified as permissible in certain contexts, but it cannot be absent in some situations. Therefore, if Kramer's explanation of the evils of torture cannot encompass coercive omission torture, his view on the evils of torture is inevitably not an inherent harm of torture.

III. Is There Such a Thing as Permissible Torture?

In the first section, this paper introduces two mainstream responses to Problem 2 of torture. Both acknowledge that torture should be strictly prohibited in ordinary circumstances, yet they diverge on its permissibility in unique situations. These unique scenarios — primarily exemplified by the scenario ticking bomb situation — are characterized by the following: (1) there is unlawful harm in urgent circumstances; (2) the person subjected to torture is a culpable wrongdoer; (3) the use of torture is the most necessary and proportionate means at the moment. The absolute prohibition stance maintains that torture shall remain absolutely forbidden even in such cases, while the strong permissibility stance argues that torture is entirely justified in these circumstances. The former fails to address the intuitive rejection, whereas the latter cannot convey the uniqueness of the evils of torture.

Kramer's approach adeptly circumvents the shortcomings of the aforementioned views. In the second section, this paper shall present and rationalize Kramer's scheme. In essence, Kramer astutely identifies that scenarios like the ticking bomb scenario inherently constitute moral conflict

dilemmas: in such cases, there exist two conflicting moral obligations, where the weightier obligation (using torture to save innocents) is deemed the morally optimal choice, temporarily overriding the lesser obligation (prohibiting torture). His theory accommodates both the intuitive rejection and the intuition of exceptional cases. However, this does not imply that Kramer's view of torture is the ultimate solution. In the third section, this paper will offer a critical sublation of aspects of his viewpoint: we must acknowledge that scenarios like the ticking bomb scenario are fundamentally moral conflict dilemmas, yet recognize that Kramer's approach falls short in addressing the "existence issue" and the "*prima facie* issue" concerning the moral obligation to prohibit torture.

A. Absolute prohibition and strong permission theories

The absolute prohibition argument can be divided into three categories. The first category appeals to the external harm caused by torture, focusing solely on the potential adverse effects on society, without considering the inherent internal harm of torture. This approach relies on a simplistic consequentialist calculation.⁴⁵ Since external harm does not necessarily occur and it is difficult to ensure that torture is always more harmful than beneficial in any scenario, we cannot conclude that torture should be unconditionally and permanently prohibited. The

⁴⁵Scholars who argue for the absolute prohibition theory based on the external harm of inquisition by torture contend that the use of inquisition by torture by the state in individual cases will inevitably lead to its normalization and routinization, failing to maximize consequential benefits. Shue, drawing on the slippery slope theory, asserts that inquisition by torture will never occur just once; it possesses an uncontrollable expansiveness. The allowance of inquisition by torture in emergencies will ultimately lead to the generalization of "emergencies". Thus, regardless of how stringent the conditions we impose on the institution of inquisition by torture, once the Pandora's box of torture is opened, it will have ample time to break free from constraints and evolve into a dreadful "administrative practice." See Henry Shue, "Torture," *7 Philosophy and Public Affairs* 2 (1978): 138. Bob Brecher argues that inquisition by torture will not be confined to culpable criminals; their families, friends, and even innocents may become inmates. Allhoff also acknowledges that, according to utilitarian principles, it may be necessary to conduct inquisition by torture the innocent family members of terrorists. However, Allhoff does not consider this wrong. In his view, from the utilitarian perspective, the moral status of the inmate (whether they are combatants) is not truly important; what matters is whether the total value of other lives to be taken away is sufficiently high to justify the cost of inquisition by torture. See Fritz Allhoff, *Terrorism, Ticking Time-Bombs, and Torture: A Philosophical Analysis* (Chicago: The University of Chicago Press, 2012), 114-115. Inquisition by torture will not be limited to counter-terrorism; it will extend to other areas such as drug crimes, smuggling, serial murder, espionage, financial and economic crimes by officials, grand theft, corporate extortion, and child pornography. See Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell Publishing, 2007), 59-60; Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument," *23 International Journal of Applied Philosophy* 3 (2006): 364. Vittorio Bufacchi and Jean Maria Arrigo further supplement these concerns from the perspectives of medical, technological, military, and legal systems, arguing that state-sanctioned inquisition by torture will corrode these sectors. See Vittorio Bufacchi and Jean Maria Arrigo, "Torture, Terrorism and the State: a Refutation of the Ticking-Bomb Argument," *23 International Journal of Applied Philosophy* 3 (2006): 362-369.

second category appeals to the harm inflicted on the inmate, arguing that torture violates the inmate's rights and should therefore be absolutely prohibited. This perspective requires further proof of what specific rights the inmate possesses and whether these rights are absolute. Such an approach is still flawed. If one argues that the inmate has a "right not to be attacked as a defenseless person," then considering that defenseless individuals can still pose threats and are liable to defensive force, torture becomes permissible. Moreover, in special circumstances, harming non-combatants, defenseless individuals, or those not liable to harm is also permissible.⁴⁶ If one argues that the inmate has a "right not to be coerced through pain," this right is not absolute either, as demonstrated by the permissible actions of the police in the previously mentioned Bomb Case 1. More importantly, even if we acknowledge that terrorists have a right not to be tortured (without delving into the specifics of this right), and even if this right plays a trump card role⁴⁷, it does not mean the right is absolute, and it cannot support the absolute prohibition argument. For one thing, rights as trump cards do not imply that they cannot be lost, as seen in legitimate self-defense: Person A has the right not to be harmed, but when A maliciously harms innocent Person B, and B retaliates with defensive force, A's right not to be harmed is lost. Thus, rights as trump cards can be perfectly compatible with the view that rights can be forfeited. The strong permissibility argument will later assert that the right of wrongdoers not to be tortured has been forfeited, and the absolute prohibition argument is unreasonable. For another, if a right has not been forfeited, a right as a trump card does not mean it cannot be justifiably infringed. According to Dworkin, to protect the important rights of others, to avoid a disaster, or to safeguard a significant public interest, it may be necessary to infringe on a person's rights; Dworkin emphasizes that judgment should not be based solely on interests. More importantly, the concession of individual rights in an emergency does not negate the priority of rights but rather protects the mechanism for safeguarding rights — the state power — whose fundamental purpose remains the protection of the rights system.⁴⁸ The third category appeals to the harm inflicted on the perpetrator: given the significant impact of torture

⁴⁶ In the case of the "armory incident," during a war where Country A is resisting the unjust aggression of Country B, if the forces of Country A were to destroy an armory belonging to Country B and it could prevent an impending battle and avert significant casualties, the bombing is still deemed permissible in this context, even though the destruction of the armory might result in the death of an innocent child nearby, infringing upon the child's right to life.

⁴⁷ Ronald Dworkin, "Rights as Trumps," in *Theory of Rights*, translated by Liu Xiaoping and Guo Jianguo, edited by Zhu Zhen (Beijing: SDX Joint Publishing Company, 2020), 299-305.

⁴⁸ Liu Yesheng, "Dilemmas of Priority of Rights and Their Solutions," *Global Law Review* 6 (2017): 134-139.

on the perpetrator, torture should be absolutely prohibited.⁴⁹ This view is similar to Kramer's perspective, so they face the same issues as Kramer did previously. More importantly, this view faces the same challenge as all absolute prohibition advocates: how to respond to the "intuitive rejection": should we allow the death of innocents to avoid using torture? Although this is merely an intuitive challenge, this intuition is strong and compelling.

The concept of "strong permissibility" is one employed by Kramer. When an actor is strongly permitted to do something, they bear no moral obligation to refrain from that action. The strong permission theory posits that in certain situations, the use of torture is entirely justified, neither infringing upon rights nor violating obligations. In contrast, the absolute prohibition theory asserts that in such scenarios, the actor has only the moral obligation to refrain from using torture, without any opposing rights or obligations. The strong permissibility theory contends that the moral obligation to prohibit torture is overridden, and the normative force of an overridden obligation is annulled, replaced, or suspended.⁵⁰ The strong permissibility theory does not face the challenge of intuitive rejection, as they believe that under specific conditions, the right of the inmate not to be subjected to torture can be forfeited. This right forms the basis for the prohibition of torture, and thus, the perpetrator no longer bears the moral obligation to refrain from torture, rendering its use entirely justified. This stance is also referred to as the "rights forfeiture theory." In scenarios such as the ticking bomb scenario, the rights forfeiture theory often uses legitimate self-defense as an argument, asserting that cases like the ticking bomb fully meet the criteria for legitimate self-defense. The right of the inmate not to be tortured is considered forfeited, akin to that of the right of a brutal murderer not to be killed in legitimate self-defense.⁵¹ Legitimate self-defense must satisfy the following conditions: the existence of an indefensible real harm, the harm is imminent, the defended is a culpable aggressor, the defensive means are necessary, and the defensive means are proportionate.

The paper posits that case akin to the ticking bomb scenario meets the criteria for legitimate self-defense. However, it does not consider the rights

⁴⁹ David Rodin, "Torture, Rights, and Values: Why the Prohibition of Torture is Absolute," available at the Carnegie Council: <https://www.carnegiecouncil.org/studio/multimedia/20080626-torture-rights-and-values-why-the-prohibition-of-torture-is-absolute>. Additionally, consider John McCain's article "It's about Us," 33 *Human Rights* 1 (2006): 20-22. See Xia Yong, *The Philosophy of Civil Rights in China* (Beijing: SDX Joint Publishing Company, 2004), 303-304.

⁵⁰ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 10.

⁵¹ Cheng Long, "Rescue Torture in Terrorist Crimes: Justification and Limits," *Tribune of Political Science and Law* 5 (2020); Zhang Mingkai, *Criminal Law (Fourth Edition)* (Beijing: Law Press • China, 2011), 95; Uwe Steinhoff, *On the Ethics of Torture* (New York: State University of New York Press, 2013), 11-18.

forfeiture theory as the optimal justification for the permissibility of torture. In truth, the rights forfeiture theory fails to account for the right not to be tortured — at least for most rights not to be tortured — as a unique category of rights that may not be forfeited. This non-forfeiture of such rights is not due to the greater value of the interests they protect, but because torture inflicts a unique form of evils, violating a unique kind of interest of the inmate. In other words, the issue at hand concerns the nature of the protected interests, not merely their magnitude, and the rights forfeiture theory is incompatible with this consideration.

Thus, the rights forfeiture theory faces at least three challenges. Firstly, this perspective struggles to address the intuition of exceptional cases of torture. Since the rights forfeiture theory focuses solely on comparing the degree of harm, juxtaposing acts that superficially appear more harmful than torture yet are permissible, such as killing or severely injuring offenders, scholars of the rights forfeiture theory fail to demonstrate what makes torture unique or what its unique characteristics are. Secondly, there are challenges rooted in solid practices and moral intuitions. A wealth of practices and moral intuitions support the notion that the right not to be tortured is non-forfeitable. Beyond the aforementioned provisions of international law, many viewpoints argue that torture, due to its degradation of human dignity, renders the right not to be tortured non-forfeitable.⁵² Although this paper does not agree with the overly “absolute” wording of the aforementioned related laws or the use of dignity to argue for the absolute prohibition of torture, it acknowledges the principles and intuitions underlying this phenomenon: certain rights and forms of harm are unique, and no people deserve to be treated in such a manner. Thirdly, torture could be unreasonably expanded. The harm caused by legitimate self-defense can be less than, equal to, or slightly greater than the harm it seeks to prevent. Thus, this challenge can be posed in the following form: if the right not to be tortured is forfeitable, why is inquisition by torture confined to such a narrow scope as the ticking bomb scenario? Why could it not be applied to urgent situations in drug crimes, economic crimes, espionage, and other areas where killing suspects is equally permissible?⁵³

B. Kramer-esque weak permissibility theory

The absolute prohibition theory fails to address intuitive rejection, while the strong permissibility theory conflates torture with acts such as murder and grievous harm, failing to highlight the uniqueness of torture. Academic discourse seems to have reached an impasse at this point. However, Kramer’s approach breaks this deadlock, as his view of torture accommodates both intuitions. In

⁵² Wang Gang, “Torture for Rescue Purposes and Legitimate Self-Defense — An Analysis of the Most Controversial Criminal Law Issue in Post-War Germany,” *Tsinghua University Law Journal* 2 (2010): 34-44.

⁵³ Bob Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell Publishing, 2007), 59-60.

Kramer's view, both the absolute prohibition and strong permissibility theories oversimplify the issue. In the ticking bomb scenario, we are actually faced with a complex moral conflict, which both the absolute prohibition and strong permissibility theories overlook.

In Kramer's view, moral conflict scenarios involve two *prima facie* moral obligations with contradictory contents. We must decide which obligation to be fulfilled based on their moral significance. Choosing to fulfill the more significant moral obligation, according to the comparison of their importance, will be the morally optimal solution. However, "*prima facie*" implies that the less significant moral obligation is merely overtopped, not overridden. "Overtopped" means that the obligation retains its normative efficacy, indicating that even if not fulfilling it is the morally optimal solution, it is still morally wrong not to fulfill it. This also implies that the actor should bear a remedial obligation afterward, and if the actor does not undertake this remedial obligation, the original obligation should not be overtopped.⁵⁴ Since a moral obligation that retains its normative force is overtopped, fulfilling the morally optimal choice is not a strongly permissible act; it is only a weakly permissible act. Weak permissibility means that when an actor does something permissible, they still face some opposing moral obligations that can be overtopped in specific circumstances.⁵⁵

The "Cabin in the Snowstorm" case illustrates the occurrence of moral conflict. A courageous mountaineer, caught in a blizzard during an expedition, found himself lost, cold, and hungry. In his moment of despair, he stumbled upon a cabin. Upon reaching it, he discovered it was unoccupied. To save his life, he had no choice but to break open the door and seek shelter inside. The mountaineer used the wooden furniture as fuel to light the fireplace for warmth and consumed much of the food within.⁵⁶ In this case, the cabin owner's rights to their property were not forfeited, and the mountaineer had an obligation not to infringe upon these rights. However, the mountaineer had a compelling moral reason — preserving his own life — that outweighed this obligation, making his choice the most morally optimal at the time. Nonetheless, despite his choice being optimal, he still violated the owner's rights and breached his duty, thus committing moral wrongdoing for which he must bear compensatory responsibility.

In the ticking bomb scenario, following the reasoning of Kramer, considering the moral integrity damage inflicted on the perpetrator and the

⁵⁴ Matthew H. Kramer, *Torture and Moral Integrity: A Philosophical Enquiry* (Oxford: Oxford University Press, 2014), 2-11.

⁵⁵ *Ibid.*, 5-6.

⁵⁶ Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," 7 *Philosophy and Public Affairs* 2 (1978): 102.

police's duty to protect public safety, the police face two conflicting moral obligations: to employ disaster-preventive torture or to prohibit its use. Given the urgency of the situation and the significant stakes involved, the moral imperative to use disaster-preventive torture outweighs the obligation to prohibit it, making the former the morally optimal choice. Thus, the use of inquisition by torture receives weak permissibility. However, the moral obligation to prohibit disaster-preventive torture retains its normative efficacy, and the use of inquisition by torture remains morally wrong, necessitating the police to undertake remedial obligations afterward.

Compared to the absolute prohibition and strong permissibility theories, Kramer's view of torture offers two significant advantages. Firstly, he accurately recognizes that torture cases like the ticking bomb scenario are essentially moral dilemmas characterized by conflict, whereas the other two viewpoints are overly simplistic and fail to grasp the complexity of the situations we face. Secondly, his view of torture balances the intuition of exceptional cases and the intuitive rejection. His approach embodies a dual nature of being "morally optimal" and "optimal yet wrong." "Morally optimal" suggests that the police should not allow innocent lives to be lost, while "optimal yet wrong" indicates that resorting to inquisition by torture in such dilemmas remains a moral wrongdoing, thus rendering inquisition by torture abhorrent. Furthermore, within Kramer's theoretical framework, the moral wrongdoing of inquisition by torture lies in its destruction of the moral integrity of the perpetrator, which also elucidates the uniqueness of the evils of torture.

C. Acceptance and rejection of the Kramer's approach

Kramer has made two significant contributions to academia on the issue of the permissibility of torture. Firstly, he accurately identifies that the scenarios we face are essentially moral conflict dilemmas. Secondly, he offers a resolution to these moral conflict dilemmas by suggesting that we should compare the moral significance of the relevant obligations, acknowledging that the moral obligation with less moral significance should be overridden, and that we should fulfill the moral duty with higher moral significance. Furthermore, he recognizes that fulfilling the weightier moral obligation is the morally optimal yet wrong action, and the actor must assume remedial obligations. In fact, only by acknowledging these two points can we reconcile the intuition of exceptional cases with the intuitive rejection.

However, on a more detailed level, Kramer's approach still exhibits shortcomings, primarily in his failure to provide a reasonable explanation for the "existence issue" and the "*prima facie* issue" concerning the moral obligation to "prohibit the use of torture." In other words, Kramer's account of why the obligation to prohibit the use of torture exists is unsuccessful, and he also fails to elucidate why this obligation is *prima facie*.

Regarding the issue of existence, Kramer posits that the moral obligation to

prohibit torture is founded on the premise that torture corrupts the moral integrity of the perpetrator. However, based on the following three reasons, we can argue that his viewpoint is flawed. Firstly, the basis for this prohibitive obligation should be that torture inflicts harm on the inmate, not the perpetrator. As previously mentioned, his explanation of why torture is evil is inherently flawed; a perpetrator-centered stance is not the best explanation for the evils of torture. The corruption of the perpetrator's moral integrity is merely a consequence, whereas the fundamental reason torture is evil is that it is a treatment the inmate should not endure. Secondly, this perspective inverts the logical relationship between rights and obligations. Kramer also acknowledges that wrongdoers have the right not to be tortured, but he believes this right is based on the perpetrator's obligation, which in turn is based on the importance of the perpetrator's own moral integrity. However, this logic of rights being based on obligations is quite absurd. If a wrongdoer wishes to invoke this right to interfere with torture, according to Kramer's logic, the reason the inmate can present during the torture would be the same as that of an observer: "My (the inmate's) interests are not important, but hitting me will tarnish your (the perpetrator's) soul, so you should stop the torture." Such a claim from the inmate is clearly inappropriate. On the contrary, if a wrongdoer has a right, then this right should form the basis of the perpetrator's prohibitive obligation, and the foundation of this right should be the wrongdoer's own interests: "Because I am still human, please treat me humanely." Thirdly, ethical wrongs do not necessarily generate prohibitive obligations. According to Kramer's reasoning, the reason for the moral obligation to prohibit torture should be a "wrongness theory": although torture is merely a wrong act that does not involve harming others for the perpetrator, it corrupts the perpetrator's moral integrity, so torture should be prohibited. The fact that torture corrupts the perpetrator's moral integrity should undoubtedly be a reason for the perpetrator to act, but can this reason become an exclusive reason like an obligation? A definitive answer is not easily given. Especially when we consider the right to do wrong,⁵⁷ we have the freedom in wrongs that do not involve others, so many ethical wrongs do not constitute prohibitive obligations. Kramer must prove that the moral integrity he advocates can generate obligations, which he has not done. Conversely, the "mistreatment theory" is more coherent on this issue. The distinction between wrongness theory and mistreatment theory stems from the difference between wrongs and mistreatment. A wrong is an act that is merely morally wrong but does not involve infringing on the rights of others. Mistreatment is not only a morally wrong act but also implies an infringement on the rights of others, so the occurrence of mistreatment is

⁵⁷ Jeremy Waldron, "The Right to Do Wrong," in *Theory of Rights*, translated by Zhu Wanrun, edited by Zhu Zhen (Beijing: SDX Joint Publishing Company, 2020), 313-330; Fan Libo, "The Intrinsic Morality of Rights and the Right to Do Wrong," *Ecupl Journal* 3 (2016): 16-25.

necessarily associated with the mistreated having rights and the mistreater having obligations (the obligation not to infringe on the rights of the mistreated).⁵⁸ To adhere to the mistreatment theory, we need to maintain an inmate-centered perspective and strive to prove that torture is a treatment the wrongdoer does not deserve and is an infringement on their rights.

Kramer offers no explanation as to why the obligation to prohibit torture is considered *prima facie*. However, this issue is of great importance, as the *prima facie* nature directly relates to whether moral dilemmas can exist. In other words, if an obligation is not *prima facie*, it can be overridden rather than overtopped in conflicts with other obligations, thus eliminating the moral dilemma. The *prima facie* nature of an obligation is guaranteed by the content it involves (or the object it protects). Since Kramer believes that the moral obligation to prohibit torture safeguards the moral integrity of the perpetrator, he needs to explain why the moral integrity involved is important and to what extent. Conversely, if we consider the perspective of the inmate and use the mistreatment theory to justify the moral obligation to prohibit torture, then the issue of the *prima facie* nature of the moral obligation to prohibit torture becomes a question of the *prima facie* nature of the right not to be tortured. We then need to demonstrate that this right is non-forfeitable, which is related to the harm that torture inflicts on the inmate and why such harm is related to uniqueness.

VI. Conclusion: Possible Directions

After the intricate discussion above, we have yet to reach definitive conclusions on the two moral dilemmas. However, we are not without gain. By examining Kramer's approach, we have acquired valuable insights and the ability to propose new ideas. Below, this paper shall summarize the experiences we have gained from the two moral dilemmas and suggest possible solutions. A detailed argument for this approach will be reserved for another paper.

Regarding the "evils of torture," as discussed earlier, it is evident that an inmate-centered perspective is more effective than a perpetrator-centered one, as the former still relies on the latter. By maintaining an inmate-centered viewpoint, we can explore three potential ways: (1) uncovering new evils in the concept of torture, which are unique evils that distinguish it from other acts; (2) elucidating the transformative process of various evils in the concept of torture, and demonstrating that the transformed evils can constitute the evils of torture; (3) discovering a new combination of various evils in the concept of torture, and proving that this combination results in the uniqueness of the evils of torture. This paper posits that the third way holds the most promise. We can understand the combination of various evils in the concept of torture — "pain," "extreme asymmetrical relationships," and "evils unique to various forms of torture" — in

⁵⁸ Ariel Zylberman, "The Very Thought of (Wronging) You," 42 *Philosophical Topics* 1 (2014): 154.

an additive manner. An additive combination implies that the evils of torture are not singular, but rather a collection that encompasses multiple evils simultaneously. In other words, the inmate experiences the torment of multiple evils during torture, which remain independent and do not coalesce into a new evil, nor are they absorbed by any single evil among them.

If torture is the result of the confluence of multiple specific forms of severe evils, then the uniqueness of the evils of torture can be elucidated. This is because many harmful acts either do not simultaneously encompass multiple evils, do not contain evils of such severe magnitude, or do not involve evils of such malevolent nature. Should there indeed exist a harmful act that simultaneously embodies multiple specific forms of severe evils, we ought to regard it as a unique form of harm, akin to torture.

Regarding the permissibility of torture, it is prudent to acknowledge that scenarios like the ticking bomb scenario inherently belong to moral conflict dilemmas. However, in addressing the issues of prohibitive obligations and their *prima facie* nature, Kramer's approach should be revised from an inmate-centered perspective. Concerning the existence of the moral obligation to prohibit torture, it suffices to demonstrate that individuals generally possess the right not to be tortured. To substantiate this, we must return to the evils of torture. By adopting an inmate-centered perspective, proving that "the moral obligation to prohibit torture is *prima facie*" essentially means demonstrating that "the right of wrongdoers in the ticking bomb scenario not to be tortured is non-forfeitable." If we can prove that the right not to be tortured is non-forfeitable, then the conflicting moral norms in the ticking bomb scenario are the moral obligation to prohibit torture and the moral obligation or right to use torture.⁵⁹ How can we prove that torture should be used in such cases? Perhaps inspiration can be drawn from the "theory of urgent danger prevention" and Judith Thomson's rights infringement theory to address the permissibility of torture.⁶⁰ The transgression of a right can be either justified or unjustified, referred to as "rights infringement" and "rights violation," respectively, depending on whether the act of transgressing the right is supported by sufficiently weighty moral reasons.⁶¹ Since rights infringement does not equate to rights forfeiture, the infringed right and the obligation it supports still retain normative force. Thus, it remains essentially an infringing act, morally erroneous yet the best choice.

⁵⁹ The question of whether "using disaster-preventive inquisition by torture" constitutes a moral obligation or a moral right is a matter of debate: for the police, it appears to be an obligation, whereas for innocent civilians, if they can employ inquisition by torture for self-defense, it seems more a right than an obligation. This paper does not intend to delve into this issue, so it is briefly mentioned in the form of "moral obligation/moral right."

⁶⁰ Judith Jarvis Thomson, *Rights, Restitution, and Risk* (Cambridge: Harvard University Press, 1986), 40.

⁶¹ Chen Jinghui, "The Indispensable Right: Is It Tenable?," *Tsinghua University Law Journal* 2 (2020): 7-8.

(Translated by *PAN Yingzhao*)