

TORTUROUS AMBIVALENCE

Judaic Struggles with Torture

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ABSTRACT

A surprising lack of consensus exists among contemporary Jewish scholars about Judaism's position vis-à-vis torture. Some claim that Judaism condones torture while others insist that Judaism condemns it. These diverging opinions on such a troubling practice suggest an ambivalence deep within the Judaic textual tradition about torturing bodies. This brief essay critiques both perspectives for twisting the textual tradition and offers some preliminary suggestions for a more robust Judaic approach to torture.

KEY WORDS: *torture, Judaism, ambivalence, ticking bomb, rhetoric*

THE INCREASING PUBLICITY of the United States's use of torture within its own institutions and its practice of extraordinary rendition sparked a rash of Jewish responses in the last six or so years.¹ It should be no surprise that these Jewish arguments are passionate insofar as they come from a community still smarting from a century of humiliating and torturous treatment by empires heavy and light alike. Nor should the fact that these positions offer no consensus astonish us, for Judaism celebrates sincere disagreement for the sake of heaven.² What should take us aback, however, is that the strongly held positions do not cluster around a particular position vis-à-vis torture, but are found on apparently opposite ends of a proverbial political spectrum. While many modern Jews find torture morally repugnant and argue that it ought to be outlawed, a few consider it a meritorious practice that deserves moral and legal warrant. What, I ask, is the nature of this ambivalence and how might it contribute to the larger debate about torture in the United States—and in Canada, especially since Richard Colvin made his report in December 2009 (CBC News 2009)?

¹ See Bleich 2006; Broyde 2006a, 2006b, and 2007; Central Conference of American Rabbis 2005; Feld 2006; Goldberg 2006; Ish-Shalom 2006; Kalmanofsky, Rosenn, and Weintraub 2006; Klapper 2006; and Lippmann 2005.

² M. *Avot* 5:17. See also B. *Eruvin* 13b.

Despite strongly held contrarian positions, both pro- and anti-torture Jewish arguments share some discursive methodologies. Almost without exception, all arguments point to certain principles championed by the Judaic textual tradition, especially the notion of *tzelem 'elohim*, that all humans are created in God's image. They invariably argue that from this foundational principle it logically follows that torture ought to be prohibited or permitted. They reach their conclusions by another shared method, that of invoking certain scriptural verses or halakhah (law) that strengthen their preferred conclusions. Rarely do any take the historical record of torture seriously, much less the arguments of the other side. Both camps are consequentialist: some hold that torture can save multitudes, while others assert that torture destroys the very fabric of civilization not to mention the individuals involved. It can reasonably be argued that such methodological approaches offer thin Jewish arguments at best. Indeed none trace the conceptualization and deployment of torture in Judaic narrative and legal texts, a silence that must not go unnoticed. It could thus be said that insofar as these approaches do not take into consideration countervailing principles, scriptural sources, laws and arguments, as well as torture's torturous history, and its so-called efficacy and efficiency, both camps fail to offer a robust Judaic wrestling with the moral morass that is torture.

In this brief piece I can only point to some of the characteristics of the arguments on both sides of this spectrum and then propose some preliminary thoughts about a more robust Judaic response to torture.³

1. Pro-Torture

I begin with an overview of the pro-torture camp. The two major proponents here are J. David Bleich and Michael Broyde, both outspoken and outstanding legal scholars strongly identified with modern Orthodoxy. Broyde argues for permitting torture because it is not inconsistent with halakhah. Insofar as halakhah understands killing to be a necessary component of war, and torture is assumed to be less severe than death, Broyde reasons that "[t]here is no logical reason that halakhah would categorically prohibit duly authorized wartime torture as a method for acquiring information otherwise not available, in order to save lives in the future" (2006). Yet his larger argument contains questionable elements. He does not, for example, clarify torture's severity or how to differentiate the sufficiently severe from the excessively severe. Across his scholarship on torture and warfare, he inconsistently invokes the halakhah category of the *rodef* (a lethal

³ A fuller analysis may be found in Crane 2010–2011.

pursuer) when he says that it does not apply at all to warfare and yet uses it to endorse wartime torture. And, moreover, he subsumes torture into the category of killing by asserting that if the latter (larger category) is permitted, it follows that the former (lesser issue) is as well. This “greater includes the lesser” argument suffers many philosophical and legal shortcomings, a major one being the qualitative and not quantitative difference between killing an opponent and keeping an opponent alive.⁴

Bleich pushes—or twists—the envelope further when he says that “in the limited situation of an innocent non-Jew in possession of information regarding a ticking bomb there is license, and perhaps even an obligation, to apply torture, if necessary, in order to elicit the requisite information” (2006, 111). The biased nature of the fantastically hypothetical ticking-bomb scenario has been well demonstrated by other scholars.⁵ Rather, we should note that Bleich’s is an argument of necessity when he assumes that “torture is the *only* available means to elicit the information necessary to save innocent lives” (2006, 97; emphasis added). This assumption suggests that interrogators, even well-trained ones, have exhausted each and every means at their disposal. To the degree that it takes time—perhaps many hours or days—to go through an interrogator’s tool box, the notion that torture as a tool of last resort fails to meet the urgency implied by the ticking bomb. That is, despite his claims otherwise, the necessity claim, if it is to be effective at all, necessarily renders torture a method of first resort. Bleich flavors this necessity argument Judaically by invoking the notion of *hora’at sha’ah* (an emergency situation), by which he means “an *ad hoc* acceptance of a lesser evil over a greater evil not incorporated in any statutory code” (2006, 114). Even though Bleich considers torture a *malum in se*, if an interrogator ascertains that it is less bad to torture in a particular situation, Bleich proposes that the law can *ex post facto* mitigate or eliminate the punishment that the torturer would otherwise rightfully deserve. In this way torture remains illegal but not officially sanctioned, and it would not be punishable if used in an emergency situation. It should be noted that the Israeli Supreme Court considered such legal reasoning in its now famous 1999 ruling, and concluded that the necessity defense cannot proactively authorize torture (ISC 1999, paras. 36–37). The reason for this rejection rests on the fact that its sole purpose is to allow a person to escape criminal liability for a violation of human rights. This cannot serve to generate norms for administrative or defense power.

⁴ See Herz 1994 and Berman 2002. Additional sources can be found in Berman 2002, 710.

⁵ See Matthews 2008; Luban 2009; and Rejali 2007.

2. Anti-Torture

Though Broyde and Bleich condone torture, most modern Jewish arguments condemn it. These anti-torture pieces ground their positions on such heavily relied upon principles as *'al tonu* (do not oppress the stranger), *'or la-goyim* (a light unto the nations), *kavod habriot* (respect all creatures), *hillul ha-shem* (do not desecrate God's name), *lo ta'amod 'al dam re'ekha* (do not stand on your neighbor's blood), and *marhivin da'ato* (preserving self-esteem), not to mention *'ahavtah le-re'ekha kamokhah* (love your neighbor like yourself).⁶ Yet they fail, more often than not, to invoke competing principles such as *hora'at sha'ah*, or *mipnei 'evah* (a rationale the Talmudic rabbis invoked for rules that would prevent raising animosity among gentiles toward Jews), or even *pikuaḥ nefesh* (the principle that most anything can be done to save a life). That is, anti-torture advocates do not justify why they prefer certain principles Judaism champions and not others. Additionally, many point to national and international anti-torture conventions and human rights instrumentalities, as if to say that these documents prove that Judaism itself condemns torture. Rather, such arguments merely demonstrate that some contemporary Jews find these conventions and instruments consistent with their own values. On the other hand, some anti-torture advocates correctly point to evidence that torture corrodes everyone involved, that it rarely evokes actionable or accurate information, and that regulating and restricting the spread of torture techniques is as hypothetical as the ticking bomb. All told, anti-torture advocates highlight universalist and humanist principles and realist evidence primarily if not exclusively because these support and further their previously decided positions.

This critique of the anti-torture camp may be reasonably leveled against Jewish academic pieces as well as resolutions and platforms put forward by rabbinic associations. Moreover, only a scant few in this camp invoke *halakhah*, and specifically *rodef* legislation, to support their anti-torture positions (see, for example, Zakheim 2006; Crane 2008; and Weintraub 2005b). It is unclear why such knowledgeable and prominent anti-torture advocates all but absolve themselves of the *halakhic* tradition. For in so doing, they sever and silence a substantial normative piece of the Judaic textual tradition, ceding it over to those like Bleich and Broyde, who quickly grasp it to ground their skewed positions.

⁶ See footnote 1, specifically Kalmanofsky, Rosenn, and Weintraub 2006; Reconstructionist Rabbinical Assembly 2005 and 2008; Weintraub 2005a, 2005b, 2005c, and 2008; Feld 2006; Lippmann 2005; and CCAR 2005.

3. Untying Torture's Judaic Knots

Let me suggest some preliminary thoughts about a more robust, and perhaps a more Judaically honest, approach to torture. This new approach would admit the presence of torture in the Judaic textual tradition—there is some, but not a lot—and demonstrate that such pieces are found in narrative and not normative texts.⁷ It would wrestle with the historical fact that Jews contemplated yet ultimately frowned upon extraditing captives to gentiles, especially when it was known that gentiles could or would resort to capital or corporal punishment.⁸ It would weigh competing values and principles that come into play during warfare and especially during extraordinary warfare that involves non-state actors such as terrorists. And it would reinforce the clear and long-held Judaic ruling that any information squeezed out of a captive through physical duress carries little legal and virtually nil military value.⁹ This more robust form of argument would, I suspect, ultimately wind its way toward the anti-torture end of the spectrum. In the process, it would abandon the weakly supported yet passionately held ambivalence extant in contemporary Jewish debate—so as to champion a dispassionate yet internally consistent and historically informed position protecting the dignity of individuals and nations alike, as well as the integrity of the textual tradition itself.

Perhaps this kind of traditionally honest and robust argument can contribute to the larger, multi-religious debate in the United States, Canada, and elsewhere about the presence and role of torture in national defense. Its primary contribution, I think, would be found more in its course than its conclusion. By taking principles, history, law, and practicality seriously, it may encourage others to do so as well and thereby strengthen public deliberation on this volatile moral topic.

⁷ See Judges 1-7; Judges 16 generally about Samson's capture; Jeremiah 52:1-11; 2 Kings 25:1-7; B. *Sotah* 10a; *Sifre Bamidbar* 91, s.v. *lo' okhel*; B. *Sanhedrin* 58b; Tosafot to b. *Sanhedrin* 58b, s.v. *qetz yada'*; and Ḥidushei HaRitba on B. *Niddah* 13b, s.v., *iba'ei laho*. On using food as a tool to punish, see M. *Sanhedrin* 9:5; B. *Sanhedrin* 81b; and Maimonides, *Mishneh Torah* [=MT] *Sanhedrin* 18:4 (but compare with MT *Rotzeah* 4:5).

⁸ See Y. *Terumot* 8:4 (46b); B. *Sanhedrin* 40b; B. *Avodah Zarah* 8b; B. *Gittin* 88b; B. *Baba Metzia* 83b; *Midrash Tanhuma*, *Mishpatim* 3; MT *Sanhedrin* 26:7; MT *Melakhim* 3:10; MT *Yesodei ha-Torah* 5:5; *Shulhan Arukh*, ḤM 26:1, 388:9; R. Joel Sirkis, *Teshuvot ha-Bach* 43.

⁹ See B. *Sanhedrin* 9b, 10a, 25a, 27b; B. *Yevamot* 25ab; MT *Sanhedrin* 18:6; MT *'Edut* 5:1; MT *Rotzeah* 4:5; Matthews 2008; Rejali 2007; I. M. Rosenberg and Y. L. Rosenberg 1998; and Ignatieff 2004.

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