Hearing a Still-Ticking Bomb Argument: A Reply to Bufacchi and Arrigo

J. JEREMY WISNEWSKI

ABSTRACT  My aim in this paper is to demonstrate that the recent anti-Ticking Bomb argument offered by Bufacchi and Arrigo is unsuccessful. To adequately refute the Ticking Bomb strategy, I claim, requires carefully addressing both policy questions and questions involving exceptional conduct.

In a recent paper, ‘Torture, terrorism, and the state: A refutation of the ticking-bomb argument,’ Vittorio Bufacchi and Jean Maria Arrigo claim to offer a refutation of the Ticking Bomb Argument. Their aim is to argue for ‘the unconditional refutation of any attempt to justify torture, under any circumstances’ (p. 355). The scope of the refutation, we can see, is meant to apply to all cases of the Ticking Bomb argument. To this end, Bufacchi and Arrigo argue that Ticking Bomb cases commit two fallacies: 1) a deductive fallacy, such that the inferences drawn from the Ticking Bomb scenario simply do not follow from its premises, and 2) a consequentialist fallacy. It is the latter fallacy that I will concentrate on, as it marks the central concern of the paper and, if correct, demonstrates a serious failure on the part of the many persons who currently employ Ticking Bomb arguments as a means of justifying certain (exceptional) uses of torture.

The Consequentialist Fallacy ‘points to the empirical evidence suggesting that the negative consequences of implementing a policy of torture interrogation outweigh any possible positive consequences; therefore argument for torture interrogation of terrorists can be refuted on consequentialist grounds’ (p. 355). Insofar as the aim of the argument is to demonstrate that torture policies have a net negative outcome, Bufacchi and Arrigo successfully make their case. The case against institutionalized torture is present here in summary:

The accuracy and speed of virtuoso torture interrogation dictate long advance preparation and coordination, and ultimately corruption, of many key social institutions. The principal parties actually include the medical establishment, the scientific establishment, the police, the military establishment, the judicial establishment, and a great many innocents falsely tortured.

It may appear that damages to democratic institutions are negligible compared to deaths of innocents because institutions can be repaired but the dead cannot be resurrected. Yet in country after country where alleged national security threats have resulted in the torture of domestic enemies – including Algeria, South Africa, Chile, Argentina, Uruguay, El Salvador, Guatemala, Ireland – human rights researchers have shown the failures of...
various programs of social repair. Criminal trials, truth commissions, reparations to victims, and community mourning rituals have all proved inadequate. Part of the difficulty of social repair is the high proportion of innocents who are tortured. Realistically, the moral calculus of the ticking-bomb argument should weigh (a) the evil of the murders of innocent victims against (b) the corruption of key social institutions, the evil of torture of many innocents mistakenly tortured, and the ruination of many torturers. (p. 367)

Bufacchi and Arrigo take this result to be a refutation of ‘the consequentialist reasoning used to justify interrogations’ (p. 362). As they put it:

We believe the ticking-bomb argument ultimately fails as a consequentialist argument because it ignores the intensive preparation and larger social consequences of state-sponsored torture. The validity of any consequentialist argument rests on a costs and benefit analysis. We argue that empirical evidence clearly suggests that institutionalizing torture interrogation of terrorists has detrimental consequences on civil, military, and legal institutions, making the costs higher than the benefits. (p. 362)

The problem here, I think, is obvious: not all consequentialist defences of torture – and certainly not all uses of the Ticking Bomb argument – advocate torture policy. A refutation of the view that we should implement a torture policy, it must be admitted, does not constitute a refutation of the Ticking Bomb argument itself (as the authors suggest in claiming that they will refute all instances of this argument). At most, revealing the Consequentialist Fallacy shows that any policy of torture will have ill effects such that said policies cannot be justified on consequentialist grounds. While this is not an unimportant result, it is hardly a refutation of those who utilize the Ticking Bomb argument for exceptional cases (and this is how most philosophers who are fans of this thought-experiment use it).

There are two broad pro-torture positions that tend to result from Ticking Bomb arguments. One position, championed by Alan Dershowitz, is that the Ticking Bomb argument gives us a substantial reason for implementing an actual policy of torturing persons – a policy replete with judicial oversight reminiscent of the ancien régime. Another position – and one that is by far the more common one in the literature – is that the Ticking Bomb argument demonstrates that torture is morally permissible in particular cases. As such, the Ticking Bomb argument does not have any particular bearing on questions of policy. Indeed, many argue that torture ought to be legally prohibited in all cases, but concede that the Ticking Bomb argument shows that the illegality of all acts of torture can in some cases be overlooked. This is precisely the view that was defended by the Israeli Supreme Court, which argued for an absolute ban on torture, but acknowledged that a necessity defence could be used when this law was broken. Importantly, this is not the same as allowing a policy of torture. It is, rather, a way of acknowledging that certain violations of the law admit of ex post ratification. Others have argued that the Ticking Bomb case provides another case where civil disobedience would be justified.

In all of these instances, then, there simply is no consequentialist fallacy – or, more carefully stated, Bufacchi and Arrigo have not demonstrated any such fallacy. The compelling case they present is only relevant to a minority position (the Dershowitz
view – a view that has been repeatedly criticized from a variety of angles), but leaves
unscathed the majority view: that torture should be banned absolutely as a legal
matter, and that it might nevertheless be morally permissible under certain cases. No
data about the ill effects of torture policies can demonstrate that this is false, and hence
Bufacchi and Arrigo have not accomplished their actual goal: refuting the Ticking
Bomb argument in all of its manifestations: Indeed, even two of the prominent legal
scholars Bufacchi and Arrigo mention do not fall prey to their consequentialist
arguments. John Parry and Richard Posner are opposed to torture policies, but nevertheless
claim that breaking the law in particular cases might be the right thing to do.9

It is here that I find Bufacchi and Arrigo’s article perplexing. As they note, the
Dershowitz view is quite distinct from the view advocated by Parry and Posner. Parry
claims that ‘we cannot completely reject the evil of torture as a method of combating
terrorism, regardless of what international law provides. If torture provides the last
remaining chance to save lives in imminent peril, the necessity defense should be
available to justify the interrogators’ conduct’ (p. 158). ‘Torture may be a legitimate
option – the lesser of two evils – in rare circumstances’ (p. 160). Posner’s view is no
less clear: ‘what is required is a balance between the costs and the benefits of particular
methods of interrogation . . . Certainly the costs include the horror that the term
“torture” evokes, but the costs can be outweighed by the benefits if torture is the only
means by which to save the lives of thousands, perhaps tens or hundreds of thousands,
of people. In so extreme a case, it seems to me, torture must be allowed’ (p. 293).

Bufacchi and Arrigo are clearly aware that this view is not the Dershowitz view. They
even remark that ‘the positions advocated by Dershowitz and Parry are radically
different, and should not be amalgamated’ (p. 358). They then go on, however, to
subject both views to a criticism based on the consequentialist fallacy, despite the fact
that this fallacy simply does not apply to cases where no torture policy is advocated.
Parry and Posner are certainly against a policy of torture – and for largely the same
reasons that Bufacchi and Arrigo offer.

The failure to make this distinction (between arguments about policy and arguments
about exceptional instances) when considering how the Ticking Bomb argument is
used significantly weakens the general argument Bufacchi and Arrigo present against
the Ticking Bomb strategy. The consequentialist argument they offer – and the evidence
they supply for it – only addresses cases where torture has been a policy of state. It
does not touch cases where the Ticking Bomb argument is utilized to justify torture in
particular cases, even though we might all agree that as a policy torture practices are
entirely unworkable.

Of course, if the majority view is refuted by the other fallacy Bufacchi and Arrigo
name (‘Deductive Fallacy’), then their argument can nevertheless be successful. I do
not think that this fallacy, however, does the work that the authors want it to. Allow
me to quote from their article at length:

The Deductive Fallacy occurs when a certain argument infers invalid
conclusions from certain premises, either because the conclusions rest on a
different set of premises, and/or because the premises don’t support the
conclusions. The ticking-bomb argument follows a deductive line of reasoning
concerning the efficacy of torture interrogation.

(P1): Terrorist is captured
(P2): If the terrorist is tortured, he/she will reveal information regarding the location of the primed bomb before the bomb detonates. Therefore (C1): Terrorist ought to be tortured. Therefore (C2): The information regarding the location of the primed bomb is retrieved. Therefore (C3): The bomb is found and disconnected before it explodes, saving the lives of many innocent people.

There are two sets of problems with this argument. The first problem is that the Conclusions C1, C2, and C3 do not follow from premises P1 and P2. In order to draw these conclusions, other ‘invisible’ premises must be in place. The second problem is that the premises (both visible and invisible) from which the ticking-bomb argument deduces its conclusions are illegitimate, being questionable from an empirical point of view.

In order to deduce Conclusions C1, C2, and C3, all the above premises are required:

(P1): Terrorist is captured.
(P1*): It is almost certain that this is the terrorist holding information regarding a primed bomb.
(P2): If the terrorist is tortured, he/she will reveal information regarding the location of the primed bomb before the bomb detonates. Therefore (C1): Terrorist ought to be tortured. Therefore (C2): The information regarding the location of the primed bomb is retrieved.
(P3): It is almost certain that the terrorist will reveal the correct information. Therefore (C3): The bomb is found and disconnected before it explodes, saving the lives of many innocent people.

All the premises in the argument are contentious from an empirical point of view. (pp. 360–361)

The remarks made by Bufacchi and Arrigo are quite compelling in one respect. As a deductive argument, the one presented above is indeed deeply problematic. As a deductive argument, Bufacchi and Arrigo criticize this view for the right reasons: intelligence is always fallible, torture is not always effective, torture is less likely to work in short time spans, torture elicits false information, etc. On all these accounts, the criticisms offered are spot on.

But Bufacchi and Arrigo are guilty of presenting a straw-man conception of the logic of Ticking-Bomb cases above, it seems to me. If someone utilized the Ticking Bomb argument as a deductive device to justify torture, they would be committing a series of logical errors. Bufacchi and Arrigo have successfully and skilfully shown this. This, however, is not typically how the argument is used (in fact, I do not think I have ever seen it used this way). The Ticking Bomb argument is used, rather, as a way of demonstrating that the in-principle moral ban on all torture has particular limitations. The argument works much like any intuition pump: it shows us that there are cases where our intuitions about the absolute moral impermissibility of some x are not nearly so strong as we initially thought. Once this is established, to borrow George Bernard Shaw’s famous wit, we only need to haggle over the price – that is, we only need to determine exactly what conditions must obtain for torture to be allowed. Thus, the
claim of a ‘deductive fallacy’ in this context strikes me as a red herring: all intuition pumps commit this kind of fallacy if we construe them as deductive arguments. The Ticking Bomb argument amounts, essentially, to the claim that there are cases under which a rational and moral person will be willing to condone torture. As such, I do not think Bufacchi and Arrigo have adequately demonstrated that the ‘Deductive Fallacy’ refutes the argument – unless it refutes all devices used to test our intuitions.

Admittedly, Bufacchi and Arrigo have shown that the Ticking Bomb case is unrealistic – but there has never been any doubt about that. To call a thought-experiment used to generate and test intuitions ‘unrealistic’ is like criticizing a dog for barking. Of course it’s unrealistic. The issue is what can be inferred from the thought-experiment as a whole (as well as the intuitions it generates). The issue is not whether the concocted scenario justifies by itself a policy of torture. By itself, the scenario justifies nothing – except perhaps the view that we should re-examine our intuitions about the absolute impermissibility of torture.

I am no fan of the Ticking Bomb argument. Much like the authors of the article I am criticizing, I am convinced that the argument is deeply misleading, and certainly must be addressed. The arguments presented by Bufacchi and Arrigo, however, do not yet constitute anything like a refutation of this argument in its most common form.10

J. Jeremy Wisnewski, Department of Philosophy, Hartwick College, Golisano Hall, #126, Oneonta, NY, 13820, USA. wisnewskij@hartwick.edu

NOTES


2 One of the primary articles used to defend the negative effects of torture policy here is L. E. Fletcher & H. Weinstein, ‘Violence and social repair: Rethinking the contribution of justice to reconciliation’, Human Rights Quarterly 24, 3 (2002): 573–649. I cite it here to give credit where credit is due.


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