
Introduction

In his critical analysis of torture, Henry Shue explains how ill-treatment is permissible only when it is the least harmful means available to secure a supremely important moral goal. Adding that this is nearly never the case, he nonetheless concludes: "An act of torture ought to remain illegal so that anyone who sincerely believes such an act to be the least available evil is placed in the position of needing to justify his or her act morally in order to defend himself or herself legally. The torturer should be in roughly the same position as someone who commits civil disobedience." (1)

This is an interesting analogy to say the least, particularly as the civil disobedient pursues the moral high ground, while the torturer plumbs the depths of depravity. But if we take the analogy seriously, then both the civil disobedient who defies local law and the nation that defies international law must defend themselves in the name of a higher moral good.

Within Israel, in the context of unusual public debate first aired in 1987, Shue's position corresponds to the "necessity defense" and constitutes the first crack in the bulwark erected by the international community against torture. Necessity offers a toehold to justify torture when a nation finds its life, or the lives of its citizens, threatened. Shue's discussion is largely theoretical, but the practical implications of the argument, that is, the imperative to articulate a higher moral good to permit ill-treatment, has occupied nearly all branches of Israel's government and all segments of its society.

Torture encompasses physically and/or psychologically painful methods designed to elicit information from an individual (interrogational torture) or to silence dissent and force citizens into strict compliance with government policy by brutalizing a limited number of individuals (terroristic torture). (2) While terroristic torture is indifferent to fatal outcomes, and may actually benefit from them, the avowed aim of interrogational torture is repudiated if the victim dies. Fatal outcomes aside, the sequelae of ill-treatment are well documented and endure long after torture ends. (3)

Today, torture is nothing less than a grave breach of international, humanitarian law. Opposition to torture rose in the wake of the Enlightenment, receded during the rampant nationalism of the late nineteenth and early twentieth centuries, and was again the focus of international concern as the savagery of the Second World War led to a succession of post-war treaties prohibiting torture under any circumstances. (4) By 1984, the international community resolved the issue unambiguously:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or threat of war, internal political instability or other public emergencies may not be invoked as a justification. (5)
Categorically phrased, the UN prohibition should preclude using torture in Israel as well. Nevertheless, Israeli practice belies this injunction. Although there is little doubt that the UN could not phrase its resolution in any other way without undermining its commitment to basic human rights, its very wording creates an acute dilemma for Israelis who are torn between the obligations of a democratic state and the "exceptional circumstances ... of war or threat of war." For nearly two decades Israel has publicly confronted this dilemma, first, in 1987, as the executive branch convened a state commission of inquiry to formulate guidelines for torture, then, more than ten years later as the judiciary repudiated these same guidelines, and finally in 1999, as the legislature sought to enact what must be the only torture law proposed by a democratic nation. This attempt at public discourse through formal institutions of government affords a fascinating case study of a democratic nation trying to come to grips with the limits that humanitarian law imposes on policy aimed to defend a nation against war and terror.

The History of the Torture Debate in Israel

Torture, Terror and the Palestinian-Israeli Conflict

The role of torture cannot be understood apart from the place terror plays in the Palestinian-Israeli conflict. Terror has accompanied periods of both conflict and peace. From 1987 until 1993, the years of the first uprising (intifada) and just about the time that torture first surfaced on the public agenda, 172 Israelis were killed in terror attacks. In 1993 the Oslo accords signaled the beginning of what many hoped would be a process leading to Palestinian statehood, yet by 1998, another 279 Israelis died in terror attacks. (6) This toll continued unabated as violent unrest erupted in 2000 following the collapse of Clinton's peace initiative.

While the role mainstream Palestinian leadership played in terror attacks prior to 2000 remains uncertain, terror attacks either by radical (Hamas, Islamic Jihad) or mainstream organizations (Fatah) formed an integral part of the fighting during the second Palestinian intifada that erupted late that year. Moreover, attacks on Israeli civilians commanded a certain strategic value. Unable to either turn down Clinton's peace plan, or take the offer back to the Palestinian street, Arafat sought to extricate himself from a "strategic predicament" by sidestepping the peace talks and intensifying the conflict in late 2000. By many accounts, Arafat strove to bring additional pressure to bear on Israel, wrest territorial concessions and internationalize the conflict by provoking massive Israeli military attacks against Palestinian controlled territory. Violent mass demonstrations, armed assaults against military targets and settlements, and terror attacks against Israeli civilians were an important part of this strategy. (7)

Although Arafat's strategy failed--largely because Israel was not goaded into massive retaliation and because September 11 created an unfavorable climate for attacks on civilians--the threat of terror did not wane. Any justification for torture hinges on whether it helps protect innocent lives from this threat. Terror and torture, however, are distinct issues from those surrounding the legitimacy of the Palestinian cause. Following Oslo and through the beginning of the second Intifada, most Israelis continued to support significant territorial concessions and the inherent justice of
Palestinian national aspirations. Yet the justice of the Palestinian cause does nothing to justify the use of terror.

Terror is a particularly egregious and reprehensible form of fighting. First and foremost, it targets innocent noncombatants with the express purpose of precipitating a disproportionate response that will increase solidarity for terrorist-backed causes among their own people and/or garner international support for their political aspirations. The victim's innocence is a necessary condition for terror, without which its perpetrators fail to provoke moral outrage of sufficient intensity to elicit the response they desire. Justifications for terror, weak as they are, do not generally portray their victims as non-innocent.

Palestinians, for example, justify attacks on Israeli civilians by raising three arguments: supreme necessity, reprisal and civilian guilt. Supreme necessity justifies terrorism because no other means are available to avert national catastrophe in this grossly asymmetrical conflict. Although the argument is entirely misplaced--Clinton's peace plan, deficient as it may have been, did not pose an existential threat to the Palestinians--the argument's internal logic still turns on non-combatant innocence. Supreme necessity, properly invoked, offers a defense for taking innocent lives. The logic of retaliation or reprisal works in the same way, suggesting to some that Palestinians may justifiably kill Israeli innocents because Israelis kill Palestinian innocents. The Israeli response invokes intentionality: Israeli forces, unlike Palestinian terrorists, do not intentionally target innocent civilians. Israeli citizens, therefore, are not legitimate targets of reprisal. Regardless of the merits of the Israeli argument or the role that intentionality should play in any cogent theory of moral responsibility, the argument for reprisal turns on the deliberate murder of innocents as a vehicle for retribution. Once a staple of international armed conflict, the practice of reprisal against innocent enemy civilians was banned absolutely by the international community in 1977. This undercuts any justification for terror based on the belligerent reprisal.

The argument based on noncombatant guilt is different, however. Claiming that no Israeli Jews are non-combatants and all are therefore legitimate targets of attack, proponents of this argument deny civilian innocence. Although religious leaders often voice this claim, it is not particularly novel or religious. Just war theorists have long sought the defining elements of noncombatant innocence. Although a full discussion of the question is well beyond the scope of this paper, it is interesting to speculate whether the distinction between combatants and noncombatants is nothing more than a matter of convention that may be changing as ethnic rivalries between state and nonstate entities replace conventional state warfare. If this is true, and it is by no means certain that it is, then the argument that Palestinian terrorists deliberately and intentionally target innocents for political gain weakens. For the moment, however, it does not appear that Palestinian terrorists have repudiated the significance of civilian innocence. In July 2002, for example, the international press reported that the assassination of Hamas leader Salah Shehada torpedoed a unilateral cease fire whereby the Palestinians were ready to declare that they would resist the occupation "but not do so by targeting the innocent."

In this atmosphere security officials use torture to elicit information to thwart attacks on innocent civilians; torture is not a means to wage war against Palestinian national
aspirations. On the contrary, torture did not emerge in the wake of the intifada but peaked in Israel between 1990 and 1999, heady years of negotiation that saw rejectionist elements employ terror to sabotage peace efforts. Embraced by the Palestinian mainstream in 2000, terror plagues the conflict and presents an ongoing need to regulate interrogational torture. Israel first confronted this dilemma in 1987.

Executive Attempts to Regulate Torture: The Landau Commission

Following complaints raised by the press, the courts and human rights organizations in the mid-1980s, a state commission of inquiry, the Landau Commission, was created in 1987 to review the use of torture by the General Security Service (GSS). (13) Throughout its deliberations, the committee showed extraordinary sensitivity to the complexity of its mission. While acknowledging that torture might be necessary to elicit information in extreme situations, commission members were acutely aware that a democratic state has a prima facie obligation to stand fast against the use of torture in any form.

The Landau Commission struggled with this question by formulating three options. First, the commission raised, and then rejected, the "hypocritical approach," the policy of some democratic nations to ignore torture carried out in the name of national security. Similarly, the commission rejected any effort to carve out a special niche for the general security services by placing them beyond the law, a common practice in non-liberal states. Instead, the committee hoped to confront torture publicly and, in defiance of all international norms, suggested that Israel can set standards and establish a regulatory mechanism to oversee the use of "moderate physical pressure."

The Commission's opinion rests on two salient points. First, is the firm conclusion that terrorism threatens the existence of the State of Israel (2.9-10; 3.17). (14) This includes an abiding threat to national life as well as intermittent threats to the lives of innocent civilians posed by explosive devices, the so-called "ticking bombs." Second, the Commission was firmly convinced that neither threat could be met without "some measure of physical pressure" (2.20, 4.6). Although Israel's penal code prohibits force or violence against suspected criminals, the commission found legal justification for exceptional uses of force in the "necessity" defense. "Necessity" exempts a person from criminal responsibility if he acts "in order to avoid consequences which could not otherwise be avoided and which would have inflicted grievous harm or injury [and] provided that he did no more harm than was reasonably necessary [nor] disproportionate to the harm avoided." (15)

The necessity defense does refer specifically to torture but is generally worded to allow one to act illegally and to later defend oneself with the claim that there was no alternative means to fulfill one's prima facie duty to protect oneself or others from imminent harm. (16) But necessity is only a defense, and while it may excuse the perpetrator it does not provide a prior, blanket justification for any class of action or policy. (17) It thus reinforces the rule prohibiting torture while allowing for cases where the rule might be overridden. One hopes the rule will hold sway in the vast majority of instances so violations will be rare and defenses solidly grounded. But the Landau Commission went one step further and used the necessity defense to recommend "binding directives" that could be "defined and limited in advance" (par.3.16, emphasis added). This turns the exception into the rule and creates a
sweeping endorsement of illegal behavior.

The Landau Commission faced a hard dilemma, a choice between national survival and degrading treatment (if not torture) or more generally between the right to life and respect for human dignity. To resolve the dilemma the commission tried to soften the damage to human dignity first, by articulating and justifying a concept of "moderate physical pressure" and second, by proposing a mechanism to implement and supervise various interrogation techniques. The attempt was unsuccessful.

Although the international community absolutely forbids torture and inhuman and degrading treatment, firm definitions remain unspecified. Convinced that moderate physical pressure "must never reach the level of physical torture ... which deprives [the suspect] of his human dignity" (3.16), the Commission tried to discriminate between torture and other physical means of interrogation by drawing on British attempts to publicly defend torture to interrogate suspected IRA terrorists in 1976. At a hearing of the European Court of Human Rights, judges heard sufficient evidence to conclude that the combined use of five particular techniques including hooding (covering a suspect's head with a filthy, opaque sack for long periods of time), wall standing (forcing a suspect to stand spread eagle against a wall for an extended time), excessive noise, sleep deprivation and starvation constituted inhuman treatment and torture. (18)

These were the same techniques the Israeli commission approved in 1987 as it accepted the European Court's distinction between the combined use of the five techniques, which constitute torture, and the techniques themselves, which, while inhuman and degrading, are free of the "stigma" attached to "deliberate inhuman treatment causing very serious and cruel suffering." (19) But this was an odd argument then and remains so today, ignoring the fact that the international community unequivocally prohibits both inhuman treatment and torture. (20) Nevertheless, the Landau Commission concluded that British techniques did not "occasion suffering of the particular intensity and cruelty implied by the term 'torture'" and decided to sanction the use of "moderate physical pressure." With the exception of "hitting and slapping," however, the Commission kept these procedures secret, while assuring the public that "the means of pressure permitted [are] less severe than the [British] techniques" (4.13). A ministerial committee, also secret, was established under the direction of the Prime Minister to implement and supervise these guidelines. (21)

In this way, the Commission resolved the conflict between life and dignity at what it hoped was minimal cost to dignity. The other horn of this dilemma--the threat that terrorism and "ticking bombs" pose to national existence--was so obvious in their view that it went unexamined. Not until the Israeli Supreme Court raised the issue in 1999, did political leaders consider that ticking bombs might not be a threat of sufficient gravity to justify torture. Nor was the "ticking bomb" argument itself without opponents. While some agree that mitigating circumstances of necessity may justify torture in rare instances without subverting the criminal justice system, others pushed for an absolute ban on the use of moderate physical pressure. Noting the overwhelming significance of human dignity, critics argue that "ticking bombs" cannot justify interrogation torture unless a suspect can deliver necessary and sufficient information to defuse a ticking bomb and avert a catastrophic threat. (22)
Upon careful examination, however, these conditions are impossible to fulfill, for they require a firm assurance the suspect is telling the truth, that his information is complete, that he will talk in time to defuse the bomb and that there is no chance that the device will be reprogrammed or moved. Under these circumstances, the criteria are so exacting that they effectively prohibit torture, thereby compelling proponents to either soften their commitment to the principle of human dignity or abandon torture entirely.

Concerned as they were, commentators writing prior to 1999 were largely ignorant of either the guidelines approved by the Commission or of those adopted by the GSS. Only when the Supreme Court ruled in 1999, 12 years after the guidelines went into effect, did the public realize that the effort to regulate moderate physical pressure was dangerous and futile.

The Judicial Response to Moderate Physical Pressure

In September 1999, the Israeli Supreme Court convened to hear the case of Palestinian detainees who petitioned the court to prohibit torture. Over the years, B'tselem, Amnesty International and the Public Committee Against Torture in Israel published numerous reports of Palestinian detainees who were killed, beaten, crippled and psychologically abused by interrogational methods similar to the five British techniques. This was precisely the kind of interrogation the Landau Commission wanted to avoid. (23)

The Supreme Court was no longer impressed with the existential argument and acknowledged that while a democracy had to fight "with one hand tied behind its back," terrorism would not bring down the State of Israel. Further convinced that conditions for a "ticking bombs" were rarely met, the court concluded that "ticking bombs" could not underwrite a sweeping policy of torture. Absent definitive legislation, ruled the court, moderate physical pressure remained illegal. Nevertheless, the court did not ban torture absolutely, allowing recourse to the necessity defense and permitting investigators to use torture to meet immediate and otherwise unavoidable grievous threats to innocent life (para. 38).

This ruling repudiated the Landau Commission's attempt to regulate torture and vindicated years of anti-torture activism in Israel. But the ruling did leave the door ajar for the legislature to approve torture, provided a law infringing upon a suspect's liberty is "befitting the value of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required." Although a daunting task, it did not dissuade some legislators from trying.

Legislative Attempts to Regulate Torture

In late 1999, during the waning days of the Barak administration, 43 opposition members, including the current prime minister Ariel Sharon and many of those who joined his cabinet following Barak's defeat in 2001, drafted a law allowing the GSS to use force during the interrogation of suspected terrorists. Legislators couched the law in secrecy, citing only "special measures" and "physical pressure" rather than specific techniques. (24) The law authorizes interrogational torture for security related offenses. Its essential features allow investigators to employ "special measures" for a
period not to exceed 48 hours but renewable from time to time with written permission from the director of the GSS. In urgent situations when the director is unavailable, an investigator may use the same "special measures" for two hours. While the GSS and the Prime Minister must periodically review guidelines and report to the Knesset every six months, there is no requirement for any public accounting.

This law is probably unique in the annals of democratic legislation and appears to set strict grounds for using torture. But this law is severely flawed for several reasons. First, it is poorly written. At first reading, the language appears to correspond to the ticking bomb case permitting "special measures" when "a reliable source raises a reasonable suspicion that a suspect has vital and urgently needed information that will, with near certainty, prevent a clear (tangible) and immediate danger to State security or persons' life and limb." Only under these circumstances and only after deciding that other means are not effective, may an interrogator use special methods. (25) But this measure of certainty is elusive, an impression reflected in the asymmetry of the qualifying terms. A source that is simply reliable and raises only reasonable suspicions cannot necessarily lead one to vital, urgent and nearly certain information. Inasmuch as it is probably impossible to strengthen the veracity and credibility of the source, then the quality of the information one seeks must be relaxed.

Second, the proposed law is too encompassing. As written any person, innocent bystander or suspected terrorist, may be tortured if he holds vital information. This has dangerous implications. Arguments permitting torture of non-terrorists in possession of crucial information rest on utilitarian arguments that often slip into justification for torturing innocents, a terrorist's child for example, in order to compel an aggressor to desist. In each case, torturing an innocent person causes harm that is offset when many other individuals are saved. To forestall this conclusion, some argue that innocents in possession of knowledge become part of the threat when they can reveal the information at no cost to themselves. (26) These individuals may be compelled to talk. While this saves us from torturing innocent children (who know nothing), it endangers others who may fear costs that torturers consider irrelevant. Who is to say, for example, that a cook knowledgeable of an impending attack but fearful of reprisals against his family, can reveal information at no cost to himself? Innocent of any wrongdoing, he may yet be tortured if his interrogators consider his fears trivial. Eliminating this outcome requires a different argument for permitting torture, namely that terrorist suspects and only suspects, lose the moral status that affords them respect and dignity. This claim, presented below, permits torture of suspected terrorists, but prohibits it in all other cases. It must be clear that only persons reasonably suspected of terrorism are subject to physical pressure. The same supervisory mechanism that determines the value of a suspect's information must also determine whether there is reasonable suspicion the person is a terrorist. This mechanism, moreover, must also be available on an "as-needed" basis. Allowing any period of unsupervised interrogation only opens the door to abuse.

Finally, the law makes no provision for abuse or mistakes. Even with the firm intent to limit torture, investigators will invariably violate the rights of innocent victims. Some victims may contribute no information whatsoever, others may have links to terror organizations but provide less than necessary information. Still others may be tortured for reasons beyond the need to elicit information. There is anecdotal evidence to indicate that torture is used to extract confessions for past deeds or to sow terror
among detainees and ordinary citizens. (27) The slide to terroristic torture is an abuse of the proposed law and the law should require the authorities to compensate abused individuals and prosecute offending investigators. Moreover, no law of this kind can remain shrouded in secrecy. Guidelines unregulated by public scrutiny spiral out of control; this is the lesson of the Landau Commission.

Whether this law can prevent terror attacks while restraining the indiscriminate use of torture remains to be seen. More than four years following the Supreme Court decision, the law remains suspended in committee. In the meantime, the GSS approached the justice ministry in February, 2001 and complained that the inability to use moderate physical pressure hindered its investigations. This led the State Prosecutor to declare that "as long as interrogators act in a reasonable manner they will not be tried on criminal or disciplinary charges for their actions even if jurists define these actions as unjustified." It is therefore not surprising that torture is again on the rise, particularly as the conflict with the Palestinians intensifies. (28)

This short history shows how extraordinarily difficult it is to regulate torture. As events come full circle, there are several policy options. One is to abandon torture entirely, but few in Israel today advocate this option. Instead, they are more likely to opt for the status quo that prohibits torture but allows for dire necessity. Unfortunately, this opens a back door for condoning torture that has proved difficult to regulate. Alternatively, a new regulatory mechanism might be established to firmly limit torture by bringing it under public supervision. Doing so first requires a defensible argument for torture under the conditions Israel faces today and second, a reasonably accountable supervisory mechanism. Without these arguments Israel is condemned to the least palatable scenario: practicing torture while pretending it doesn't exist. While preferable to many who will not be sullied by torture, hiding ill-treatment only serves to perpetuate it.

Torture: An Affront to Human Dignity and Other Arguments

The dilemma of torture will simply not go away in Israel. Death or indignity, which should it be? The dilemma is hardest when all things are equal, when death and indignity balance one another so, like the proverbial mule standing midway between two bales of hay, choice is impossible. Dilemmas like these are only resolved once one horn is blunted. Underlying social and cultural norms that make death a greater evil than indignity will do this. While this outlook figures heavily in the Israeli political tradition, it does not carry much weight beyond it. Or, one may invoke utilitarian arguments to weigh the good and evil caused by torture. Or, finally, one may appeal to non-consequentialist claims to contend that dignity carries overriding or, alternatively, relatively little weight when placed opposite human life.

Death and Indignity: The Local Ethos

One argument elevating life over dignity is local and idiosyncratic, characteristic of Israel's ethical milieu. This is not so much an argument as a perspective inherent in an overriding commitment to the sanctity of life exemplified by Jewish law, to collective well-being and to a genuine disrespect for liberal individualism that comes from a founding ideology anchored in a nationalist and socialist state, and perpetuated by an historical fear of national extermination. (29) This undermines the very premise of the
UN resolution which assumes that preventing inhuman treatment, an atomistic concern for individual well-being, supersedes the threat to collective well-being posed by "a state of war, a threat of war or other public emergencies." There is a consensus among members of the Landau Commission, Supreme Court justices and many philosophers cited above that dignity, in principle, runs second to human life so that torture can be outlawed but remain defensible on the basis of dire necessity. This is not the UN's position; in the international community torture is never defensible.

Appealing to the exigencies of Jewish history to make the case for collective well-being would doubtlessly be unpersuasive. The UN took particular note of these circumstances and rejected them; merely reiterating them will not do. Other arguments must be considered.

Death and Indignity: The Utilitarian Argument

Simple utilitarian intuitions support the ticking bomb argument: torture is necessary because it brings more good than harm, saving many lives while costing few, if any at all. But intuitions are not that simple. Utility functions have two parts, the value of the good sought and the probability that it can be obtained. Acute dilemmas result when the value of disparate goods, avoiding death and indignity for example, are equal. Reducing the relative value of one of the outcomes, as described above, is one way to resolve the dilemma. Another is to adjust the outcome probabilities. Doing both delivers a knock-out blow: if avoiding death is the higher good and there is a high probability that torture will work, then there is little recourse but to accept torture and try to regulate it to reduce attendant costs as much as possible. I believe that this is the position of many Israelis.

Opponents of the ticking bomb scenario weigh in with two arguments. First, violating human dignity is such a serious harm that one may only torture the suspect who can deliver the necessary and sufficient information to defuse a bomb. Second, the probability of acquiring this information is very, very low and more than offset by the higher probability that torture will cause significant harm. I want to confront this claim in two steps. First, I will continue the consequentialist analysis to weigh the harm done by torture and second consider non-consequentialist arguments to assess the harm done to dignity.

Short-Term Consequences: The Ticking Bomb Revisited

Consider the following recent news item:

A suicide bombing was narrowly averted in Haifa (Israel) yesterday morning when the would-be perpetrator was arrested shortly before carrying it out. The drama ... began when police, acting on specific intelligence information about a planned attack in Haifa, arrested a number of Palestinians who had been staying in the city illegally.
One 18-year-old from Samaria was arrested ... and when questioned, he admitted that he had hidden explosives for use in a suicide attack [and] directed [police] to an abandoned building where they found a belt containing several bombs that the Palestinian had planned to strap to his body and set off.... (30)
This is probably about as close to a real-life ticking bomb as one might find. Security forces elicited information at two stages, first, before the arrest of the suicide bomber and then, after his arrest but before discovery of the explosive device. In each case, but particularly the first, a simple calculation of expected utility can justify torture if no other means are available to secure information in time to avert a catastrophic attack. Prior to the terrorist's capture the time constraint is pressing enough to preclude alternative methods of interrogation. Once the terrorist is captured and as long as there are no indications that others may use the material instead (which is perhaps unlikely) it may be possible to avoid using physical pressure.

Under these circumstances, opponents can only invoke long term deleterious consequences to prohibit torture or other physical means of interrogation. This is the slippery slope: innocent individuals or common criminals will be tortured, torture will become the interrogational tool of choice when lesser means are available, torture will erode other civil liberties and eventually expand to terroristic torture. The argument can be compelling, but while fragile regimes may slide down the slope, sufficient reason in and of itself for the UN to issue a blanket condemnation of torture, stable democratic regimes should be less vulnerable to the long term dangers of torture.

Long Term Consequences: Torture in Democracy Revisited

Law and tradition prohibit excessive torture in democratic regimes. Moreover, the effects of intermittent torture in the name of national security are blunted, ironically enough, when the victims belong to a clearly delineated and hostile outgroup that often resides beyond the territorial boundaries of the affected nation. Vidal-Naquet ticks off the dangers posed to France from the torture they practiced in Algeria: sadism and indifference among soldiers, disrespect for laws prohibiting torture, and a steady emasculation of judicial protections as "emergency measures" gained ground and as authorities set secretive rather than transparent public policy. (31) But these measures were not directed against Frenchmen and the French were indifferent to torture because the victims were Algerian. Similarly, Israelis don't fear their own security services because the victims are all Palestinian. So the best efforts to convince the French or Israelis that torture is a malignant cancer growing in their society will fail. On the contrary, democracy is, in their view, under siege, and torture is a necessary evil to save it. (32) They are not moved when confronted with increasingly severe interrogation techniques even when they occasionally infringe on the rights of national minorities. (33) Nor have Israelis seen their nation's international standing fallen as they fight the scourge of terror. It is unlikely, then, that long-term consequences of torture would persuade many citizens of democratic nations to curtail torture. Opponents of torture can only take refuge in non-consequentialist arguments.

Non-consequentialist Arguments Against Torture

Torture is repugnant because it is an affront to human dignity. It inflicts pain without any discernable benefit to the victim and robs an individual of his capacity for free will and choice. Torture is a deliberate attack on the mind, body and will of a helpless person, who is humiliated and degraded to the point where he is no longer a human being, neither in his eyes nor those of his tormentor. Torture, in other words, is dehumanizing. But apart from the effects on those involved, torture destroys the
conditions necessary for any form of social or political interaction. Respect for human
dignity, in this sense, is prior to any idea of natural rights, including the right to life,
and forms the basis for human intercourse of any kind whether holy or profane.

This is a powerful argument but rather than try to balance respect for dignity against
the right to life, a difficult business at best, the argument might be disarmed if we can
demolish the dignity we accord to certain classes of individuals. Once denied human
status, they are reduced to a means that may serve human purposes so long as they are
not harmed more than necessary.

The universal prohibition against torture grew largely from the obligation of world
bodies to shield weak, unprotected citizens from the rampant human rights abuses of
the Second World War. The modern terrorist does not suffer from the same weakness
vis a vis the state as innocent victims of Nazi persecution. But then again, neither do
arch criminals. Nevertheless, torture, if ever permissible, remains confined to
terrorists, not heinous criminals. The relative strength of the victim, therefore, is
insufficient to justify torture. Justification must come from elsewhere and one source
might be the changing status of the suspect.

One such argument invokes the logic of self defense. Aggressors are culpable once
they create a situation "in which someone must be killed, either he or his intended
victim," a harm that the intended victim "can now only redirect but not eliminate."
This may then "forfeit, override, or specify out of existence the aggressors' right to
life."34 Inasmuch as Moore seamlessly extends this argument to justify torture, one
assumes that the aggressor also forfeits his dignity.

This argument is appealing but overdetermined, for it allows one to kill or torture any
mass murderer or common criminal whose actions put others at risk. This, of course,
we don't do, nor is there any indication that we want to extend the argument in this
way. We can tighten the argument, however, by distinguishing between forfeiture of
the right to life (which Moore explicitly accepts) and forfeiture of dignity (which is
only presumed if the lessons of self-defense apply to torture). Self defense entails
forfeiture or suspension of the right to life: threatening criminals may be killed in the
course of law enforcement; terrorists setting explosives may be eliminated. These
criminals indeed lose their right to life by threatening others. (35) But as an argument
for torture, this is problematic. If the argument from self defense leads to forfeiture of
dignity then we could torture criminals (which we don't); if it does not apply to
dignity then we can't torture anyone. So an additional claim, beyond defending
oneself against a criminal whose action puts others at risk is needed to justify loss of
dignity. This comes from the nature of terror acts themselves.

Criminal acts are fundamentally different from acts of terror. However heinous,
crimes against persons fall within the framework of recognizable human interaction
so that the net of human dignity protects both perpetrators and victims. We will not
torture a mafia hitman to find his potential victims, victims of avarice, greed, rage,
desire and envy. However innocent his victims, they are not dehumanized but
murdered and robbed as humans are wont to do to one another. There remains a link
between the criminal and his victim. The link may be immoral, corrupt, and perverse,
but one we recognize within the constellation of quotidian human passion. As such all
the parties retain some semblance of human dignity even as they are hated, feared,
envied, and desired.

Terrorist crimes are entirely different and beyond the minimal norms of human interaction. Terrorism, by definition, targets innocent civilians for political gain. Innocence is an indispensable condition of victimhood, without which it is impossible to provoke the harsh retaliatory response necessary to further the political aims terrorists espouse. Terrorists reduce civilians to the basest of means, a relationship wholly devoid of human passion. To any objective observer, victims of criminal activity may be innocent, but to their killer they are guilty of some infraction however slight or misguided. The abomination of terrorism rests precisely on the conviction that its victims are innocent of any wrongdoing. The terrorist who recognizes no intrinsic value in the life of his victim, who takes advantage and abuses his innocence for his own purposes, forfeits his own moral status as a human being. He may then find his own human dignity stripped away and his body subject to abuse.

Critics of this view will object that I have ignored "intrinsic" human traits that bestow respect for an individual's dignity regardless of his or her behavior. Margalit, for example, finds promise in the "capacity of reevaluating one's life at any given moment [and] the ability to change one's life from that moment on." As such, "even the worst criminals are worthy of basic human respect" and this, of course, protects them from torture. Two difficulties immediately come to mind. First, the argument seems to require an empirical foundation. "Thus respecting humans," writes Margalit, "means never giving up on anyone since all people are capable of living dramatically differently from the way they have lived so far." This is certainly debatable, particularly as living "differently" means, in this context, living a better moral life, a change contingent on conditions that Margalit does not specify but must include an available, alternative and normatively superior world view and probably better socioeconomic conditions as well. While criminals live in a society that can offer them morally preferred norms together, in many cases, with a higher standard of living, the same is not true of terrorists who lack similar recourse. Second, it is not clear why the ability to change overrides actual behavior. Actual behavior, at least, is entirely tangible and under some circumstances, like those characteristic of terrorism, should entail disrespect.

If human dignity offers powerful protection for ordinary criminals, it carries no force when the suspect is a terrorist. Loss of dignity and torture require two conditions beyond the need to maximize the good of others. First, the suspect must be responsible, as Moore indicates, for the harm created, and the crime in question (terror) must be sufficiently heinous and inhuman to merit forfeiture of dignity. This has several important ramifications. First, it means that one may not cause indiscriminate pain to a terrorist. Terrorists may lose the protection afforded by human dignity, but they retain the moral status accorded any living, sentient creature that protects them against unnecessary pain and loss of life. (37) Second, it means that although terrorists may not be unnecessarily harmed, they may be tortured under weaker conditions than ticking bombs strictly entail. Convinced of the overwhelming harm that torture inflicts on a suspect's dignity, ticking bomb critics demand a firm expectation of necessary and sufficient information before employing physical pressure. But this no longer applies. Shorn of their dignity and moral status as human beings, terror suspects are subject to the dictates of efficiency. The criteria for permissible torture and physical pressure only demand a reasonable expectation of
effective results while inflicting a minimum of pain necessary to benefit human beings. (38) This entails the conviction that suspects only possess necessary, not necessary and sufficient, information to avert a terror attack. The higher probability of acquiring information under these weaker conditions coupled with attenuated long-term harm as argued in the previous section, make a reasonable case for using moderate physical pressure to elicit necessary information from suspected terrorists.

Finally, while human dignity carries no force when the suspect is a terrorist, it carries overwhelming weight when the suspect is not. One cannot torture the cook or the passerby who chances upon information of an impending attack. This constraint is inherent in the nature of the necessity defense. The necessity defense implicitly assumes that illegal acts are directed against those who are in some way responsible for the harm one is trying to avoid. It also demands that one take into account all the harms one causes including grave harm to the dignity of innocents. The cook is neither responsible for the intended harm nor does he lose his dignity. Nevertheless, we should not be blinded by the brilliance of human dignity. It does not protect those who disregard it as a basic component of human discourse. The trick is to determine who is entitled to what protection. There must be a preponderance of suspicion to strip a suspect of his moral status as a human being. It is a weighty but not God-like decision and one that, unfortunately, must be taken under circumstances already tainted by racism. Rather than ask "Is torture forbidden?" the question must be "When and how is torture permitted?"

Regulating Torture: Thick and the Thin Solutions

Thin Solutions for Regulating Torture

Practical suggestions to regulate torture are hard to come by. Thin solutions are defensive solutions, prohibiting torture but allowing circumstances of "necessity" to mitigate punishment. Torture is therefore illegal but defensible under certain circumstances. This solution is problematic for several reasons. First, the necessity defense requires a vigilant public prosecutor and cannot regulate torture or any other illegal activity if the prosecutor has, as in Israel, publicly abdicated this role. The purpose of the necessity defense is to enforce the ban on torture not circumvent it. Second, a defensive approach faces practical difficulties. Assuming that torture is the product of a single mind and motivation, the thin model affords a particular investigator an opportunity to mount a defense after the fact. But this naively assumes that an investigator acts alone, and calls to mind a seemingly solitary individual sitting in a room opposite a suspect. This fiction allows Kadish, for example, to differentiate between "what is morally permitted for the state to do and what is morally permitted for an individual to do." (39) While the state, in his opinion, must ban torture, an individual "may justifiably use cruel methods to obtain information in certain extraordinary situations." This ignores, however, the role of ancillary personnel--additional investigators, supervisors, service staff and particularly physicians--and any responsibility they must bear. Are all equally culpable? The Supreme Court refers only to the "potential criminal liability of the GSS investigator" (para. 35) but if others must take part shouldn't we require their approval before moderate physical force is applied? Do they need to mount a necessity defense or are they required to cooperate once an investigator decides to use moderate physical pressure? Answering these questions requires firm guidelines to regulate their behavior, the very guidelines
the Supreme Court rejected.

Finally, the thin model is unstable, and readily devolves from an ex post defense to ex ante justification. Once the state prosecutor can declare that she will not prosecute interrogators who act reasonably, the game is up. Reasonableness presupposes acceptable and specific guidelines to regulate behavior under certain conditions. Reasonableness, in this case, means recourse to moderate physical pressure as a last resort to elicit information from suspects sitting on ticking bombs. Once these conditions are fulfilled, the investigator can be confident that his actions are reasonable, justifiable and non-indictable. Once he has met the conditions that define reasonable behavior, the need to mount a defense is formally precluded. This stands in stark contrast to the general conditions of necessity which prohibit torture and ill-treatment and only allow a case-by-case defense.

In contrast to thin solutions, thick solutions rely on predetermined guidelines and regulations to guide torture before it is administered. This makes room for accommodating ancillary personnel and for approving torture on a case by case basis. But the experience of the Landau Commission shows that these regulations are vulnerable to the slippery slope and slowly encompass increasingly inhuman practices. This stems not from an effort to formulate justificatory guidelines, but from the attempt to do so in secret. Thick solutions shrouded in secrecy and far from the eyes of the public push torture to the grey margins the Landau Commission sought to avoid and allow most citizens to evade the moral responsibility of facing up to torture. Confronting torture and bearing direct responsibility for its implementation may eventually bring Israelis to limit its use. This requires a thicker law than the one proposed.

Thickening the Model: Torture by Public Committee

The role of the legislature--the only firm instantiation of popular will, authority and sovereignty in a democracy--cannot be overlooked when considering if and how to regulate torture. Only the legislature can oversee an issue that must remain public. Relegating torture to secret, ad hoc provisions, only repeats the mistakes made by the Landau Commission.

The requirements requisite to mount a solid defense of ill-treatment, namely dire necessity, imminent danger, minimally necessary harm and reasonable suspicion inevitably surface in the form of conditions and guidelines that can be written into legislation to regulate and justify the use of torture. The proposed Israeli law modified by the suggestions outlined above that tighten supervision, exclude torture of innocents, prosecute offenders, abolish secrecy and ensure publicity can serve as a basis for legislation.

While Zamir recommended that the courts approve torture on a case-by-case basis, an interdisciplinary, quasi-judicial committee might perform this function more successfully. (40) Instead of a lone judge, a committee of lay and professional members acts in the court's stead to decide each case on its merits. They confront the same questions placed before a court: Is the suspect in possession of information necessary to thwart a terrorist attack? Does the attack pose an immediate danger to civilians? Is torture necessary to elicit the needed information? Is the suspect's
information reliable, etc? In some cases, the dilemmas resolve themselves once the committee ascertains that the threat is not dire or that there are other avenues for eliciting information. In other, probably rarer, cases the dilemma will remain acute. Surely if judges make their decisions based on the answers they receive to such questions, then an interdisciplinary public body can do the same.

There is a precedent for such a public committee, at least in Israel, in the form of hospital ethics committees that convene with judicial authority to consider patient's request to end life-sustaining treatment as well as physicians' requests to treat critically ill patients against their will. (41) These committees, composed of physicians, psychologists, lay community members and clergy, philosophers and jurists face a dilemma, similar to the one that torture poses, that weighs the right to life against human dignity. Patients who wish to die with dignity compel the state to relinquish its duty to protect life. Once a serious dilemma, most Western nations today believe that human dignity and respect for autonomy trump the state's duty to protect life. In Israel, however, the issue remains contentious precisely because concern for life often overrides human dignity. Consequently, ethics committees can take the unusual and unparalleled step of permitting a physician to treat a competent patient against his or her wishes. Care of hunger strikers presents a similar problem. In 1975, The World Medical Association made it clear in its Tokyo Declaration--the same declaration prohibiting physicians from participating in torture--that a physician may not artificially feed a prisoner who refuses nourishment. The attitude of many prominent Israeli physicians, on the other hand, is just the opposite: when life is at stake, respect for dignity runs a poor second. (42) In each case, be it torture or medical care, one makes a stark choice between death and indignity.

Committees may be the best defense against the abuses of torture. We have already seen how torture grew increasingly severe and savage in the years following the Landau report. And, we have seen how the police and army may have recklessly endangered lives of Palestinian Israelis during street riots in October 2000 and abused the rights of those suspected of incitement, a process of deterioration that cannot be unrelated to the widespread use of torture against Palestinians. (43) Under ordinary circumstances, these brutal social consequences would be more than sufficient to repudiate torture. In the shadow of terror, however, they highlight the need for extreme caution as legislators, public officials and ordinary citizens consider the necessity of torture in a conflict plagued by terrorism.

Conclusion

In his exhaustive study of torture, Edward Peters ridicules the "classic" attempt to justify torture, one that hangs on "the possibility of the heroic, unemotional torturer in the service of the state on behalf of innocent victims." (44) While it is true that the need to protect the lives of innocent victims sets the stage for the justification of interrogational torture, the use of torture remains subject to the conditions the law sets: grave threats, properly identified subjects, quality intelligence, efficacy of physical pressure, etc. After addressing these questions, the supervising committee may make the weighty decision to forego dignity in the name of Shue's "supremely important moral principle." The important moral principle remains collective and individual life. The right to life either usurps human dignity entirely, a local argument acceptable in Israel's ethical milieu, or remains the only principle standing after
human dignity is stripped from the terrorist suspect. Circumstances justifying torture do come together in very rare instances; the challenge remains to recognize them.

Whether an interdisciplinary public committee can limit torture any better than the courts or the GSS itself remains to be seen. Far from transparent, court-approved torture may soon succumb to the abuses of earlier times while an independent, interdisciplinary and public committee may make oversight more efficient, limit its use to exceptional situations and ensure, as many hope, that it is nearly never the case that torture is the least harmful means to secure a supremely important moral goal.

None of this, however, makes the torturer heroic or unemotional. Because, and in spite of, the horrific nature of terror, most reasonable individuals grasp both the need and the shame of torture. Needed for safety and security, shameful because we are compelled to divest others of their moral status as human beings. No citizen should hide these feelings as he goes about his daily life. On the contrary, every citizen should shoulder the incongruities of a democratic society that must condone torture and, at the same time, have the courage to embrace the torturers among them. Torture is the responsibility of all citizens; no one should be able to say that they didn't know. The idea of the Landau Commission to bring torture to the public arena was the right one, but the mechanism for doing so, a secret ministerial committee, was the wrong one. Once brought to the public arena it must stay there.

Can the public regulate torture? Do they have the stomach for it? A public committee to supervise torture is as necessary as torture itself; the more a nation thinks it necessary to torture and seek refuge in the necessity defense, the more a public committee is required to regulate its use. If committees can regulate withdrawal of life support or conversely compel a patient to be treated against his will, sometimes with very unpleasant outcomes, then they can regulate the use of torture. If they cannot do it, then they have no business letting anyone else do it either.


(2.) Shue, "Torture".


(6.) Israel Government Press Office, "Israelis Killed by Palestinian Terrorists."


(8.) In December, 2000, 62% of Israeli Jews supported the peace process, 68.5% thought negotiations would lead to a state and 69.2% supported a two state solution. Contrast this with 45.8%, 39% and 47% of the Palestinians respectively (Jerusalem Media and Communications Center, "Four Months after the Beginning of the Palestinian Intifada: Attitudes of the Israeli and Palestinian Publics toward the Peace Process" (Tel Aviv: The Tami Steinmetz Center for Peace Research, 2000). (www.tau.ac.il/peace/Peace_Index/IPPPPI/Dec_2000_final.html).


(14.) See note 13.

(15.) Israel Penal Law, section 22, cited in Landau Commission, 3.11.

(16.) The condition of "imminent harm" is not specified in the law, but was inferred by the Landau Commission (3.12)

(17.) Albin Eser and George C Fletcher. eds., Justification and Excuse: Comparative Perspectives, Volume 2 (Freibure i. Br: Max Planck Institute, 1987).

(18.) Ireland v the United Kingdom. Yearbook of the European Conventions on

(19.) Ireland vs the UK, para. 167.

(20.) Rodley, The Treatment of Prisoners, 92.


(25.) The special methods are not defined and in fact are left to the Prime Minister's discretion. By and large they probably correspond to those described in the 1999 Supreme Court ruling.

(26.) Moore, "Torture and the Balance of Evils."

(27.) Gordon, "Political Evil."


(32.) Surveys do not ask about torture, but Arian asked Israelis to choose between security and the rule of law. [See Asher Arian, Security Threatened: Surveying Israeli Opinion on Peace and War (Cambridge: Cambridge University Press, 1995): 112, 279.] The mean score is always on the security side of the midpoint, a trend that intensifies during Palestinian unrest. Indirect evidence for local support comes from the behavior of physicians. Human rights organizations are astonished that more Israeli physicians, who often serve in the military as reservists, do not report torture, particularly as they do not risk imprisonment or jeopardize their job by whistleblowing (Human Rights Watch, Torture and 10 Treatment, 210). One reason may be simply that they condone torture as a necessary evil.

(33.) There are no reports of torture against Israeli Jews. The treatment of Israeli Arabs detained by police following riots in October 2000 is described in Racism, Violence and Humiliation, Findings, Conclusions and Recommendations of the Public Committee Against Torture in Israel Concerning the Behavior of the Security Forces toward Persons Detained during the Events of September October 2000 (Jerusalem: PCATI, 2001). The report describes cases of pushing, kicking, beating, slapping, tightening of handcuffs, humiliation, curses, threats and late night interrogation (although "not to the point of sleep deprivation"). While these actions do not constitute torture as defined in this paper, the report also describes how agents of the General Security Services, (who, in addition to the police, also conducted interrogations) tied suspects to chairs in painful positions, a form of interrogational torture banned by the Supreme Court in all cases but "ticking bombs" of which there were none in the aftermath of these riots.

(34.) Moore, "Torture and the Balance of Evils," 321-22


(37.) See Mary Ann Warren, Moral Status: Obligations to Persons and Other Living Things (Oxford: Clarendon Press. 1997). Living, sentient creatures (i.e. capable of experiencing pleasure and pain) have an intrinsic interest to continue to live a pain free life. This affords them moral status and limited protection encapsulated by two
basic principles Warren defines as reverence for life and anti-cruelty. However, these interests are contingent on human needs which may be met by killing sentient creatures, for food or clothing, for example, or inflicting pain on animals, as in the case of medical experimentation.

(38.) This should not be construed to mean, however, that terrorists are proper subjects for medical experimentation. Terrorists may not be subjected to ill-treatment to prevent harm they are not responsible for causing.

(39.) Kadish, Torture, the State and the Individual, 347.


(43.) See note 31.

(44.) Peters, Torture, 178.

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