

Torture in the Light of Jewish Values

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On Rosh Hashanah eve, Rabbi Yitzhak shared his concern about the times we're living in. He offered a progressive Jewish perspective on fundamentalist misuses of religion among the three Abrahamic faith traditions, and he spoke out about our own government's misplaced moral priorities, laid bare by the failures surrounding Hurricane Katrina. Building on his words, I would like to urge us not to lose hope in these dark times. Dark times are when we need to plant seeds of change, seeds that can take root and sprout at opportune moments into a harvest of change for the better. Many of us have experienced first hand the way that planting seeds can help us get through dark times in our personal lives, and it's no secret that on the community level, the national level, and on the global level, many positive transformations have resulted from seeds of change that were planted by those who kept faith with a vision of a different kind of world despite the seeming hopelessness of the times they lived in. It's true – we are living in a troubled world, and we are living through difficult times. But planting seeds of change is still the best response we can muster to that reality.

Tonight I want to talk about one particular seed that is being planted in this country. Senator John McCain and others are right now planting a seed that I hope you will support. They are trying to plant a seed that reaffirms some basic American values: the

values of due process and human rights. As you probably know, Senator McCain is the co-sponsor of an amendment to a bill currently before Congress that would prohibit the United States military from using torture on prisoners and detainees. Last week, 90 Senators, representing both parties and people with widely divergent political views on just about everything, voted for McCain's amendment. Yet the White House says it will veto the measure.

This Yom Kippur, I want to talk with you about the issue of torture in our country. I realize that in this community, the overwhelming majority of us probably support McCain's stand, and I know that choosing this topic means risking simply preaching to the choir – or, I suppose in a Jewish community one might say, *kvetching* to the *mishpocha*. But this talk is different. Rather than being just another liberal opposed to torture, what I want to share with you tonight are some of the nuances of Jewish legal and ethical thought on this issue. In other words, why does this issue matter Jewishly? Why as Jews should we make an extra effort to lend our voices, our money, and our energy to help Senator McCain plant this particular seed during this time of darkness? What do Judaism and Jewish history add to the discussion that isn't already part of our shared concern as Americans and as human beings?

I'm going to talk about three core Jewish values that enter into this discussion, in the hope that what our tradition has to offer deepens our understanding of what's at stake in this issue. In doing so, I am going to rely primarily on materials on this issue compiled by a wonderful organization called Rabbis for Human Rights, or RHR. I want to give credit in advance to Melissa Weintraub, a rabbinical student at the Conservative movement's Jewish Theological Seminary, who wrote extensive treatments of the Jewish sources and texts for RHR that I will refer to.

The first Jewish value that comes to mind when we think about the question of whether torture should ever be permitted is the value that is known in Hebrew as *b'tzelem elohim*. ***B'tzelem elohim*** means "made in the image of God," and it is the core Jewish principle going all the way back to Genesis and reaffirmed over and over again by the rabbis that human beings are a reflection of the divine image – *all* human beings, including those who commit crimes, including those who are your enemies.

B'tzelem elohim is probably the most well-known of the Jewish values I'll mention tonight. I'm sure many of you thought of it in relation to the subject of torture before I even said it. It's not a value that is unique to Judaism, so the temptation is for me to just name it and move on to the more culturally specific Jewish thought that bears consideration on this subject. But before I do that, let me take a moment to focus on the powerful implications of what it means to have as a foundational value the idea that all human beings are created *b'tzelem elohim*, in the image of God.

The great rabbis of old discussed these implications. Rabbi Akiva said: "You should not say: Because I have been dishonored, let my fellow human being be dishonored along with me..." R. Tanhuma explained: "If you do so, know who you are dishonoring" – and then he quotes Genesis: 'God made the human being in the Divine image.' *B'tzelem elohim* is a critical building block for the philosophy of Martin Buber. Seeing the divine in the other is what makes the difference between what he called an "I – It" relationship and an "I – Thou" relationship. As Melissa Weintraub writes, "God is at stake in human relations, [and God] is harmed and violated through acts of cruelty and degradation, even in retaliation..."

I'd like to move on to a second Jewish value at stake in the Jewish conversation on torture and U.S. military policy. This is a legal principle of the rabbis known in Hebrew as ***ayn adam masim atzmo rasha***, which means that a person may not incriminate himself or herself. The bar against self-incrimination in Jewish law is important to the conversation on the use of torture because self-incrimination is usually brought about by a confession. As we all know, one of the most common uses of torture is to try to obtain a confession from someone.

Now the argument that our current Administration is using to defend its stand against Senator McCain's amendment is not based on the use of torture to obtain confessions. Rather, it is based on the supposed need, during this time of war and the ongoing threat of terrorism against Americans, for military personnel to sometimes use certain forms of physical and psychological coercion to obtain what is called "actionable intelligence." In other words, the Administration wants to be able to protect American lives by using some forms of torture to extract

information from detainees about plots against us that they might know about.

Supporters of this position might argue that the issue of using torture to get a confession of guilt from someone is an entirely different matter. But Melissa Weintraub shows how Jewish law on the matter of confessions to crimes is relevant. So let's look at it for a moment. Jewish law simply doesn't allow a confession to be used as evidence in a trial. It goes farther than American law, which doesn't allow a confession that is obtained under duress or from someone in a mentally unstable frame of mind to be used as evidence. In America, a completely voluntary confession is acceptable in court. Jewish law won't allow even a voluntary confession.

Why not? It almost doesn't seem to make sense. If someone of sound mind wants to confess to a crime to a judge, why not let him? The Talmud is silent on the reasons for this. The medieval scholar, Maimonides, offers a psychological explanation. We can never know if the person confessing is confused, or is perhaps suffering in some way we don't know about and consequently looking for some way to end it all. Rabbi Saul Lieberman, a 20th century Talmud scholar and former dean and rector of the Jewish Theological Seminary, supposedly believed that the reason for the rabbinic bar on all types of confessions was a response to the world of Roman conquest that the rabbis lived in. Torture was commonly used to compel confessions in Roman courts, and, Lieberman thought, the rabbis simply wanted to eliminate any possibility of Jewish courts using torture to try to get a confession. If you can't use a confession under any circumstances, then you don't have the temptation to cheat and try to get one by means of secret torture.

Other contemporary scholars write that the reason for the bar on confessions may have been that confessions are inherently unreliable. A confession is testimony from only one witness, who may be confessing for hidden reasons we will never be able to uncover. Jewish law going all the way back to the Torah requires at least two credible witnesses to verify that information is accurate.

Whatever the rabbis' reasons were, as Melissa Weintraub writes, "It is no secret that Jews have historically often been the victims of a lack of juridical and procedural safeguards" in kangaroo courts of the many lands of our dispersion. For me,

the most important lesson from the Jewish value that confessions are not admissible as evidence in the current discussion of the issue of the use of torture by our military is that our legal and ethical tradition reminds us that there is no substitute for making sure that the facts and the information you gather are accurate. If voluntary confessions are insufficient to establish the facts, how much the more we should be suspicious of information or so-called "actionable intelligence" that our military interrogators can gather by torturing people. How many times have spies and covert military personnel killed the wrong people because of faulty intelligence? When someone is being tortured, their number one goal is to say the words that will make the suffering stop. Our tradition's carefulness about how we establish correct information guides us to question the value of information obtained by torture – and indeed, there are career interrogators who have stated flat out that the information they've obtained through torture has been of little value. As Melissa Weintraub puts it, "Whether [the U.S. military's program of using certain forms of torture] has resulted in 'actionable intelligence' is disputed. That it has resulted in unspeakable trauma is not."

Let me turn to the third and last of the Jewish values I'd like to discuss. This is the value of *pikuach nefesh*, or the saving of human life. If there is any argument grounded in Jewish values to be made for permitting the limited use of torture in certain extraordinary cases, it is the so called "ticking bomb" argument – the scenario in which the authorities are certain that a prisoner in their custody has knowledge of the details of a planned attack that is sure to take many – maybe thousands – of human lives. The most extreme scenario is right out of a James Bond script. The intelligence interrogators have in custody a terrorist who knows the whereabouts of a nuclear bomb that has been planted and set to detonate later that day in the heart of a major city. Wouldn't it be consistent with the Jewish value of *pikuach nefesh*, of saving human life, to use any means necessary, including torture, to obtain the information needed to save innocent lives?

That's a question anyone supporting Senator McCain's amendment needs to address, because it's the justification the Administration is using to justify its clinging to the right to torture. Classical Jewish texts don't really address the "ticking bomb"

scenario, so the field of Jewish legal and ethical interpretation on this question is pretty wide open to a range of opinions. In forming her own conclusions, Melissa Weintraub chooses to look at the areas of Jewish law dealing with the right to self-defense and the obligation to prevent an attacker from harming an innocent third-party.

What she concluded about this body of law was basically this: First, the use of force against an attacker is only justified if it is being used spontaneously to save a clearly known victim from imminent death. In other words, if I see a robber point a gun at a bank teller, and I have the power to intervene to prevent him from firing, I have to intervene. There's no doubt about who the attacker is or who the potential innocent victim is, and I'm obligated by the Jewish principle of "thou shall not stand idly by the blood of thy neighbor." But, before I pull out my own concealed pistol – don't ask me why I was carrying a concealed pistol, just go with it – before I pull out my gun and shoot the robber, there are two considerations I have to take into account before I use force to act. The first is whether by intervening in this way I will harm any other innocent people. The second is that I need to try to use the least amount of force necessary to stop the robber. Now that may sound like a lot to think about in the heat of the moment, but that's actually what's expected in some of the texts.

What all this amounts to is this – if there was a true "ticking bomb" case – and being realistic, these kinds of cases are really rare – an interrogator who had exhausted all non-violent means of trying to get life-saving information could potentially defend himself against charges of torture if he reluctantly resorted to physical coercion or some other cruelty to try to get the desperately needed information. But, and I quote Weintraub, "...it would not permit authorizing physically coercive techniques in advance or applying them across the board in a deliberate and routine way to detainees held over extended periods of time. ... [And it would not] permit 'torture' ... to be anyone's training or job description in the military."

You might be interested to know that in 1999, the Israeli Supreme Court took exactly that position. The court ruled that the government and its security services were not allowed to establish directives that authorize the use of torture in advance. If an interrogator in a true "ticking bomb" situation

spontaneously resorted to some form of torture after exhausting all other means, then the court ruled that that interrogator could plead "ticking bomb" in his defense when *he* is on trial for torture. When he faces these charges, however, he is going to have to prove that the danger he was preventing was certain to materialize and that there was no other way of preventing the danger from materializing. Basically, the Israeli Supreme Court said, "no torture, it's illegal, and if you do it under extremely rare extraordinary circumstances, you're going to have to defend yourself if you're charged with a crime." Here's what the Israeli high court wrote:

[We conclude that] a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. ... This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, 'cruel, inhuman treatment,' and 'degrading treatment'... These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable.

What I hoped to do tonight was share with you some of the ways in which Jewish law and ethics come to bear on an issue that faces us squarely, right now, as Jewish Americans. There are lots of other arguments in support of Senator McCain's amendment – arguments most of us know well and many of us have probably stated ourselves. These include the noble principles that Senator McCain and others have stated publicly – that a ban on the use of torture is about affirming who we are as Americans, that it's about making sure we don't let terrorism cause us to abandon our core values, that it's about upholding a standard that ultimately protects American soldiers and civilians by taking away from the enemy the charges they are currently able to make against us of cruelty and hypocrisy. I didn't focus on those arguments because we already know them. What I wanted to do was focus on some ways in which our rich tradition offers additional reasons why we should take a stand now on this issue.

I'd like to close with one more reason why it seemed important to speak about the issue of torture

tonight. Our liturgy for Yom Kippur includes our historical memory of torture as Jews. As Melissa Weintraub writes, "When torture is explicitly named in Jewish texts, it is from the vantage point of the victim." The sad thing is that our people knows all too well the inhumanity of torture.

The Yom Kippur liturgy includes a service called "'Eleh Ezkera," which means, "These I remember." This service, which also goes by the name, "The Martyrology," recounts the violent torture and execution of ten of our rabbinic sages by the Romans. To quote from the Mahzor, "Wherever I stand, I hear rattling: My brothers in chains, in chambers of the stricken. They pierce the walls and burst the silence. Through the generations their echoes cry out. In torture camps, in pits of the dead." After the Romans, in the Middle Ages, our ancestors were tortured by Crusaders. The *unetaneh tokef* prayer of the High Holy Days is a liturgical poem that is associated with Medieval torture. And during the Inquisition, Jewish *converses* and others were tortured. And in modern times, Jews were tortured by the Nazis. The Geneva Conventions, at the center of much of the current controversy around torture and the U.S. military, were created in large part in response to what the Nazis did to *us*. Torture is very much an issue of personal concern to Jews, because our history is sadly rife with it. We have to care about it being done in our name.

What all of us do when we plant a seed like the one John McCain is trying to plant is give life to something truly good that might take root, something that can benefit future generations even if it fails to change things in the short run. I don't know how this dark time will finally end, how the war in Iraq or the so-called war on terror will finally play out, or where our country is heading. Maybe it's going to get worse before it gets better. But planting the seed of affirming the kind of America I think pretty much all of us here want to live in and believe in – planting that seed has an impact, regardless of whether or not McCain's amendment becomes law. The Dreyfuss affair is a great example of this. A century ago, a Jewish military officer was falsely convicted of treason because he was a Jew. The French writer Emile Zola courageously protested and accused the government of anti-Semitism. His protests failed to protect Dreyfuss from being sent to prison on Devil's Island and resulted in Zola himself being convicted of libel.

But look at the good that blossomed from the seed Emile Zola planted through his public act of courage. A century later, it is Emile Zola who is the shining light the French can feel proud about in that whole scandal. It is Zola who was memorialized a century later by none other than the French President, who said, "Let us never forget the courage of a great writer who, taking every risk, putting his tranquility, his fame, even his life in peril, dared to pick up his pen and place his talent in the service of

truth." The seed Zola planted eventually grew into something great. My sincere hope is that all of us can help Senator McCain and countless other concerned Americans plant a crucial seed at this moment, perhaps establishing the moment that will be remembered in the future as the beginning of the end of the use of torture in our beloved country.

May we all be sealed for a healthy and good year.

Editor's Note: Rabbi Maurice encourages those who are concerned about the issue of torture in American policy to visit the website of Rabbis for Human Rights - North America:

"Rabbis for Human Rights - North America is offering us an easy way to participate in an e-activism campaign. If you go to the web site link below you can check out what is at stake and send your own message directly to the relevant decision makers."

<http://www.stoptorture.rhr-na.org/>