

Imagine this scenario: A potential suicide bomber is captured in his apartment in a large American city. The FBI has solid information that there are anywhere from 10 - 25 more such people scattered around other cities, all planning on detonating themselves at the same time, sometime in the next 24 hours. The captured terrorist had planned to give up his life - the threat of imprisonment or even the death penalty would not induce him to give up information in exchange for a lighter sentence. What should our law enforcement personal do? What means ought to be permitted in order to get enough information out of him to begin tracking down the rest of the bombers?

If you are a fan, as I am, of the FOX series "24," then you have seen scenarios like this played out numerous times. We are thrilled that Jack Bauer is on the case -- we know that he can figure out a way to force the information out. But then -- oh no -- here comes the squeamish bureaucrat or human rights lawyer to mess things up, which inevitably causes a delay in catching more bad guys, allowing them to kill more Americans.

"24" is written to make us root for Jack Bauer, cheer his techniques of torturing suspects in order to save lives. However, when we saw reports and pictures of abuse of prisoners at the hands of American soldiers at the Guantanamo Bay Detention facility or at Baghdad's Abu Ghraib prison, I think we were all properly shocked and horrified. The group Rabbis for Human Rights began an anti-torture campaign, and I, like some 500 other rabbis, signed their anti-torture letter directed to the US Senate which outlined a Jewish perspective on torture. They made the following points:

- 1) First, we understand that the most fundamental ethical principle, which results from our belief in God as Creator of the world and Parent of all humanity, is that every human being is seen as reflecting the Image of God. Torture shatters and defiles God's Image.
- 2) Second, Jewish tradition calls for humane treatment even of one's adversaries. In the Book of Exodus (23:4), the Bible teaches, "When you encounter an enemy's ox or donkey, you must take it back to him."
- 3) Third, classical Rabbinic texts are rigorous in prohibiting acts of humiliation. In Jewish tort law, an additional penalty is assessed against one who has physically injured another person when it is found that the victim also suffered humiliation. Even verbal humiliation is said to be the equivalent of shedding blood. We are particularly appalled by the infliction of sexual humiliation on prisoners under United States custody. Jewish tradition upholds a high standard of personal modesty.

The letter is sufficient for what it is, primarily a letter directed against the clear abuses of Gitmo and Abu Ghraib. In thinking more broadly about this issue, though, one ought to wonder if in fact there is a Jewish position that would allow any degree of torture, physical coercion of a suspect, that would result in saving lives.

It is difficult to find Jewish sources that speak directly to the issue of torture, in part because of the nature of Jewish law. Halakhah was developed by a community without power. Until the modern state of Israel was established, all Jewish law from the first century and the Mishnah onward represents Jewish society that was ruled by others. Such a society can afford to make absolute decisions against things like the death penalty and mandate the most civilized rules of warfare, because for the most part it is powerless to act on those portions of law anyway -- what meaning has the prohibition against the death penalty to a society that does not control criminal courts? And what meaning have the rules regarding warfare to a society without an army?

This problem is best illustrated by an analysis of a text on giving up, or by extension harming, one life to save many lives, an important text in the discussion of Judaism and torture.

The foundational "one vs. many" text appears in the 2nd century *Tosefta*, presenting a dilemma in which oppressors surround a city demanding that one person be delivered to death, and threatening that otherwise the entire population will be killed (T. Terumot 7:20). The *Tosefta* states unequivocally, "all must be killed rather than surrendering even one," but then adds one exception: "If they specified which person is to be surrendered, they surrender him—that they not all be killed." The exception is based on a Biblical story in which a man named Sheva ben Bikhri was killed in order to prevent the destruction of an entire city (II Sam. 20:14-22).

The next generation of Halakhists, however, were uncomfortable with the notion that one person's life could be handed over, even to save an entire town. Rabbi Yohanan ruled that the person singled out may be handed over even if he is totally innocent, since he would die anyway along with the rest of the group. Resh Lakish, on the other hand, argued that a person may not be handed over unless he has already forfeited his life by committing a capital crime for which he stands condemned (*JT Terumot* 8:4). Most authorities accept Resh Lakish's more restrictive interpretation. Even those who accept Rabbi Yohanan's view that it is permitted to hand over a specified person to save the town add the qualification that the person specified may be delivered only if it is not certain that he will be killed, for one may not directly and knowingly kill an innocent, even to rescue many others. This text along with its history of interpretation is a powerful argument for the sanctify of each individual life, arguing that one may not endanger one life even to save many lives.

From a theoretical point of view, it is beautiful to hold human life in such high regard. Mathematically, if each life is of infinite value, then one life of infinite value is equal to 1000 lives of infinite value -- infinity times 1000 is still equal to infinity! From this understanding of the text, one can come to the conclusion that no matter how many lives might be saved from torture, the life of the one may not be harmed to save the many.

Practically, however, when Halakhah comes up against certain realities, traditional answers may be insufficient. During the Holocaust, Jews were put in situations in which Jewish councils were required to distribute work certificates which would allow some people to live, but condemn others to almost certain death. The standard answer using the previously cited source is that those councils who cooperated with the Nazis should have refused, and themselves been put to death.¹

A different answer using the same source was reached by another rabbi who was faced with an equally tragic question. A group of Jews, amongst them an infant, were hiding in a bunker while Nazis were searching the area. The infant began to cry. One of their number covered the child with a pillow to stifle the cries, suffocating it. The question is, is this man guilty of murder -- or was his unintentional killing of the child justified because by doing so he saved the lives of the many people in the bunker. While the specific halakhic reasoning is complicated, going back to our text, he concludes that since the child would have died in any case when his crying attracted the Nazis, the accidental killing of the child to save the entire group was justified.

Might one argue that in today's world, when the enemy values their own lives so little that they are eager to destroy themselves as long as they can take innocent lives with them, that the life of one captured terrorist may justifiably be harmed or taken in order to save other lives?

Two additional sources help us answer this question. The first source concerns the *rodef*, one who is pursuing another with the intent to kill. Because *Pikuah nefesh*, saving a life, is among the highest *mitzvot*, one is permitted to take the life of a *rodef* based on Leviticus 19:16, *לֹא תֵעָמֵד עַל-דַּם רֵעֶךָ*, "Do not stand idly by the blood of your neighbor." One could argue that if it is permitted to take the life of someone who poses imminent danger to another person, then certainly it is permitted to do physical harm short of taking the life of one who refuses to divulge information which will save lives. Note, however, that permission to kill the *rodef* assumes that we are certain that he is imminently going to kill another person.

There is another relevant source in connection with a man who refuses to give a *get* to his wife. For a man to refuse to give a *get* and thereby make his wife into an *agunah*, unable to remarry, is a disgusting act. The halakhic sources say that such a man may be compelled to give her the *get* - and Maimonides, in his *Mishneh Torah*, specifies that "the court may beat him until he says, 'I want [to give my wife a *get*].'"

We now have some halakhic justification to suggest that it is permitted to use physical force to coerce an individual if we are certain that he or she is imminently involved in a threat against others; and we have evidence that when the cause was just, rabbinic

¹ This and the following scenario are described in "Holocaust and Halakhah," Chapter 2, *Matters of Life and Death*, by Irving J. Rosenbaum, 1976.

tradition actually did permit beating to force a desired outcome.

However, there are two additional questions that must be addressed. First there is the question of does torture work? There is some evidence that crucial information obtained through torture has been used to thwart murderous attacks, but other studies suggest that information obtained through torture is unreliable - that people lie to stop the torture (not a surprise!). The central defense of torture in the Jewish tradition is grounded on the assertion that the person to be tortured has information that can immediately be used to stop a murder, or murders, in progress. If there is serious doubt that information obtained through torture will not in fact save lives, then torture ought not to be permitted.

Second, there is the questions of the side effects of torture on us, those doing or condoning the torture. What does it do to our own humanity, and what does it do to our reputation, our *shem tov*. A generation from now, will historians look back to April 28, 2004, the day Abu Ghraib photographs were broadcast on CBS News, as the day the United States lost the war in Iraq? America suffered a huge defeat the moment those photographs became public. They became vivid illustrations of the worst suspicions of the Arab world: that Americans are corrupt and power-mad, eager to humiliate Muslims and their values. The acts they document have helped energize the insurgency in Iraq, undermining our rule there and magnifying the risks faced by our soldiers each day. It is widely believed that abuses in American detention have fueled the engine of recruitment among terror groups. The al Qaeda affiliated Ansar al-Islam terror network in Iraq, for example, prints pictures from Abu Ghraib in its recruitment literature.

What are we to conclude from this?

Jewish tradition certainly allows physical coercion in a true "ticking bomb" case. Such permission, however, comes with grave responsibility and severe consequences. Everyone potentially involved in interrogations needs intensive training -- all those involved in interrogations that might become physical must be made keenly aware of the massively negative consequences of acts of torture. Those who have not been properly trained should under no circumstances be allowed by their commanding officers to use physical pressure.

Jewish law is beginning to grow out of its exilic shell -- The Israeli Supreme Court, while not a judicial system based on halakha, adopted a standard of imminence similar to that demanded by the *rodef* defense in Jewish law. The Court provided an exceptional, narrow "out" from an otherwise absolute prohibition against torture and "cruel, inhuman, and degrading treatment." In rare, extreme circumstances, and certainly not as a norm, interrogators may resort to force to obtain information about an imminent attack.

Halakhah ought to have answers to the extreme and difficult questions of life in the contemporary world -- we can only hope and pray that "peace will fill the earth as the

waters fill the sea," and that the scenario with which I began and this area of Jewish law will become irrelevant in our lifetime.