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TORTURE, THE STATE AND THE INDIVIDUAL

Sanford H. Kadish*

The Report of the Landau Commission puts a painful question for public debate: can it ever be morally acceptable in a liberal democracy for the state to use cruel measures against a person to compel him to reveal information needed to prevent grave harms, such as the loss of lives? The question, of course, belongs to a class of questions that has baffled and divided people for generations. Are some actions inherently and intrinsically wrong, so that they may not be redeemed by the net good consequences they produce on balance? Even if this is the case in general, can it be true regardless of the enormity of the consequences? Battle lines in moral philosophy are drawn in terms of how these questions are answered. For consequentialists the morality of all actions is solely determined by their consequences, near and long term. For deontologists the morality of all actions is always determined, at least in part, by their intrinsic wrongness, so that if they are wrong they are not made right by their desirable consequences. Each side has, so it seems, an unanswerable objection to the position of the other. Deontologists ask: then you mean you are ready to declare, for example, that punishment of innocent persons may be morally justified if it is necessary to prevent crime? And consequentialists (without answering) ask in turn: then you mean that even if the life of thousands and the preservation of the basic freedoms of a democratic community depend on it, you would regard it as morally prohibited to use any force against a single innocent person?

These questions are among the hardest of all hard questions. But they become even harder when they are asked in the context of a public debate over how a government should act in some immediate crisis. And yet still harder when they are asked not just as a matter of what should be done

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here and now in these circumstances, but as a matter of what general principles should be publicly articulated in terms of which the morality of government action will hereafter be determined. The members of the Landau Commission have my sympathy, and I venture to comment on what they have said with the greatest humility. It is not difficult to write a report defending one or the other horn of this dilemma. What is difficult is to choose between them.

I will not in these comments enter the argument between the consequentialists and the deontologists. I will simply start with the unargued assertion that the deontological position in its most rigorous form can not be right. *Fiat justitia ruat coelum* is a stirring proclamation of a deep commitment to justice, but taken literally (I mean taking it to refer to the destruction of the earth and all mankind) it can’t be true. If the only way the heavens could be stopped from falling was to do an injustice, then, at the least, one who did it could not be morally condemned, and at the most, one who did not might be. I will take the position, then, that wrongful actions may be morally redeemed by the goodness of their consequences, and whether they are or not depends on the degree of wrongfulness of the actions and the seriousness of the consequences portended by failing to take those actions, discounted by the degree of probability that they will ensue. The use of torture is so profound a violation of a human right that almost nothing can redeem it — almost, because one can not rule out a case in which the lives of many innocent persons will surely be saved by its use against a single person, say to find out where a bomb is set to explode. Lesser forms of physical abuse, according to this reasoning, can be morally redeemed by circumstances less compelling and less certain.¹

This position, of course, is not far from that taken by the Landau Report. It is a hard-boiled position and, as I have just indicated, many will disagree with it. But it has another major difficulty as well: by itself it doesn’t suffice to answer the questions put to the Commission. It only provides one possible starting point. This is because the task set for the Commission was not simply to identify morally acceptable principles governing how moral

¹ I am not here embracing a simple balance of evils test, according to which acts of torture or lesser forms of violence against the person are justified when the harm they do is less than the harm avoided by doing them. Where torture or other cruel methods are used against a person, the imbalance in favor of doing them must be extremely great. Moreover, in assessing evils I do not mean to treat all human dissatisfactions or dispreferences equally and sum them up, as some utilitarians would. It is only where the evil avoided in terms of its quality exceeds the evil done to the individual that cruelty to the person may be justified.
agents should deal with hostile terrorist activity, but to publicly articulate a law and policy to govern the actual conduct of Israeli officials. With the ultimate moral principle enunciated by the Commission I am basically in agreement. However, the Commission went on to favor the promulgation of regulations authorizing the use of some kinds of physical ill treatment for the purpose of obtaining information to be used to combat terrorist attacks, and detailing (in a non-public document) the kinds of ill treatment permitted subject to specified limitations and regulations. With this I do not agree.

I will try in these comments to defend a distinction between what is morally permitted for a state to do and what is morally permitted for an individual to do. On the basis of this distinction, I will argue the paradoxical position that while a person may justifiably use cruel methods to obtain information in certain extraordinary situations, a state may not justifiably so provide in its law, but must rather maintain a flat and unqualified ban against such measures.

Let me start with such authority as there is in this area. There have been a number of formal pronouncements concerning a state's use of torture and other cruel methods applied to persons for various purposes. What have they been like?

It is the internal law of Israel, as it is of most western states (certainly all democratic ones), that neither torture nor physical or psychological abuse may be inflicted on a person accused of a crime in order to extract testimony with which to convict him, and this without regard to how important a conviction appears to be for the state and the community.\(^2\) The question before us is not punishment, however, but prevention; namely, the use of such means to prevent criminal injuries from being inflicted on innocent victims, where the injuries threaten to be of enormous consequence. As to this, what guidance is provided by past pronouncements?

A number of pronouncements and conventions on the international level give explicit evidence of the norm prohibiting torture and related forms of physical cruelty. The earliest declarations sought to apply the conventional norm requiring states to protect the life and liberty of aliens even in times of war: The Hague Conventions of 1899 \(^3\) and of 1907\(^4\) require

\(^2\) See Israeli Penal Law (L.S.I. Special volume), sec. 277.
\(^3\) International Convention with Respect to the Laws and Customs of War, 1899, U.S. T.S. 403, 32 Stat. 1803.
that prisoners of war be humanely treated; the latter also prohibits forcing inhabitants of occupied territories to furnish military information.5

The Third Geneva Convention of 19496 (dealing with prisoners of war) protects prisoners of war and other nonbelligerents in a number of ways. It prohibits “at any time and in any place whatsoever... violence to life and person...cruel treatment and torture”, as well as “outrages upon personal dignity”,7 and requires that prisoners be “humanely treated”.8 Neither “physical or mental torture, nor any form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever”, and those who refuse to answer “may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind”.9 The Fourth Geneva Convention of 1949 (dealing with civilian populations)10 has similar provisions, specifically providing in Article 31 that “No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from their parties”.

Subsequently the norm prohibiting torture and similar cruelties directed at aliens in wartime was extended to all persons, including nationals, at all times. The 1948 Universal Declaration of Human Rights11 proclaims in Article 5 (apparently without qualification)12: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. This was followed in 1950 by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which contained virtually the identical prohibition in Article 3. A notable feature of the European

5 Ibid., Art. 44.
7 Ibid., Art. 3.
8 Ibid., Art. 13.
9 Ibid., Art. 17.
12 Art. 29(2) provides: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. This could not be readily interpreted, however, as a qualification of the prohibition of torture in Art. 5, since that provision is cast in the form of a prohibition against the use of torture rather than (as other provisions are) the grant of a right to the person.
Convention, however, is that it went further to include a nonderogation clause with respect to torture. Although the Convention provides that states can take measures derogating from their obligations under the Convention in war or public emergencies threatening the life of the state, they are explicitly denied the right to do so with respect to the provisions of Article 3 concerning torture. The International Covenant on Civil and Political Rights which was open for signatures in 1967 (and signed by Israel on Dec. 19, 1966, though not yet ratified) followed the European Convention in this respect.

The two most recent pronouncements on torture and other cruel treatment focus on these subjects exclusively. The first is the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which led in 1984 to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Signed, though not yet ratified, by Israel, this convention defines torture in Article 1 as an act that causes and is intended to cause severe pain and suffering, whether for the purpose of obtaining information or inflicting punishment. Article 2(2), a nonderogation provision, states that: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. However, the Convention in Article 16 explicitly distinguishes “other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture”. (I will use the phrase cruel treatment or cruel measures, to refer to this concept.) Each state is obliged to try to prevent

13 Art. 15(1) and (2). Europ. T.S. No. 5, Sept. 3, 1953.
such acts as well as torture,\textsuperscript{19} but not all of the provisions applicable to torture apply to them. Most significantly for our purposes, the non-derogation provision, Article 2(2), applies by its terms only to torture,\textsuperscript{20} although Article 16(2) provides that the provisions of the Convention are without prejudice to the prohibitions of cruel, inhuman or degrading treatment in other international instruments.

Whether or not one wants to regard these international formulations as authoritative, they are at least the most formal and deliberative declarations available of the prevailing international norm. They do not provide for the kind of consequentialist assessment I argued to be appropriate for a proper solution of the moral dilemma by an individual actor. They speak to states in absolute terms to condemn the use of torture as well as other cruel measures for any purpose. With one exception, they explicitly reject the possibility that emergencies of any kind might diminish the strength of the prohibition. That one exception, the Convention Against Torture, in distinguishing torture from other forms of cruel measures, seems to imply that the non-derogation principle applies only to torture. Yet the

\textsuperscript{19} Art. 16 provides: “Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment”. Arts. 10 through 13 have to do with training of personnel, review of interrogation rules and practices, investigation by state authorities, and allowing for complaints to be made.

\textsuperscript{20} The separate treatment of torture and cruel, inhuman or degrading treatment was apparently deliberate and was the subject of some controversy. An earlier document did not make this distinction. See the Summary and Analysis accompanying the Letter of Submittal from the Department of State to the President of the United States. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Message from the President of the United States, 100th Congr. 2d Sess., Senate, Treaty Doc. 100-20 at p. 15, where it is observed: “Initially, the Convention provided much the same obligations with respect to torture and CIDT [that is, cruel, inhuman or degrading treatment]. The United States as well as a number of other countries expressed concern with this approach, noting that the attempt to establish the same obligations for torture as for lesser forms of ill-treatment would result either in defining obligations concerning CIDT that were overly stringent or in defining obligations concerning torture that were overly weak. This view prevailed, and Article 16 thus creates a separate and more limited obligation with respect to CIDT not amounting to torture”.

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issue of how to construe the international norm is left in some ambiguity, since the Convention specifies that it is not designed to diminish the prohibitions imposed by other instruments which, as we saw, establish the non-derogation principle for cruel measures as well as torture.

The Landau Commission concluded that its recommendations were in accordance with the international norm as evidenced in these declarations and conventions. I take a different view. The Commission Report makes no reference to the explicit non-derogation provisions of several of the conventions, including the 1967 International Covenant on Civil and Political Rights, to which Israel became a signatory. That makes the Report's claim problematic. The best argument for its position would be one based on the arguable exemption of cruel, inhuman and degrading treatment (in contrast to torture) from the non-derogation provision of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. But beyond the ambiguity as to whether this is a proper interpretation of the language of the Convention, there is the unambiguous provision that that language is not meant to qualify any obligations imposed by other conventions.

Perhaps the Commission finds its conclusions in accord with the international conventions on the view that its conclusions are meant to be applicable only to means of pressure that are neither torture nor cruel, degrading and inhumane treatment. There is some ambiguity in the Report as to precisely what kinds of practices the Report is talking about. Inevitably so, since the Report did not want to make public the kinds of practices it was authorizing and the kinds it was forbidding for fear of impairing the effectiveness of future interrogations. But the Report explicitly approves physical assaults (it speaks of face slapping, which can cover a multitude of sins) and threats of assaults (R., 60–61). Moreover, in its discussion of one of the causes célèbres that led to the creation of the Commission (the Nafsu case), where the interrogators (apparently) pulled Nafsu's hair, threw him to the ground, shook him and kicked him, the Report seems more concerned with the fact that the interrogators lied than with what they did (R., 6). In any event it is with practices that do constitute cruel, inhuman or degrading treatment that I am concerned in this comment.

Let me now leave the subject of what the authorities provide and turn to the argument. I believe the flat prohibition of torture and other cruel treatment, which, I think, expresses the prevailing international norm, is right. I also think, as the quasi-consequentialist I confessed to being, that the Landau Commission was right in its conclusion that even the prohibition against torture and other cruel treatment may be morally violated by
an individual in circumstances of extreme exigency. This calls to mind the story of the Rabbi who resolved the controversy between a husband and wife by saying separately to each that each was right. When presented with his own wife's challenge that it was not possible for both to be right, he replied: "That's right too". What I want to add is that maybe the Rabbi was right too.

The foundation of my case is the same consequentialism that leads to the conclusion that an individual may be morally justified in using cruel measures against a person in extreme cases. The consequences of publicly proclaiming that judgment as a basis for the actions of government officials is fraught with such peril to interests of high moral moment as to require the absolute ban on torture and similar acts of cruelty in the law and policy of the state. Let me now suggest the kinds of threatened consequences that lead me to this conclusion.

The deliberate infliction of pain and suffering upon a person by agents of the state is an abominable practice. Since World War II, progress has been made internationally to mark the perpetrators of such practices as outlaws. This progress has been made by proclamations and conventions which have condemned these practices without qualification: not even war or public emergencies threatening the life of the state could justify their use. Any claim by a state that it is free to inflict pain and suffering upon a person when it finds the circumstances sufficiently exigent threatens to undermine that painfully won and still fragile consensus. If Israel can claim the right, then so can any country. And if any state is free of the restraint whenever it is satisfied that the stakes are high enough to justify it, then the ground gained since World War II threatens to be lost. It is not an adequate answer that what other states would be licensed to do as well as Israel could also be justified on a consequentialist basis. Lost would be the opportunity immediately to condemn as outlaw any state engaging in these practices. Judgment would be a far more complicated process of assessing the proffered justification and delving into all the circumstances. In terms of creating an appropriate moral climate and minimizing the occasions when torture is employed, it is one thing to say that no state may torture period, and another to say that no state may torture except when exigent circumstances require it. The absolute prohibition comes to a form of strict liability, since it serves to deny the possibility of a defense that can morally justify the action. In judging the actions of states, the enhanced general effectiveness of the ban on torture justifies such a denial.

If that is not enough reason to reject the conclusions of the Commission Report, there are also considerations of acute self-interest as well. There
is a parallel between torture and other cruel measures, and terrorism. Both have been condemned in absolute terms by formal international proclamations and conventions. If the norm to prevail for torture and other cruel treatment is that it may be justified if the evils to be avoided are great and significant enough, how can a similar qualification be denied to the resort to acts of terrorism? Would Israel be in a position to assert that terrorism is an absolute evil, while torture and other forms of cruelty are not? Surely the case that the Palestinian terrorists would make in justification of their terrorist acts is precisely the one that the Commission adopts for cruelty against the person, mutatis mutandis: that the gain of saving the Palestinian people from the oppression of the Israelis justifies its use, horrible as it is. There are situations of extraordinary character in which an individual may be morally justified in engaging in terrorist acts as well as inflicting torture or other cruel measures on a person, at least in my quasi-consequentialist view. But for a state, nothing less than an absolute ban on both is morally imperative.

There are further consequences internal to Israeli life and government that may be expected to follow from the legal legitimation of varying degrees of ill-treatment. Chief among them is the general loosening of moral restraints against torture and other cruel practices, for the legitimation of repugnant practices in special cases inevitably loosens antipathy to them in all cases. As Justice Brandeis observed in a related context, the government in its laws is "the potent, the omnipresent teacher".\(^\text{21}\) The law's prohibitions gain in effectiveness to the extent that they are absolute and unqualified. It is not an accident that the Ten Commandments took the form they did.

If ill-treatment were to become legal in combatting terrorism, how long would it take for pressures to develop to extend its use to other contexts where it could also be thought that much was at stake? Why should not provision be made for beating suspects to discover the existence of physical evidence of great and brutal crimes? If the community were plagued by a particularly vicious crime highly resistant to prevention, why should it not subject convicted offenders to torture-like treatment to heighten the deterrent effect of punishment? Would not the use of ill-treatment become a normal issue to be seriously considered whenever the state faced what seemed like crises that might be solved by its employment? When torture is no longer unthinkable, it will be thought about. These, then, are the kinds of

\(^{21}\) Olmstead v. United States, 277 U.S. 438, 485 (1928).
consequences that militate in favor of an absolute ban on torture and related forms of ill-treatment in any declaration of official law and policy.

A not unfair way to put my conclusion is that while it is morally permissible to use cruel measures against a person if the gains in moral goods are great enough, it is not acceptable for the state to proclaim this in its law. To be sure, this may have the smell of hypocrisy about it. My defense rests on the distinction I announced earlier in this comment between what is morally permitted for a state to do officially and to proclaim as its law, and what is morally permitted for an individual to do. The consequential assessment is radically different in the two cases.

Surely one question implicit in the Report is whether the individuals of the General Security Service who used cruel measures against persons held in custody in order to gain information were morally wrong; and more generally, what is permissible for persons to do in such situations in the future. The Commission concludes that it is justifiable to use cruel methods (putting actual torture aside) where the gain in moral goods is great enough. As I said, I agree on the basis of a consequentialist morality.

But the Commission was not called into being just to judge the morality of the actions of these particular officials. Its primary mission was to develop a statement of what the public law and policy of the State of Israel should be. This is a different matter. The distinction is not between what is moral and what is lawful, but between what is moral for a state to do and what is moral for an individual to do. In concluding that the law and policy of Israel should legitimate cruel methods in these circumstances, I believe the Report to be in error. And for the consequentialist reasons I have tried to marshall. Individuals, even individuals who happen to be state officials, may take it upon themselves to use such methods, and they may turn out to have been morally justified. But the state itself in what it legally authorizes, in contrast to what individual officials may take it upon themselves to do, may not.

Consider this hypothetical situation. Suppose the State of Israel entered into a binding treaty obligation never to authorize the use of torture or cruel and inhuman methods in any circumstances whatsoever. A situation arises in which an official realizes he can prevent the explosion of a terrorist bomb in a crowded district by beating a suspect who, he is virtually certain, knows where the bomb is planted. Is he morally justified? Yes, let’s agree. But does that mean that the State is justified in adopting a law, in violation of its treaty obligation, permitting such beatings in like circumstances? Perhaps, but not necessarily. It faces a different situation than that faced by the individual official.
Now how is our case any different? To be sure we do not have the weight of a promise to assess (though we may, because Israel did sign such a convention, but I don't mean to argue that here). But we do have the tangible and substantial adverse consequences I described above, consequences of considerable weight. And these can make a moral difference just as a promise can.

It is not my argument that the ban on cruel practices should be mere sham, there to create an appearance of a prohibition without its substance. The prohibition would not be a sham at all. The State of Israel would in clear conscience continue to be signatory to international conventions that ban these methods; internal efforts would be made to set up rules and procedures to discourage their use; the law would be enforced and violators sanctioned; and so on.

But suppose circumstances arose in which it became morally justifiable to use these methods — what is an official to do? The law flatly prohibits torture and cruel measures without qualification. To the great moral weight against engaging in such odious practices is added the positive prohibition of the law. The moral (and social) pressure toward compliance would be enormous. But it need not in every possible case be overwhelming. There are no absolute moral prohibitions always binding in every possible circumstance, at least not according to the consequentialist view I have been taking. The individual official would have to make his own decision whether the circumstances are so utterly powerful in their moral weight that even the legal and moral ban must give. This is a great burden, but it is not essentially different from the predicament of every moral agent faced with the need to act in morally problematic situations. Would not the burden on the official be so great that it would require circumstances of a perfectly extraordinary character to induce the individual to take the risk of acting? The answer is of course yes, that's the point.22

How much does it change the picture that the legal legitimation of cruel treatment would be accompanied by substantive regulations defining what measures could be used in what circumstances and specifying the procedures and authorizations that would be required to permit such measures

22 It is also possible, practically as well as theoretically, that the legal system might over time, in a variety of ways, come to grant a degree of legal legitimation to its officials taking it upon themselves to depart from the strictures of the legal ban in certain circumstances. And all without modifying the legal force of the ban. These lines of argument are pursued in a book written by Professor M.R. Kadish and myself, Discretion to Disobey — A Study of Lawful Departures from Legal Rules (1974), and I will not try to restate them here.
to be employed? I do not see how it could alter the adverse international consequences I tried to describe – the threat to the developing consensus against torture and other cruel treatment, the invitation to other states to legalize the use of torture and cruel measures in situations and through procedures they chose to specify, the loss of moral ground against the very terrorism the use of these methods is designed to defeat. Nor would it remove the threat to Israeli life and government – the weakening of the sense of moral outrage at the use of cruelty, the state teaching that its use of cruel methods against an individual is tolerable, the pressure to extend the use of such methods to other situations in which there are strong interests at stake.

On the contrary, legal regulation of cruel practices may actually make matters worse. How should the legal guidelines define what measures may be used in what circumstances? How long should a person be deprived of food? Of sleep? How long can he be made to stand? How much force may be used against him? May he be struck with a fist? With a stick? Will provision be made for applying extraordinary pain in extraordinary situations? The Report excluded genuine torture, but it is hard to see why that line should be considered absolute, given its reasoning. Consider how much respect a book of law would evoke if it contained regulations of this kind. In the Middle Ages the use of torture was subject to just such detailed laws and regulations. It is sufficient answer that this is no longer the Middle Ages. Indeed, it is instructive that the Commission made it a point to submit its proposals on permissible degrees of ill-treatment only confidentially.

That raises another matter. Presumably any regulations that might be enacted to govern the use of torture and less cruel practices would also have to be confidential, as would proceedings to determine what kind of ill-treatment to authorize. This itself would go a long way to dissipating the advantages proposed to be obtained by subjecting cruel treatment to the rule of law. Indeed, to the horror of legal brutality would be added the evil of secret law secretly applied.

In the end, then, subjecting the use of ill-treatment to legal restraints does not make its legitimation any more acceptable. For certain practices are so abhorrent that seeking to control their use through law only magnifies their horror.