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The Ethics of Torture-Lite: A Justifiable Middle-Ground?

Introduction: Torture on the Table

The debates and issues surrounding torture are well known. International law strictly prohibits its use under any circumstance;[1] it is considered to represent a quintessential crime against humanity;[2] and human rights organisations use it as a benchmark to admonish states for failing to accord basic human rights.[3] However, after the 9/11 terrorist attacks, the debate regarding the justifiable use of torture has resurfaced. Since the attacks both politicians and the intelligence community have come under increased pressure to be seen to be acting to prevent such atrocities from happening again. Many blamed the ability of the hijackers to carry out their plan as a failure to provide timely information that would have prevented it.[4] Indeed, the US Senate Select Committee on Intelligence noted in its report, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, how the 'pervasive fear in late 2001' left everyone under a pressure 'to act quickly in response to threats and world events', and how this created an 'impulse to consider the use of every possible tool to gather intelligence… and to do whatever it could to prevent another attack'.[5] It was in this atmosphere that the intelligence community expressed their own frustration at being restrained in their interrogation techniques and for Cofer Black, State Department Coordinator for Counterterrorism, it was clear that 'there was a before 9/11 and there was an after 9/11… and after 9/11 the gloves come off'.[6] However, set against these growing national security sentiments was an explicit narrative from democratic societies and their leaders that torture is absolutely prohibited, keen to make it clear to both their own people and the rest of the world that they are still adhering to internationally recognised laws and norms. In 2006 President Bush repeatedly claimed that 'We don't torture'; former CIA director Michael Hayden who served from March 2006 until February 2009 testified at length before the Senate Intelligence Committee about the agency's detention and interrogation program, stating that 'there are no instances in which such threats or abuses took place'; and in 2011 former Secretary of Defence Donald Rumsfeld criticised the media and Congress for asserting that CIA was torturing and waterboarding detainees at Guantanamo Bay, stating that the prison 'is one of the best-operated prisons on the face of the Earth'.[7]

The result, the development of three distinct trends within the torture debate, each seeking to allow interrogation techniques that would not normally have been allowed while still maintaining political, legal, ethical and international respectability.[8] The first trend was

to reshape the definitions used within the debate itself. This included a series of Presidential directives that sought to change the definition and legal parameters surrounding torture both in technique and target, making it a more readily available option. First it was claimed that the Geneva Conventions did not apply to al Qaeda suspects, and that neither they nor the Taliban would be eligible for prisoner of war status[9]; second, on 13th November, 2001 orders were given that allowed for the detention of all Al-Qaeda suspects and denied them access to any civilian court thus relegating them to military tribunals,[10]; and third, in August 2002, a Justice Department memorandum redefined a narrower account of 'torture' under US law than the Geneva Conventions allowed, and limited it to abuses causing physical pain 'equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death'.[11] These amendments essentially raised the bar on what amounted to torture or who was protected from its use, creating a greater realm of non-torture interrogation techniques.

The second move in comparison was to take the torture off-shore. In September 2006 President Bush admitted that the CIA operated a secret network of 'black sites' in which those suspected of terrorist activity were subjected to 'alternative procedures'.[12] This included the American Central Intelligence Agency (CIA) flying individuals to countries including Egypt, Jordon and Syria with the knowledge, and even intent, that they would be interrogated in ways far too extreme to be have been allowed under any American jurisdiction. People were being systematically abducted from locations across the world, transferred by American intelligence operatives to other counties, held in detention without charge for indefinite amounts of time and subjected to torture. It has been estimated that since 2001 more than 150 suspects have been renditioned using this process.[13]

Finally, the third move, and the one under consideration in this paper, was to develop a new type of interrogation that it could be argued was less harmful and therefore represented a more ethically acceptable option, referred to as 'enhanced interrogation techniques'[14], 'stress and duress'[15] or 'torture-lite'.[16] While torture-lite would use methods that are more harmful than would normally be allowed in an interrogation room, it has been argued that they are not sufficiently destructive so as to be considered full torture or what might be considered as cruel, inhuman or degrading treatment, and so intuitively offers a set of options that are likely to be more ethically and politically acceptable.[17] This is an interesting position compared to the previous two trends mentioned as it argues for a third way, an entirely new and separate set of activities with a distinctively reduced level of destruction so as to require a different ethical evaluation for its use. It creates a space between two ends of the

interrogation spectrum and, as a result, offers a useful means for encouraging reluctant sources to cooperate while not exhibiting the same ethical baggage seen with full torture.

The question is, however, whether or not it is even possible to conceive of this middle ground in this way, and if so what the ethical implications for its use are. Is there an argument to be made for a differentiation on the types of activities used and the level damage caused so as to satisfy both the desire of the state to force information from those who represent a threat while not causing an unacceptable level of harm? Or should this third space and all forms of enhanced-interrogation be prohibited with the same ethical condemnation that is saved for torture? The answer is essentially neither. This paper will argue that there is no such thing as torture-lite in the first instance; that it is a political tool designed to create a mental space where previously prohibited interrogation methods can be used. By presenting the main arguments for torture-lite and systematically countering them, this paper will argue that those efforts to construct a middle ground fail to understand what torture, and therefore torture-lite, actually is and so does not, and could not, exist.

The Torture-Lite Debate: Reduced Harm, Same Return

The debates surrounding the use of torture-lite can be separated into two strands. The first examines what activities should be included within the torture-lite category, while the second then interrogates whether the result is ethical or not. Within this first strand much work has been done on how to best distinguish between full torture and torture-lite, whether it be on a psychological versus physical basis, or on the severity and length of the attack, or for how long the individual feels the effects afterwards. However, many of the definitions revolve around claiming that torture-lite makes a distinctively lesser amount of harm that separates it from full torture. For example, definitions put forward by Mark Bowden and David Luban are based on the level of destruction to the physical body, arguing that 'moderate physical pressure', although painful, 'generally leave no permanent marks and do no lasting physical harm' and so are not sufficient to be considered torture.[18] This would mean torture-lite would include the use of 'sleep deprivation, prolonged standing in stress positions, extremes of heat and cold, bright lights and loud music'.[19] Jessica Wolfendale, however, argues that the distinction should not simply fall along physical versus psychological lines. She quotes a 2007 study on 279 torture survivors noting that 'psychological effects of such techniques as isolation and forced standing with the effects of more physically violent tortures and found that the former "do not seem to be substantially different from physical torture in terms of the extent of mental suffering they cause, the underlying mechanisms of traumatic stress, and

their long-term traumatic effects"'.[20] Indeed, this is correct as many of the psychological attacks harm the individual as much as a physical attack and can be felt for many years after the initial event. Secondly, Wolfendale also argues that focusing on whether the activities used have long lasting consequences is problematic. It does not matter whether the harm is long lasting or not, the initial high level of suffering is sufficient to classify the attack as being torture: 'our judgment of whether an act constitutes torture should not focus on whether it leaves physical scars or not, but on whether it causes extreme suffering'.[21] Importantly, however, Wolfendale does argue that there is a distinction to be drawn: 'this should not be taken to imply that there are therefore no distinctions to be made within the category of torture. Some torture methods are undoubtedly worse than others'.[22] Rather, 'our judgement of the severity of a particular torture technique should take into account such factors as its duration and effects' when making the relevant distinction.[23] In comparison, David Sussman distinguishes between torture and torture-lite on the grounds of the effect it has on the individual's agency. For example David Sussman argues that what is different between full torture and torture-lite is the impact it has on the individual and state they are left in as a result. That is, 'In full torture, victims experience such central emotions as fear and hope turned against themselves as they succumb to the will of their tormentors… Torture lite, in contrast, does not marshal the victim's emotions against himself or herself in this way… Instead, victims are made unable to gain any sort of practical purchase on their world at all'. Torture leaves the individual without a self at all to resist with, whereas torture-lite leaves the individual disorientated to the extent that resistance is a failure.[24] Regardless of where the line is placed, however, there is clearly a desire to differentiate torture-lite as a separate realm, either in terms of level of harm caused or the degree of disorientation caused in the individual.

From these distinctions the debate then moves on to whether the use of the torture-lite is itself ethical. Much of this debate is drawn from the broader debates had on full torture, namely of a consequentialist nature, which takes the particular level and type of harm caused and compares it against the ends sought in order to determine if its use is ethically justified or not.[25] Many of these debates are set within the ticking time bomb scenario where a secret bomb is placed in a populated area that significantly threatens a large number of people, whereby you are in possession of an individual who is (suspected) of knowing where the bomb is.[26] The question presented is whether the harm done through torturing him is outweighed by preventing the harm that letting the bomb explode would cause. By necessity this argument is reliant on a very tight time frame and a suspect who is actively defiant of

providing any information under normal interrogation. In such situations Michael Levin argues that 'the decision to use torture is a matter of balancing innocent lives against the means needed to save them' and when presented with situation where 'letting millions of innocents die in deference to one who flaunts his guilt' torture is not merely permissible 'but should be morally mandatory'.[27] Similarly, Michael Herman, who served as a British intelligence professional from 1952 to 1987 and former Secretary to the Joint Intelligence Committee, also argues this point strongly, stating that 'intelligence has to be judged in the first instance on its manifest consequences'[28] and proposes an 'ethical balance sheet' where knowledge and activities can be examined separately, and then can be integrated together to make a judgement on the overall outcome of an action.[29] As such, when he considers whether 'one should torture a terrorist to forestall imminent operations' he concludes, 'one should'.[30] By the same token Fritz Allhoff makes a 'utilitarianism of rights' argument, contending that there is a hierarchy of rights and so when two rights come into conflict with each other, the action with the least number of right-violations is the one to take. In such a balancing of rights Allhoff argues that even if you are not a utilitarian, the minimising of right violations must seem attractive.[31] Indeed, Allhoff goes as far as to argue that even if one is presented with a situation with two possible suspects 'Surely it is worse to torture a guilty person and an innocent one than to torture just a guilty one, but I maintain that this [the torturing of both] could still be justified if there are enough people at risk'.[32] By violating the right not to be tortured, we are able to prevent a greater number of violations to the right to life for many more innocent people.[33] Samuel Schleffler thus asks, 'how can the minimisation of morally objectionable conduct be morally unacceptable?'[34]

However, such arguments are equally unpicked using the same consequentialist framework, arguing that the level of harm caused is in fact too great to outweigh, or that the factors chosen to be included in the ethical calculation are misleading. Richard Matthews argues that although the calculation of the many against the few is naturally appealing, it fails to take into account wider harms and repercussions. That no individual is an island, but is a part of a complex set of social networks that are also damaged when someone is tortured: 'In torturing one person, torturers also harm these networks… Torture never merely attacks a single "terrorist"; its run-on effect is well documented and involves wide-ranging pain and suffering across the communities and contexts from which the torture victim comes'.[35] We should therefore include additional costs such as 'the mental and emotional toll on victims and torturers, loss of international stature and credibility, and the risk of retaliation against soldiers and civilians' into the calculation, each of which raises the bar and makes the overall

benefit of torture ever reduced.[36] Or, by travelling further down the utilitarian path David Luban asks what happens if the suspect does not break under torture, is it then right to move onto family and loved ones: 'of course you would not know if torturing the victim's child would cause him to break until you have done it. But that just alters the odds not the argument'[37], bringing into question the arbitrary nature of where the consequentialist line should be drawn and the limits to the harm allowed. This becomes particularly problematic with intelligence since no one is really able to see the exact repercussions of an event, nor do they have enough supreme knowledge to know if what they do will even achieve the desired ends. Indeed, Michael Quinlan, a distinguished former British defence strategist and former Permanent Under-Secretary of State at the British Ministry of Defence, cautioned that 'it is hard even with hindsight to measure the reality and scale of the possible benefits in any concrete way and to bring them into common calculus with costs. Much of intelligence is directed towards insurance against events whose probability, importance and cost cannot themselves be measured'.[38] Intelligence services are notoriously secretive and operations incredibly complex. The information gained is rarely the smoking-gun that would be required to act as the overwhelming positive in the consequentialist calculation, but provides piecemeal information contributing to an overall case. Finally, there are arguments to be made that when carrying out balancing evaluations dying humanely can be better than suffering greatly yet living. Ian Clark makes the point by asking, 'Which is the greater evil, the humane killing of non-combatants or the burning of combatants to death by flamethrowers?'[39] It is because of the type of suffering caused that the use of the flamethrowers are prohibited even if the individual lives.[40] Torture is essentially the epitome of inhumane treatment and so cannot be so easily calculated against other forms of harm.

What is important for the torture-lite discussion is that the crux of the debate is rested on the same examination of the level and type of harm caused and comparing this against the consequences of (not) acting. This means that even for those who make consequential, utilitarian or general balancing arguments against torture one might find torture-lite a more attractive option. With the costs reduced, especially at the lower end of the scale, while the gains theoretically remain the same, it is ever more likely to satisfy a consequentialist argument to justify its use. For example, critiques on grounds of imperfect knowledge that claim that the torturer can never truly know if their actions will provide the required information or that the target might not be the correct one with the necessary knowledge becomes less pertinent when lower harms are involved and so makes reduced odds or imperfect knowledge less stringently required. To borrow from legal terminology, it might

only require an on balance of probabilities rather than the need for beyond any reasonable doubt for it to be justified. Also, with reduced harms the consequentialist good produced at the end would not have to be the smoking-gun argued for in cases of full torture. Relative, smaller gains could more readily be argued for when the damage caused is less. Moreover, it could be argued that while some might prioritise the right not to be treated inhumanely over the right to life, it is less clear as to whether this prioritisation is still maintained with less harmful activities. In essence, if the concern is that the level of harm caused through torture is too great to be outweighed by the gains, then torture-lite, with its reduced harms, is more likely to be offset by the same level of benefit.

Against Torture-Lite: The Imagined Middle Ground

The problem with these arguments, however, is that they each misunderstand the nature of interrogational torture itself and as a result are unable to see that there is no such thing as torture-lite to begin with. This concept of the middle ground is a false one born from a misconception of what torture is designed to do and what its end point is. In essence interrogational torture is used for the purpose of collecting intelligence through a highly specialised form of behaviour modification.[41] Using conditioning theory as the basis of analysis it can be seen that the physical, social and emotional conditions created by interrogational torture are designed to, first, break any resolve or resistance the individual might have, while, second, conditioning his responses.[42] That is, attacks on the individual are designed to deliberately induce physical and mental weakness in the target, to erode any resolve he might have. But interrogational torture is more than just attacks. These attacks are used to condition the individual into associating resistance with highly negative results, while allowing brief respite as a means of reinforcing good behaviour when he cooperates. The utter control the torturer exhibits over the target reminds him of who has the power. The target is stuck in an asymmetrical power situation, dependant on the torturer for everything in their life. This creates a paradoxical dependency upon the torturer: the victim is brought to believe that his fate is entirely within the hands of the torturer.[43] The victim must realise that he is completely at the mercy of the torturer. As a result of this asymmetric relationship, the victim starts to feel obliged to the torturer both as his punisher and saviour.[44] Punishment both physical and psychological, coupled with select moments of relief and constant variation in the treatment in order to stop the victim from seeing through the ordeal are essential to break the individual's will and force him to turn against himself. What will be argued below is that if this is true then there is essentially no such thing as torture-lite. Torture-lite would

never be able to create the same self-betraying effect without crossing over into the higher harms caused by full torture, and so is unable force the individual to provide the necessary information to act as the good in the consequentialist argument.

Torture Acts v Torturous Experiences

The first argument made for torture-lite, and one that is seemingly heavily reflected in the literature, is that it is possible to examine the bag of tricks used and determine whether the level of harm they cause is torturous. By doing this we can conceive of a range of activities that can be used to encourage an individual to provide information that, while not pleasant, are not torture. For example, according to official accounts under the Bush administration on the 2nd December, 2002, then Secretary of Defense Donald Rumsfeld signed an 'Action Memo' headed 'Counter-Resistance Techniques' drafted by William Haynes II, the General Counsel at the Defence Department, that listed and ranked a range of interrogation techniques that were to be deployed at Guantanamo Bay. Attached to this was a memorandum from General Tom Hill, Commander of U.S. Southern Command and the US Joint Task Force 160/170 at the Guantanamo Bay detention centre that argued that the current interrogation guidelines 'limit the ability of interrogators to counter advanced resistance' and that in order to overcome this a greater range of options was required.[45] The result was a detailed list of actions that were broken down according to the level of harm caused to the individual. Of the different levels it created, Category I is the lowest level of harm and includes actions such as 1) yelling (but not loudly enough to cause physical pain), and 2) techniques of deception including multiple interrogators and misidentification of the interrogator as a citizen of a foreign country 'with a reputation for harsh treatment of detainees'. Whereas Category II, which required the permission of the General in Charge of the Interrogation Section, included '...the use of stress positions (like standing), for a maximum of four hours,' the use of falsified documents or reports, solitary confinement for up to thirty days, interrogation in other than the standard interrogation booth, sensory deprivation, hooding with unrestricted breathing, 'removal of all comfort items (including religious items),' feeding cold Army rations, removal of clothing, 'forced grooming (shaving of facial hair etc.),' and 'use of detainees individual phobias (such as fear of dogs) to induce stress'. While Category III techniques include the use of 'scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family,' 'exposure to cold weather or water (with appropriate medical monitoring),' 'use of a wet towel and dripping water to induce the misperception of suffocation,' and use of 'mild, non-injurious physical

contact such as grabbing, poking in the chest with the finger and light pushing'.[46] By December 2002, Secretary of Defence Rumsfeld, approved Category I and II techniques and item four in Category III ('mild, non-injurious physical contact'). The use of death threats to family, exposure to cold weather and water, and simulated drowning were not approved although DOD General Counsel advised they 'may be legally available.'[47]

This position is intuitively attractive as we regularly consider various activities as being more or less harmful according to which vital interest they violate and the severity of the violation. Being made to stand for one hour is arguably less harmful than six, which is less harmful than being made to stand in a stress position for several hours, which is less harmful than having ones arms broken, et cetera. Depending on the particular vital interest violated, the severity of the violation and the duration of the violation, the level of harm caused is arguably altered.[48] It is possible to conceive, as former chief of CIA counter-intelligence James Olson does, of a 'sliding scale' of interrogation activities that could be included, that ranges from 'mild discomfort to serious stress'.[49] Of the twenty-one activities he lists he includes removing religious items, shaving of hair and beards, use of hooding, bright lights, loud and offensive music, noxious odours, repugnant food, extreme temperatures, stripping, slapping, dogs to frighten, death threats, solitary confinement, and mock executions. Some activities are decidedly worse than others and the argument is that they do not represent a level of destruction that would intuitively lead one to think of as being torturous. Importantly this was the logic held by those who argue for the practical use of torture-lite. Rudy Giuliani, former Mayor of New York City, talked about sleep deprivation as being no different from the 'fatigue of campaigning' he experienced;[50] Donald Rumsfeld, US Secretary of Defence in the Bush administration, commented that 'I stand for 8-10 hours a day. Why is standing limited to 9 hours?';[51] and in 2009 former National Security Advisor and Secretary of State Condoleezza Rice insisted that the enhanced interrogation techniques never led to or amounted to the level of torture.[52]

The problem is that any actual engagement with this debate in this way is dangerous as it reinforces the notion that torture-lite can exist. Any examination where each activity is taken and ethically evaluated in isolation to determine the particular level of harm caused fails to understand what torture, or even torture-lite, actually is. In reality the actions are not carried out in isolation or for one off periods where the individual has time and space to recuperate. Rather the activities are deployed over a long period with no option of recovery, revival or understanding of when the ordeal will end. They act to reinforce each other and in combination amount to full torture. These politicians were taking their well-fed, previously

well-rested, experiences with foreknowledge that respite was coming as being analogous for actions discussed in the memorandum. The victims would not be allowed such respite. The nine-hour stress positions would be combined with sensory deprivation, sleep deprivation and lack of food, followed by deceptions and mock executions. Over time the building up or continuation of such activities can have profound effects on an individual's mental, physical and emotional state. Even small harms, when strung together, are repetitive or span greater amounts of time, become chronic and can amount to a torturous state.[53] There is essentially a cumulative effect when the attacks come without respite. When understood in this fashion it is clear that the actions cannot be taken as a checklist and ethically evaluated individually, but as part of an overall experience.

Importantly, it is not just that these methods are often used in conjunction or for an indeterminate amount of time because this is an efficient means of getting information, but that they are necessarily done together in order to create the behavioural modification desired. The individual must be brought to a point of weakness or the torturer would not be able to achieve the necessary end. By the very nature of torture you cannot allow people to see the end point; to let them know that what they are experiencing will finish; that the execution is just a mock; that you will have to give them respite at the end of 24 hours because any longer you will be crossing the boundary into full torture. To do that will give the victim too much power. They will not be dependent on the torturer and will be able to resist the torturer for they know that relief is coming. The level of harm caused is, by necessity, much greater than that previously thought because if the harm experienced by the individual is not at its greatest then it will fail. The problem is that discussions often revolve around individual activities and the harm they can cause, rather than understanding to purpose for which they are used and the ethical situation this necessarily creates.

All the Small Things

However, while this argument might stand for those activities that it is reasonable to foresee as being able to create torturous experiences when put together, it can still be argued that there are some activities at the lower end of the harm spectrum that, even when done in combination, would not be torturous. For example Category I activities such as yelling or using multiple interrogators, or some of Olson's less destructive activities would stretch the common understanding of torture to claim that they could accumulate into being a torturous experience without a significant amount of time and effort. Given their limited level of harm a claim for the very bottom end of the spectrum for torture-lite could therefore be made.

Indeed, many small and transitory hurts do not harm us. They come, are felt, pass without leaving any mark, and are forgotten quickly, and are far from creating a torturous experience, yet might encourage people to give useful information.

Importantly for the cases given, however, by necessity the person being questioned is not just disinclined to offer the information, but is actively trying to resist. The emergency situation created is a necessary means of justifying the harm caused. Without the tight deadline or the active resistance of the suspect, non-harmful means could be used instead. In the ticking time bomb scenario, the individual being tortured necessarily resists providing the required information, his active defiance and unwillingness to cooperate means that the interrogators must act so as to get him to actively betray himself. This means that the level of work required to force the individual to betray himself is necessarily high. Under these circumstances it is not just a case of persuading the individual, making his experience uncomfortable so he will provide the information, but he must be broken and forced to act against this expressed desire; his will must be worn down over a long period of time.

The end for torture-lite is the gathering of intelligence and it is the collection of the information that is used in the calculation to offset the harm caused. So, while Category I techniques, such as yelling, deception and threat of transfer, would arguably cause a much lower level of harm they will not be sufficient to break those individuals who are holding the information needed. This, therefore, undoes the argument for the use of lower level actions because if the mechanisms used are restrained then the individual will remain unbroken, eliminating the possibility of gaining the required information, which means there is no good end produced to fulfil the consequentialist argument to outbalance the harm caused. Therefore, by necessity the information gained must be considerable, without which there is no 'good' to be put into the moral calculation to offset the harm that is cause. Without this good, all the harms, even the low level harms, cannot be ethically offset and justified. So, if the individual is truly resistant then Category I techniques would be of no use, and if the individual is not truly resistant then other non-harmful techniques can be used, and so Category I methods become redundant. Furthermore, if time is no longer of the essence and the Category I techniques are used over a long period of time or if the individual is so disposed that such methods could be used to quickly get him to comply against his expressed will, then his broken will would reflect that the experience for him was torturous and so would amount to full torture and carry with it the associated ethical baggage.

Conclusion

Torture represents a powerful tool when it comes to forcing a target to cooperate. The stark contrast it highlights to the individual between what he has and what he has to lose if he fails to cooperate means that for intelligence agencies it is indeed an enticing avenue. However, torture has come under heavy criticism for causing a level of harm that could never be justified. The temptation offered by torture-lite therefore is that it carries with it an automatic expectation that it is more likely to be justifiable as it suggests a less harmful but equally powerful form of interrogation. What this paper has argued, however, is that the concept of torture-lite is a false one, created to construct this very automatic response. Those activities employed at Guantanamo Bay were justified by politicians in the media by pulling the experience apart and discussing individual methods in isolation of all the other attacks the victim would suffer. These techniques either combine to cause a harm equal to full torture and so fail any justification or are unable to force the target to comply and so offer no benefit for its use, relegating itself to simple brutality.

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Counsel, Department of Defense, From: John Yoo, Deputy Assistant Attorney General, 'Application of Treaties and Laws to Detainees', available in The Torture Papers: The Road to Abu Ghraib, pp.38-39, 43-44, 47, 57, 79.
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