

But Does Torture Save Lives? Torture, *Pikuakh Nefesh*, and the *Rodef* Defense

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I am convinced that more Americans are dying and will die if we keep the Gitmo prison open than if we shut it down... Why care? It's not because I am queasy about the war on terrorism. It is because I want to win the war on terrorism... This is not just deeply immoral, it is strategically dangerous... I would rather have a few more bad guys roaming the world than a whole new generation.

-Thomas Friedman¹

The brutality with which we fought [Vietnam] almost certainly contributed to our defeat. In a war for 'hearts and minds' rather than for land and resources, justice turns out to be a key to victory... One might almost say that justice has become a military necessity.

-Michael Walzer²

...your own sword has devoured your prophets, like a destroying lion.

- Jeremiah 2:30

As mass attacks hit one city after another, as the world feels like an increasingly insecure place, we know that no public will remain safe without strong self-protection and counter-terrorism measures. Many of us may be tempted to want any means necessary used to protect our children and thwart more violent assaults on innocent lives.

Even in anxious times like these, torture arouses unique disgust from most corners of the democratic world, retaining its place on a brief list of moral "nevers." In international law, torture joins genocide and slavery as acts categorically deplored and outlawed, regardless of political circumstances. Henry Shue, among others, attempts to formulate why torture receives such worldwide censure, suggesting that it violates a "primitive moral prohibition against assault upon the defenseless," for the torture victim, unlike the soldier on the battlefield, carries no weapon to defend himself nor option of visible surrender to bring his torment to an end.³ Others argue that torture is the ultimate assault upon individual autonomy and human dignity, the crowning twin ideals of modern liberal democracies.⁴ Perhaps our consciences simply cry out against human beings inflicting unbearable, drawn-out pain on other human beings, a fate many consider worse than death. Mothers of the "disappeared" in Argentina claimed that worse than worrying that their children were dead, they worried that their children had been afflicted with torture during their last moments on the earth.⁵ Regardless, President George W. Bush appealed

¹ "Just Shut it Down," *New York Times*, May 27, 2005

² *Arguing about War*, Yale University Press, p. 9

³ Henry Shue, "Torture," in *Torture: A Collection*, ed. by Sanford Levinson, Oxford University Press, 2004, p. 48

⁴ See Ariel Dorfman, "The Tyranny of Torture," p. 8, John Parry, "Escalation and Necessity: Defining Torture at Home and Abroad," pp. 152-154, and Oren Gross, "The Prohibition on Torture and the Limits of the Law," p. 229, all in *Torture: A Collection*, *ibid.*

⁵ Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands,'" *Torture: A Collection*, *ibid.* p. 77

to a nearly universal condemnation when he partially justified the U.S. invasion of Iraq in terms of the prevalence of torture in Saddam Hussein's regime.

One proverbial example, however, tugs at the absolutist prohibition against torture. Known as the "ticking bomb" case, it presents some version of the following hypothetical: a captured fanatic has set a hidden nuclear device in the heart of a major metropolis, set to go off within hours. The authorities are certain that the prisoner in their hands is the perpetrator whose knowledge could avert the catastrophe and spare thousands of innocents, even a whole nation, and the non-violent devices of their most expert interrogators have not yielded enough information to locate and deactivate the bomb. Should we really, ask the thinkers who present this scenario, damn thousands rather than suspend our moral commitments? "It seems fanatical," says Harvard law professor Charles Fried, "to maintain the absoluteness of the judgment to do right even if the heavens will in fact fall." Fried, who is generally critical of sacrificing rights on the altar of utilitarian cost-benefit analysis, nonetheless leaves the door open for this "catastrophe exception."⁶

Today, particularly since Sept. 11, the "ticking bomb" scenario is often invoked to defend torture and its milder cognates as "lesser evils" necessary to save human lives. Some extend the "ticking bomb" justification to argue that it is difficult to obtain intelligence about terror cells and future planned attacks without coercive interrogations that "soften" detainees into yielding vital information.

This defense of torture strikes a Jewish nerve, for one of Judaism's most preoccupying values is the sanctity of life and the importance of preserving it at great cost. In the aftermath of the Holocaust, this traditional value is freighted with even greater emotional potency and urgency.

What instruction does Judaism provide about balancing the need for self-defense with other Jewish values? By what means may we protect ourselves? Are there any limits? This section will focus on the "*rodef*" principle and conditions for its application, the classic Jewish statement of pre-emptive self-defense and defense-of-others.

A Few Caveats: The Paucity of Jewish Sources on War

Some might argue that less stringent rules should apply to treatment of enemy combatants and civilians than in the society-based situations generally treated in the *rodef* literature. There is, however, no separate area of law governing "battlefield ethics" in *halakhah*. It is not surprising that – given the historical realities of the Jewish people during previous eras of *halakhic* development – there should be a much more extensive treatment of the proper parameters for self-defense and defense-of-others in the sources on *rodef* than in those dealing with war proper. It is the assumption of this piece – as it seems to be the assumption of the Israeli Supreme Court – that to develop Judaism's positions on "battlefield ethics" issues, we must extrapolate from general principles of

⁶ Charles Fried, *Right and Wrong*, Harvard University Press, p. 10

Jewish ethics and apply them to the military situation,⁷ particularly the laws of *rodef* and self-defense.⁸ The *rodef* principle is particularly germane to any discussion of torture, for the interrogation room lies at the crossroads between the battlefield and the courtroom, and is often justified with criminal defenses – like the "necessity" defense in a "ticking bomb" situation – that resemble the *rodef* defense.

A cautionary note, however, must precede any attempt to adapt *halakhic* principles to contemporary military concerns. Jewish traditional sources offer very little systematic treatment of "battlefield ethics" in general, and do not explicitly address the permissibility of "torture," in either a military or a criminal justice context. This lacuna in Jewish tradition is understandable given that Maimonides (the Rambam) and other medieval scholars were not confronted with practical military questions – nor could they expect whatever directives they did offer to be observed – unlike questions dealing with ritual law and the execution of justice *within* their communities.

This section begins with an appreciation of the difficult and rudimentary nature of applying traditional *halakhic* principles to contemporary military concerns, and an acknowledgement that others might read these sources differently. The following is offered as a modest beginning instructed by traditional sources while recognizing the markedly different military and political realities in which we live today as Jews.

Pikuakh Nefesh: The Sanctity and Preservation of Life in Judaism

Judaism prizes nothing more than human life. The prohibition against murder serves as both one of the Ten Commandments (Ex. 20:13 and Deut. 5:17) and as one of the seven Noahide laws viewed as binding upon non-Jews (Gen. 9:5-6). Life – tradition teaches –

⁷ Marc Gopin similarly rejects the seeming assumption of some contemporary authorities that "other religious values, such as humility, compassion, and justice, which are incumbent on the individual, were abolished during war...as if the Jewish moral agent somehow disappeared on the battlefield." Gopin argues that the few texts about war that we have available reflect a "complex interaction" between the interpersonal sphere and the war context, and he asks a series of questions about how we are to make decisions given this interplay: "How is the individual who is committed to a personal code of morality expected to suspend all of those values in the context of war? When is the personal code, or one's *halakhic* code in the Jewish situation, to be suspended and when is it not to be suspended? When does the obligation to kill, steal or destroy things as a part of warfare, override all of the everyday laws that absolutely prohibit these activities? When exactly is there a suspension of the numerous *halakhic* moral safeguards governing one's internal life and external behavior that often prohibit even the hint of violence, such as talebearing or losing one's temper?... Does one treat [individual members of groups that have expressed some hostility to Jews] as an enemy, as if war has been declared, or does one, on the contrary, owe him all of the moral obligations of the Jewish tradition: honoring him as a creature of God, or as an elder (if he is older), greeting him with peace, honoring his property, even loving him as a creature of God, as Hillel did to all gentiles, and so on?" See "Judaism, The Limits of War, and Conflict Resolution," Paper delivered at Princeton University, April 27, 2001. Available at: http://www.gmu.edu/departments/crdc/docs/j_limitsofwar_and_cr.html#_ftn13

⁸Other scholars are similarly attempting to extend *rodef* and self-defense principles to law enforcement and police action in the State of Israel. See Stephen M. Passamaneck, "Halakhah, Law Enforcement, and the Modern World," *Jewish Law Association Studies VIII*, ed. by E.A. Goldman, Global Academic Publishing, 1994, p. 123.

belongs to God rather than to human beings, a principle whose practical implications include a prohibition against suicide and a refusal to allow murder to go unpunished:

Rambam, Hilkhoh Rotzeah, 1:4

The life of the killed does not belong to the redeemer of his blood, but to the Holy One, Blessed be He, as it says, 'you shall take no ransom for the life of a murderer.' And there is nothing that the Torah is more stringent about than the spilling of blood, as it says, 'for blood pollutes the land'" (Num. 35:31-33).

The *halakhah* privileges the preservation of life above all other enactments, outside of murder, idolatry, and sexual crime (eg. adultery or incest). One may not obey the law if in doing so one will endanger human life, based on the verse: "You shall therefore keep my statutes and my judgments, which if a person do, he shall live by them" (Lev. 18:5); the Talmud deduces from this verse that the affirmation of life reigns supreme over all other commandments: "he shall live by them and not die by them" (BT Yoma 85b). One *must* transgress ritual laws – including stringent Biblical laws like those governing *kashrut*, Shabbat, and Yom Kippor – rather than imperil human life (BT Yoma 82a, 85b). The law grants tremendous latitude in determining the degree of actual threat, recognizing that taking the time to assess whether a situation is in fact dangerous could result in death that might otherwise be averted (BT Shabbat 129a, Shulhan Arukh, Orah Hayim 328:2, 328:13). Any doubt in a matter of life is resolved in favor of transgressing the law rather than risking the loss of life that might incur if obeyed. Paraphrasing former Israeli Supreme Court Justice Haim Cohen, rather than a right to life, Judaism presents a duty to live, a duty that supersedes all other duties.⁹

According to some authorities, the law may be put on hold even more readily where the entire public is threatened with harm, let alone death: "Shmuel said: A metal ember in the public domain may be extinguished on Shabbat so that the public not be harmed, but not a burning piece of wood" (BT Shabbat 42a).¹⁰ The conclusion of the Talmud seems to be that only rabbinic prohibitions may be suspended out of concern for the public, but some authorities suggest that the principle extends to biblical prohibitions as well.¹¹ The Ran asks, "How can Shmuel suspend Torah prohibitions where there is no danger to life? It appears that [Halakhot Gedolot] maintains that public injury is equivalent to mortal danger" (in Rif, Shabbat 19b). Similarly, the Maggid Mishnah rules in favor of trapping even nonpoisonous snakes on Shabbat because "they may injure the public; hence they are equivalent to mortal danger" (Hilkhoh Shabbat 10:17). Where the public as a whole is

⁹ Haim Cohen, *Human Rights in Jewish Law*, Ktav Publishing House, 1984, p. 36

¹⁰ The Biblical prohibition against extinguishing extends to wood, but not metal, since metal does not really burn but does throw off sparks; the prohibition against extinguishing metal is a rabbinic extension of the Torah law. Rambam (Hilkhoh Shabbat 12:2) and the Magen Avraham (Orah Hayim 334:35) argue that only metal may be extinguished, whereas the Shulhan Arukh (OH 334:27) and Mishnah Brurah (334:84-85) argue that both metal and wood may be extinguished where the public is endangered. Most authorities condition that rabbinic law may be suspended only in response to a threat of physical injury, and not out of concern for property damage

¹¹ For example, such early authorities as Rav Hai Gaon (Halakhot Gedolot 24) and Rebbenu Hananel (on Shabbat 42b). See the discussion in Rakover, "The One vs. the Many in Life and Death Situations," *Jewish Law Association Studies VIII*, ed. by E.A. Goldman, Global Academic Publishing, 1994, p. 144.

in danger, preventative measures may be taken that override other enactments, though these measures must be limited to those necessary to secure public safety and order.

The duty to preserve life prevails over almost all other obligations, but it does not permit one to take the life of another in order to save oneself, for each life is incomparably valuable and "one life may not take precedence over another" (Rambam, *Hilkhot Rotzeah* 1:9; *Hilkhot Yesodei Torah* 5:7; see below). One cannot murder another *innocent* person in order to save one's own life or the lives of others, for "how do you know that your blood is redder? Perhaps his blood is redder" (BT San. 74a). Only capital punishment, self-defense, and defense of the lives of others (*rodef*) may override the prohibition against homicide, and extensive conditions limit the application of each of these exceptions. The Mishnah's classic statement about the singular sanctity of each human life takes place in a discussion of the lives of those being tried for capital crimes, as a warning to those who would dare to condemn them to execution:

M. Sanhedrin 4:5

Witnesses in capital cases are brought in and intimidated...In capital cases, the witness is held responsible for the blood [of the convicted] and of his [potential] descendants until the end of time. We find this in the case of Cain, who killed his brother. The Torah teaches [that God says to Cain]: "The bloods of your brother cry unto me" It doesn't say "the blood of your brother," but rather "the bloods of your brother." That is to say, "His blood and the blood of his [potential] descendants."...

For this reason was the human being created alone, to teach you that whoever destroys a single soul (of Israel),¹² Scripture holds guilty as though this person had destroyed a complete world; and whosoever preserves a single soul (of Israel), Scripture ascribes [merit] to him as though he had preserved a complete world. Furthermore, [Adam was created alone] for the sake of peace among people, that one might not say to another, 'my father was greater than yours, and that heretics might not say, there are many ruling powers in heaven; again, to proclaim the greatness of the Blessed Holy One: for if a man strikes many coins from one mould, they all resemble one another, but the supreme Sovereign, the Blessed Holy One, fashioned every individual in the stamp of the first human being, and yet not one of them resembles another. Therefore every single person is obliged to say: the world was created for my sake.

The Mishnah presents a concept of radical equality between human beings; the criminal, no less than the judge who condemns him, traces his lineage to Adam and from him to God. As former Israeli Supreme Court justice Haim Cohen eloquently summarizes this text: "Nobody may be heard to say that one human life is worth more or is better than any other- and the life of the lowest criminal is, *qua* human life, as essential and valuable in the eyes of God as your own...To bring home the equality of all men and the equal value of all human lives in situations like these, where a man stands to forfeit his life because he committed a capital offense, or where he is in peril of losing his own life unless he

¹² The word "of Israel" does not appear in most early manuscripts and is probably a later insertion.

takes the life of another, is to give such equality a meaning far beyond idealistic theorizations."¹³

Self-Defense and Rodef: Im Ba L'Horgakh, Haskem L'horgo

Capital punishment, *rodef* and self-defense are the only exceptions to an otherwise absolute prohibition against taking human life.

Based on a Biblical case of a thief invading a private home at night (Ex. 22:1-2), Jewish law lays out a general principle of self-defense:

Sanhedrin 72a (cf. BT Berakhot 58a and 62b)

Raba said: what is the reason for the law of breaking in? Because it is certain that no man is inactive where his property is concerned; therefore this one [the thief] must have reasoned, 'If I go there, he [the owner] will oppose me and prevent me; but if he does I will kill him.' Hence the Torah decreed, 'If he comes to kill you, kill him first.'

Given that the nighttime intruder entered one's property during a time one was likely to be there, the law assumes that he entered with intent or willingness to kill, and permits one to kill him in pre-emptive self-defense (Shulhan Arukh, Hoshen Mishpat 425:1).¹⁴

Jewish law obligates one to act to preserve the lives of others as well as one's own life.¹⁵ Third-party bystanders must attempt to save other innocent people from life-threatening danger: "If one person sees another drowning in the sea, or being attacked by bandits, or being attacked by wild animals, and although able to rescue him either alone or by hiring others, does not rescue him...he transgresses...the injunction, 'Neither shall you stand idly by the blood of your neighbor.'" (Rambam, Hilkhhot Rotzeah 1:14; cf. BT Sanhedrin 73a).

The principle of the pursuer (*rodef*), in particular, requires bystanders to use preventative force to thwart acts of rape or murder transpiring before their eyes (M. Sanhedrin 8:7; Sanhedrin 73ff; Rambam, Hilkhhot Rotzeah 1:6-16; Shulhan Arukh, Hoshen Mishpat 425:1-2).¹⁶ Jewish law elevates the 'Good Samaritan' principle to a duty, obliging one

¹³ Haim Cohen, *Human Rights in Jewish Law*, ibid. p. 152.

¹⁴ See below for a discussion of the degree to which one must be certain of the intruder's intent to harm.

¹⁵ As Chaim Povarsky elaborates, these two principles (*rodef* and self-defense) are not originally connected. The burglar, however, whom one may kill in self-defense, is designated as "*k'rodef*" (like a *rodef*) in *halakhic* sources. For an extensive discussion of the relation between these two principles, see Povarsky's "The Law of the Pursuer and the Assassination of Prime Minister Rabin," *Jewish Law Association Studies IX*, ed. by E. A. Goodman, Global Academic Publishing, 1997.

¹⁶ As the Talmud elucidates, the duty to save the innocent derives from two verses: "Neither shall you stand idly by the blood of your neighbor" (Lev. 19:16) and "The betrothed damsel cried and there was none to save her" (Deut. 22:27). The latter verse implies the bystander's obligation to save because it assumes that if one would have heard a betrothed woman scream one would have intervened, and therefore, sex with a betrothed woman in the country is considered rape, whereas sex with a betrothed woman in the city is considered consensual. The obligation to kill a pursuer in case of murder is derived from an analogy with the case of the betrothed woman (Sanhedrin 73a; Rambam, Hilkhhot Rotzeah 1:10, 14).

who witnesses another in mortal danger to save the would-be victim from harm as well as the pursuer from committing a sin (Rashi and Tosafot, ad. loc. Sanhedrin 73a). A Jew must hinder perpetrators with force, even lethal force, where no other means for preventing an imminent capital crime are available.

Jewish tradition encourages such intervention by shielding the intervener against tort liability: "If one chases the pursuer in order to rescue the pursued and he breaks objects belonging to the pursuer or to anyone else, he is exempt. This rule is not strict law but is an enactment made in order that one should not refrain from rescuing another or lose time through being too careful when chasing a pursuer" (Rambam, Hilkhoh Hovel U-Mazik 8:14). The law encourages action, but refrains from punishing inaction, for with few exceptions, omissions may not serve as the basis for criminal sanctions (Makkot 16a, Rambam, Sanhedrin 18:2, Rambam, Hilkhoh Rotzeah 1:16).

While the original *rodef* rule applied only to perpetrators *directly* responsible for *capital* crimes, later applications extend the principle to cases of indirect harm and non-capital crimes. The Rosh writes: "If a Jew is seen striking his fellow man and the latter cannot be saved without beating the striker, even to death, the striker may be beaten to keep him from a prohibition" (Piskei haRosh, Baba Kama 3:13). The informer (*moser*), furthermore, was declared a *rodef* who might *indirectly* jeopardize the entire community (Shulkhan Arukh, Hoshen Mishpat 388:9 ff).¹⁷ Similarly, a counterfeiter who threatens the whole community by engaging in an act prohibited by non-Jewish authorities was later deemed a *rodef* who may be handed over to the authorities rather than endanger the community (Rema, Shulkhan Arukh, Hoshen Mishpat 425:1). Yigal Amir invoked a *rodef* defense to justify his assassination of Yitzhak Rabin in part by arguing that Rabin was a *moser*, indirectly imperiling the entire Jewish polity. Most contemporary *halakhic* authorities dismiss Amir's reasoning as an abuse of the principle of *rodef* and the many strict conditions that constrain its application.¹⁸

Conditions on Rodef

The rabbis place many limits on applying the *rodef* principle, recognizing the enormous danger of providing a legal override to the prohibition against murder, especially one that shortcuts the judicial process.

1) *Force must be intended to save a particular victim from imminent death.*

- **Spontaneity rather than premeditation.** The *rodef* defense applies only to a spontaneous act in a moment of unavoidable urgency. One may kill in self-defense

¹⁷ The *Bavli* also includes one case in which the self-defense principle is applied in the case of an informer. See BT Berakhot 58b.

¹⁸ For critiques of applying the *rodef* principle to Rabin, see Chaim Povarsky, *ibid.* pp. 192-193, David Golinkin, "The Assassination of Prime Minister Yitzhak Rabin ז"ל," *Responsa in a Moment: Halakhic Responses to Contemporary Issues*, The Institute of Applied Halakhah at the Schechter Institute of Jewish Studies, 2000, pp. 87-92, and Mark C. Alexander, "Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings," *Arizona Law Review*, Winter 1997, pp. 1166-1184.

when the act is carried out without premeditation and when life is in immediate danger (Rambam, Hilkhhot Gneiva 9:7-10).

- **Present need rather than response to prior or future attack.** One may not kill or injure a harm-doer in response to prior conduct or future threat, but only in response to a need of the present moment. One may not avenge or punish a finished crime, but must be acting to prevent a crime about to transpire before one's eyes; only the formal system of justice, through its procedural safeguards and careful inquiry into the facts, may determine punishment. Maharam mi-Rotenberg emphasizes that one may not intervene violently after an attacker has desisted: "[Assault occurs] after one person attacks another and injures him and then has no intention to continue to attack him, but the other goes on to attack the first person and injures him. But as long as the attack continues one may save oneself, and if that is not possible without inflicting injury, that is permissible and he is exempt" (Resp. Maharam bar Barukh cited in Mordekhai, Baba Kamma 196.) As Rashi puts it, the thief must be "in the very act of forcing the entry" for one to respond justifiably with force (Rashi, ad. loc., Ex. 22:1).
- **Difference of opinion over required degree of certainty.** According to some, including the Rambam, one must verify that the "pursuer" understands the implications of his crime with an acknowledged warning (Hilkhhot Rotzeah 1:7). The Rivash argues that prior warning is not necessary if one is acting to save one's own life, but is necessary if acting to save another's (Responsa 238), perhaps because a third party intervener, not directly in harm's way, is expected to make more clear-headed judgments than the direct victim of an attack.

One may not kill in self-defense if one is certain that the aggressor does not pose a lethal threat in the present moment. In the Biblical case upon which the right to self-defense is built – the case of the nighttime intruder – the second verse states: "If the sun has risen upon him, there will be bloodguiltiness for him" (Ex. 22:2). Some commentators read this verse literally, arguing that during the daytime a thief is more likely to have non-violent intentions, and is less likely to come armed, with intent or will to kill (ibn Ezra ad loc.). Other commentators read the risen sun as a metaphor for certainty (Mekhilta Nezikin 13, 101; Rashi and Ralbag ad loc.; Rambam, Hilkhhot Gneiva 9:10); the owner is forbidden from killing the intruder if it is clear that he entered one's home purely for financial gain, and not with murderous intent.¹⁹ "Similarly a person who breaks into a garden, a field, a pen, or a corral may not be killed, for the prevailing assumption is that he came merely [to steal] money, for generally the owners are not found in such places" (Rambam, Hilkhhot Gneiva 9:12). One is granted impunity for killing only in a case such as the nighttime intruder, in which one may presume immediate danger to one's life.

Later authorities disagree over the extent to which one must be certain of the homicidal threat posed by the pursuer; some say one must be "approaching

¹⁹ Nehama Leibowitz summarizes these divergent interpretations in her *Studies in Shemot*, World Zionist Organization, 1976, pp. 374-376

certainty"²⁰ while others that the danger need only be "feared."²¹ Some of those who maintain a lower standard of risk base their judgment on the opinion of R. Yishmael in the Talmud, who draws an analogy with the nighttime burglar case to assert that the Sabbath can be desecrated for the sake of *pikuah nefesh* even where threat to life is uncertain (Yoma 85a). In a situation of imminent threat, most say that one may respond to one's fear without full knowledge of the facts; but evidence must be strong, if not incontrovertible, that the aggressor poses a danger in the present moment.

In short, the *rodef* defense applies in a situation of absolute immediacy and some degree of certainty that an attacker poses an imminent threat of serious physical injury or death. Intervention with force is permitted to stop a grave, urgent wrong in the process of being committed. Once this particular danger has lapsed, the *rodef* rationale is no longer available.

As the Israeli Supreme Court declared, in one of the few cases in which it applied the *rodef* principle: "The duty and right are only available as the circumstances may require for the defense of the pursued, i.e. when the pursuer is likely to continue attacking the pursued, but not when it appears that the danger has passed."²²

The analogues to self-defense and *rodef* in American law similarly require that force used be directed against a threat that is imminent, immediate, and certain: "The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."²³ American law furthermore requires a reasonableness standard to determine whether the actor was indeed justified in believing force was necessary: "To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a ... defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law."²⁴

2) *Rodef does not justify harm to third-party innocents.*

- **The "many" have no priority over the innocent individual**

Jewish law generally does not permit one to save oneself or others by killing other innocents. In such cases, another principle applies: "One life may not be given priority

²⁰ Moshe Feinstein, *Iggerot Moshe, Hoshen Mishpat*, II:69, sec. 2.

²¹ For a summary of different views on the degree of certainty required for *rodef* to apply, see J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Contemporary Halakhic Problems IV*, Ktav Publishing House, 1995, pp. 84-86.

²²Cr. A89/78 *Afangar v. State of Israel*, (1979) 33(3) PD 141, 150, 160. Cited in *Modern Applications of Jewish Law, Vol. I*, ed. by Nahum Rakover, Library of Jewish Law, 1992, p. 448

²³Alexander, *ibid.* pp. 1186-1188.

²⁴ *People v. Goetz* 497 N.E.2d, 41, 48, 50 (N.Y. 1986), cited in Alexander, *ibid.* p. 1195.

over another" (M. Ohalot 7:6, Rambam, Hilkhot Rotzeah 1:9 and Hilkhot Yesodei Ha-Torah 5:5, 5:7).

The classic text in this regard appears in the midst of the discussion on *rodef*, insisting on the equal value of human lives:

BT Sanhedrin 74a (cf. BT Pesahim 25b)

Incest and murder [may not be practiced to save one's life] ... How do we know this of murder? — It is common sense. Even as one who came before Raba and said to him, 'The governor of my town has ordered me, "Go and kill so and so; if not, I will kill you"'. He answered him, 'Let him rather kill you than that you should commit murder; why do you think your blood is redder? Perhaps his blood is redder.'

Rashi, ad loc. Pesahim 25b

"Who says your life is more beloved by God than his? Perhaps his life is more beloved."

Later authorities apply this principle to all cases in which one can find no way to avoid endangering oneself without committing violence against another innocent person; the law generally forbids one from doing so. We are to preserve ourselves, but not at expense of other innocents, presumed to be of absolute equal value to us. Over against the strong imperative to preserve ourselves, the law asserts that we must die before becoming the direct cause of another innocent human being's death.

R. Akiva's position in another "kill or be killed" story presents an obvious counter-text. The text poses the following dilemma: "two men traveling together had only one bottle of water: if they both drank, both would die; if only one drank all, he could reach a place of human habitation and be saved. Ben Pattura held, better they should both drink and die than that one should see the other die; R. Akiva held, it is written, 'that your brother may live with you' (Lev. 25:36), hence your own life takes precedence over the life of your brother" (BT Baba Metzia 62a). The overwhelming thrust of *halakhic* literature, however, seems to reject R. Akiva's endorsement of self-preservation at another innocent person's expense in favor of other principles: "One life may not be set aside for the sake of another" and "how do you know that your blood is redder."²⁵

According to many authorities, not only are we prohibited from sacrificing an innocent life to protect our own; we are prohibited from surrendering a single innocent life even to protect a whole community. The foundational "one vs. many" text appears in the *Tosefta*, presenting a dilemma in which oppressors ask for a person to be delivered to death, threatening that otherwise the entire group in which he has sought refuge will be killed (T. Terumot 7:20). The *Tosefta* states unequivocally, "all must be killed rather than surrendering even one," then adds one qualification: "If they specified which person is to

²⁵ Some argue that one may assign preference to one's own life by killing *indirectly*, such as drinking the limited water in one's possession without sharing with one's companion. One cannot, however, actively kill another in order to save oneself.

be surrendered, as they specified Sheva ben Bikhri, they surrender him—that they not all be killed."²⁶ In the *Yerushalmi's* explication of this statement, R. Yohanan and Resh Lakish disagree over the meaning of the qualification; R. Yohanan rules that a person may be handed over even if he is totally innocent, provided that he has been singled out for death, since he will die anyway along with the rest of the group. Resh Lakish, on the other hand, argues 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). As Haim Cohen points out, Resh Lakish's position seems to eliminate, on a practical level, the possibility that the group can hand over any of their members, given the unlikelihood that the person singled out will have been condemned in court but not yet punished for a capital offense.²⁷

Authorities disagree over whether the law follows R. Yohanan or Resh Lakish's view. Rambam adopts the view of Resh Lakish, asserting that if the individual singled out is indeed guilty of a capital offense, the group may not so much as suggest it to the oppressors (Hilkhot Yeshodei Ha-Torah 5:5). The Kesef Mishneh explains that Rambam's ruling is based on the idea presented in San. 74a: "How do you know that your blood is redder?" The Meiri disagrees with the Rambam, pointing out that the law generally follows R. Yohanan in his disputes with Resh Lakish (Bet HaBehira, San. 72a).²⁸ The Meiri adds two qualifications: one may surrender a person only if in doing so one will save many people, and not only oneself, for "one cannot give oneself priority over others;" and two, the person specified may be *delivered*, but only if it is not certain that he will be *killed*, for one may not directly and knowingly kill another innocent, even to rescue many others.

Despite their disagreement over the case in which a person has been singled out for death, R. Yohanan and Resh Lakish, as well as Rambam, the Meiri and other authorities, agree that *a community may not save itself by killing a single innocent individual unless that individual will die in any event*. If the individual can be saved, we are prohibited from surrendering him in order to save others. Life's value is unquantifiable, and murder is unjustified even when it might save many lives. We not only may not destroy a village in order to save it, we may not deliberately destroy a single life in order to save an entire village.

In a beautiful passage in *Mishpat Kohen*, Rav A.Y. Kook explains that Jewish law rejects the utilitarian cost-benefit logic that might lead one to conclude that the blood of the many is indeed 'redder' than that of the one. While the law provides criteria for evaluating whom to save if two people are already drowning and only one can be saved (M. Horayot 3:7-8), such a judgment about the relative value of peoples' lives is not granted enough weight to permit one to kill *actively* on its basis:

²⁶ Sheva ben Bikhri was killed in order to prevent the destruction of a city: "...and they cut off the head of Sheva ben Bikhri, and threw it out to Joab..." See II Sam. 20:14-22.

²⁷ Cohen, *ibid.* p. 39

²⁸ The Remah, Yoreh Deah 157:1 reviews authorities who disagree about whether the law follows Resh Lakish or R. Yohanan. See Povarsky, *ibid.* p. 177, for a summary of different views. See also Rakover *ibid.* p. 132.

Mishpat Kohen 143

"In my opinion, this matter derives from the principle of the Rambam (Hilkhot Sanhedrin 20:1)²⁹ that capital punishment cannot be decided based on evaluation... Since the 'gate' of judgmental evaluation is very wide and not defined, the Torah locked the gate completely before us, so that we not be able to put someone to death on the basis of evaluation, even if it is very clear... Hence, [in the case of rescuing two drowning individuals], where we are not directly killing anyone, it is appropriate to try and decide who is more important, whether by the objective criteria of the sages, or by our own evaluation, judging who is more righteous, etc. However all these considerations are only estimations; hence it is prohibited to actively do anything on that basis. Accordingly, even in the case of an individual and a group, although it appears to us that the individual is not equal to the worth of one of the group, and surely not the whole group, this is no more than a very clear and persuasive evaluation... To rely on it and deliver an individual to death in order to save the group is forbidden."³⁰

Rav Kook, following the Rambam, does not claim that Judaism contains a deontological rather than a utilitarian doctrine of human life; we do not know whether life can be quantified, whether the lives of the many outweigh the life of the individual, or whether each life should be considered infinite in and of itself. But in matters of life and death, it is not up to us to decide through our own evaluative judgment. The stakes are too high.

The *rodef* defense may not be invoked to justify harming any third-party innocent person, even one who has committed crimes in the past.³¹ In this sense the pursuer defense

²⁹ Rambam, in this passage, describes the extreme caution with which Jewish law deals with matters of life and death: "The court does not impose the penalty of death on mere conjecture but on the conclusive testimony of witnesses. Even if the witnesses saw [the assailant] chasing the other, gave him warning, and then lost sight of him, or they followed him into a ruin and found the victim writhing, while the sword dripping with blood was in the hands of the slayer, the court does not condemn the accused to death, since the witnesses did not see him at the time of the slaying. Concerning this and similar cases, Scripture says: 'And the innocent and righteous slay not' (Ex. 23:7). Cf. Rambam, *Sefer Ha-Mitzvot* II, Negative Commandment 290: "Hence, the Exalted One has shut the door, so to speak, ordaining that no punishment is to be inflicted unless there are witnesses who testify that they know for certain what happened, without any doubt whatever, and there is no other possible explanation. If we do not give judgment even on the basis of a very strong presumption, the worst that can happen is that the sinner will be acquitted; *but if we punish on the strength of presumptions and suppositions, it may be that one day we shall put an innocent person to death; and it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death.*"

³⁰ *Mishpat Kohen* 143, pp. 310-311. Cited in Shaul Yisraeli, "Individual Life During Mass Rescue," *Crossroads: Halacha and the Modern World* Vol. III, Zomet Institute, p. 69-70. See too Rakover, *ibid.* pp. 137-139

³¹ Michael Broyde deduces from the rule that a minor may be declared a pursuer – while he may not be declared legally "culpable" – the notion that formal culpability is not a prerequisite for being declared a *rodef*. (See "Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties and Pacifism in the Jewish Tradition," Available at: <http://www.jlaw.com/Articles/war1.html>). This exception for the minor, however, seems to be based on the gravity of the crime the minor is about to commit through his own agency. The exception would not permit the killing or injury of a person who is not himself involved in the commission of a serious, imminent crime.

There is, however, one famous, controversial case in which an innocent person was deemed a "*rodef*." During the Holocaust, a group of Jews was hiding from the Gestapo, when a baby began to cry,

differs from the necessity defense as it exists in both American and Israeli law. *Rodef* is not based on a balancing between two evils – on the understanding that a violent act is justified as a "lesser evil" – but rather on the basis of preserving life or preventing a capital crime. One cannot choose to sacrifice another *innocent* life for the sake of the many based on this principle, nor, according to many authorities, can one choose to sacrifice one's own life for the many based on this principle, for the imperative to preserve life applies equally to both you and to other innocent people.³²

The presumed equality between lives – "one life may not be given priority over another" – forbids one from killing or maiming another person even to save the lives of the many, unless that person has forfeited his life such that the equality principle no longer applies.³³ Capital punishment, self-defense, and *rodef* are the only exceptions to the equality principle in matters of life and death. In the moment of direct violent attack or other indirect, grave, deliberate harm (i.e. the informer and the counterfeiter), the idea that all lives are equally valuable no longer applies. So too, according to some, the equality principle does not apply in a case in which an individual is certain to be killed anyway, such as the case in which one person in a group has been singled out to be killed, or else the entire group will be killed.

As already noted, after the imminent danger has passed, and in all cases outside of these exceptions, the principle of the equal worth of human lives pertains in full force. The innocent individual may not be willfully sacrificed even for the sake of the lives of the many.

- **Who is "innocent?" Combatants, civilians, and collective punishment**

If Jewish law prohibits harm to innocent bystanders, even for the sake of preserving many other innocent lives, the question becomes who is included within the category of the "innocent." Are the fathers, mothers, and siblings of confirmed terrorists "innocent?" What about their neighbors, friends, and associates, who may harbor information about past or future attacks and be reluctant to share it? There is strong evidence that many if not most of those held in U.S. detention centers and undergoing interrogations are not confirmed or even suspected "terrorists."³⁴ Are we permitted to cast our net wide and hope someone will reveal the information we need?

threatening the safety of the entire group. One member put a hand over the baby's mouth (or according to another version, covered the baby's face with a pillow) to keep it from crying, and the baby suffocated. Many rabbinical authorities justified the act on the basis of the "pursuer" principle since the baby was jeopardizing the whole group even though the baby was clearly not committing a crime. Even in this exceptional case, the group did not make a decision over whom to kill *actively*; many argue that the baby "was specified" or singled out by its crying, and if it hadn't been suffocated, would have died anyway along with the rest of the group. See discussion in Povarsky, *ibid.* p. 177. Cf. Irving Rosenbaum, *The Holocaust and Halakhah*, Ktav Publishing House, 1976, pp. 31-34.

³² See discussions in Rakover, *ibid.* pp. 148-151; Povarsky, *ibid.* p. 183, and Yisraeli, *ibid.* pp. 71-72.

³³ The following argument is based on Povarsky, pp. 187-190.

³⁴As of Fall 2003, the International Committee of the Red Cross estimated that between seventy to ninety percent of those held in Abu Ghraib were there "by mistake;" more recent official inquiries have dropped the estimate to two-thirds. At Guantánamo, official reports have estimated that forty percent of detainees never belonged there.

Judaism, as a general rule, rejects collective punishment: "The fathers shall not be put to death for the children and the children shall not be put to death for the fathers; every man shall be put to death for his own sin" (Deut. 24:16). The Talmud attempts to reconcile the apparent contradiction between this verse and a verse that appears in Exodus – "visiting the sins of the fathers on the children and on the third and fourth generations" (Ex. 34:7) – by suggesting that the former relates to children who break from the evil ways of their parents, whereas the latter refers to children who imitate the ways of their parents, and are therefore directly culpable themselves (BT Brachot 7a). Other commentaries resolve the contradiction differently, attributing the former verse to human action, and the latter to divine action; only God knows "the calculation of iniquities," whereas fallible human courts must inflict judicial penalty only on those convicted, through incontrovertible evidence, for their own criminal actions (ibn Ezra, Rashbam, and ibn Kaspi ad. loc.).³⁵ How, asks Malbim, could a court that attempts "to exhaust every conceivable loophole to acquit the accused, sentence [a person] to death for the sin of others?" (ad. loc.). Most commentators view it as *peshita* (obvious) that an individual's wrongdoing may not indict that person's affiliates or relatives, and they therefore search out other implications from the Deut. verse: "That is obvious. Rather, it is an admonition to the ruler, that he should not consider punishing children for the sin of their parents" (*Hiddushei ha-Ran* on Sanhedrin 27b).³⁶ Samson Raphael Hirsch extends the verse's meaning still further:

Samson Raphael Hirsch, ad. loc., *Commentary on the Torah*

Our verse does not come to prevent the gross miscarriage of justice of children being punished for the sins of their parents... for it is inconceivable that any judicial system would behave thus. Rather, it comes to teach us that even from a political and social standpoint, no one is to be punished for the wrongdoing of his relative.

The tradition not only rejects collective punishment on the part of human agents, but also challenges instances of divine collective punishment, notably Abraham's intercession on behalf of the people of Sodom: "Far be it from You to do such a thing, to bring death upon the innocent as well as the guilty, so that innocent and guilty fare alike. Far be it from You! Shall not the Judge of all the earth deal justly?" (Gen. 18:25). So too Moses implores: "When one man sins, shall You be wrathful with all the community?" (Num. 16:22), to which a *midrash* fancies God's reply: "You have spoken well. I know who has sinned and who has not and I will inform you" (Rashi, based on Midrash Tanhuma, Bamidbar 7 and 19; cf. Midrash Tanhuma, Breishit 29 and Ramban on Num. 16:21).

The Rivash describes a scenario that demonstrates the ways that, historically, Jews have understood the injustice of collective punishment from the vantage point of the victim:

³⁵ For a discussion of these two verses and the ways they are traditionally reconciled, see Nehama Leibowitz, *Studies in Devarim*, Haomanim Press, pp. 236-242

³⁶ These sources are cited in Rav Meir Batiste, "Collective Punishment," *Crossroads: Halacha and the Modern World*, Vol. V, Zomet Institute, 1999, pp. 234-235.

Rivash, Responsa Rivash HaHadashot 9³⁷

Two or three Jews were in charge of the king's mint, and it was discovered that the coins were flawed. The king was greatly incensed and his wrath burned to the extent that he wished to expel all the Jews from his kingdom. After great efforts, a compromise was struck with the king, whereby he would refrain from expelling the Jews in exchange for thousand gold pieces. This levy which the king imposed upon the Jews was pure theft... for [is it reasonable that] because of the mistake of two or three Jews, the king should be angered with all the Jews and expel them forcibly from his land unless they pay him several thousand gold pieces!?! It was regarding a case like this that our patriarch Abraham of blessed memory said to the Holy One, blessed be He, "Far be it from You to do such a thing." And [so said] our master Moses of blessed memory, "Shall one man sin, and You will be angry with all the community?" And the old Aramaic adage rightly asks: "*Tuvia chata v'Zigud nagad!?!*" (Tuvia sinned and Zigud was lashed!?!). If so, this levy is pure theft.

Given this deep-seated rejection of penalizing the many on behalf of the one, the sages are hard-pressed to explain certain passages in the *Tanakh*, particularly Shimon and Levi's massacre of all of the inhabitants of Shechem due to the actions of Shechem ben Chamor: "Many will ask, how could the righteous sons of Jacob have committed this action, shedding innocent blood?" (Ramban, Gen. 34:13). While many commentators suggest that Jacob's sons were not justified in their killing spree and were in fact disobeying their father's orders (Rashi and Ramban, ad. loc.), some commentators try to tease out a way the residents of Shechem must have been directly implicated in wrongdoing rather than unduly punished or guilty by proxy; the Rambam, for example, suggests that their guilt consisted in witnessing Shechem's crime and not attempting to establish a legal system that could execute justice (eg. Rambam, Hilkhhot Melakhim 9:14).³⁸

The stoning of Achan in the Book of Joshua presents another story that challenges the rejection of collective punishment: "Then Joshua, and all Israel with him, took Achan son of Zerah... his sons and daughters, and his ox, his ass and his flock...all Israel pelted him with stones. They put them to the fire and stoned them" (Joshua 7:24-25). The verses lend themselves to ambiguity about whether Achan's children were also stoned for Achan's sin, and again some commentators attempt to ease the difficulty by seeking out an element of culpability or collusion on their part. One *midrash* proposes that the children were passive collaborators for harboring knowledge of their father's crime: "It is written, 'Parents shall not be put to death for children.' If so, how did the sons and daughters of Achan sin that they should have been executed? Achan alone should have been executed, for he alone violated the proscription. But they [too] were executed because they knew and did not tell" (Pirkei de'R. Eliezer 38). Other commentators, however, reject this "guilt by association" logic. The Talmud discards the idea that Achan's sons and daughters were punished at all, asserting that they were brought to witness the execution in order to be instructed by it, but were not themselves to be punished (BT Sanhedrin 44a). Rashi

³⁷ Cited in Batiste, *ibid.* pp. 233-234

³⁸ For other interpretations of the story, see Batiste, *ibid.* pp. 237-238

similarly contends that Achan's children were not punished; the plural object for "stoned" refers, rather, to his oxen (ad. loc.).

In each Biblical incident of seeming collective punishment for the sins of individuals – the stories of Shechem and Achan are two primary examples, but there are a handful of others³⁹ – the commentators scramble to either find some direct blameworthiness on the part of those punished, read their way out of the punishment's application to the innocent, or express their perplexity at the punishment's injustice.⁴⁰ While some sanction Shimon and Levi's violence in Shechem – offering forced interpretations of mass complicity out of the exegetical assumption that Jacob's sons must have behaved prescriptively, rather than descriptively – no commentator sanctions the idea that the inhabitants of Shechem were punished simply through proximity or affiliation to other wrongdoers. *The rabbis sustain the prohibition against collective punishment as a fundamental, unwavering principle despite its apparent tension with several Biblical passages.*

A few of the methods used to resolve these Biblical difficulties, however, have been used by some contemporary authorities to argue that punishment may be extended to an entire society where that society does not enforce a legal system, harbors wrongdoers, or passively colludes in crime by withholding information.⁴¹ Others go so far as to argue – in part through recourse to an obscure text in Masekhet Sofrim (15:7)⁴² – that during wartime (*sha'at milhama*) the principle banning collective punishment is suspended altogether, and all members of the "enemy" society are considered "pursuers" by default rather than innocent bystanders:

Rabbi Shimon Weiser⁴³

Although in peacetime it is forbidden to kill non-Jews...in wartime it is a *mitzvah* to kill them...The Jew is distinguished from a non-Jew as follows: Although the principle 'if someone comes to kill you, kill him first' applies to a Jew too...it holds only if there are grounds to suspect that he is coming to kill you. But with

³⁹ See Batiste, *ibid.* for others.

⁴⁰ See for example the words of Rav Meir Halevi Abulafia (HaRamma): "I am perplexed by [the Rambam's] ruling that 'the children and wives of the idolators are [also] killed by the sword,' for these women... why are they killed? Tuvia sinned and Zigud was lashed!?! And as for his ruling that the children are killed – 'Wickedness be far from God!' (Job 34:10). Where do we find a minor culpable, that we should hold these children culpable?" *Igrot HaRamma*, p. 186, cited in Batiste, *ibid.* p. 238.

⁴¹ Batiste, *ibid.* See especially p. 250

⁴² The text reads: "R. Shimon b. Yohai taught: Kill the best of the non-Jews in times of war; crush the brain of the best of serpents. The most worthy of women indulges in witchcraft. Happy is he who does the will of the Omnipresent." The Soncino edition of this text comments about this line, in an uncharacteristic editorial: "It was called forth in a time of bitter oppression and is not to be taken as typical of Jewish ethics." The text includes many other broad generalizations not viewed as having *halakhic* implications by later authorities: "A man should not teach his son to be an ass-driver, sailor, coachman, shepherd, or shopkeeper, because these occupations are robbery. R. Yehuda, however, quoting [Abba Guria] said: Ass-drivers are mostly wicked, but sailors are mostly pious. The best of physicians are [destined] for Hell and the most worthy of butchers is Amalek's partner. Bastards are mostly keen-witted, slaves are mostly arrogant, the children of reputed parents are mostly bashful, and children usually resemble the mother's brother."

⁴³ Cited in Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law*, Jewish Lights Publishing, 1999, p. 206.

regard to a non-Jew in time of war it is assumed that this is the case, and one must always consider him to be someone who is coming to kill you, unless it is clear that he has no evil intent.

Rabbi Shaul Yisraeli⁴⁴

No military action that is a normal part of war—even though it may kill or injure children—is forbidden. As long as one is not intentionally operating against children, it is considered to be a punishment from Heaven, a situation in which children are certainly punished for the sins of their parents.

These opinions, issued in the context of Israel's wars during the last fifty years, eliminate the category of the civilian and remove the possibility of attributing "innocence" to any member of the States' neighboring societies.

Jewish law, as already noted, does not extensively treat the subject of "battlefield ethics" nor give much guidance about how to distinguish combatants from civilians.

Nonetheless, many sources reject the indiscriminate logic of these recent *halakhic* opinions even in the context of war, and reflect, rather, the judicious scruples reflected in the *rodef* literature. Early texts implicitly repudiate wholesale attacks on neighboring peoples by declaring obsolete any references to the Seven Nations, arguing that since the king of Assyria "removed the bounds of the peoples" (Is. 10:13), all peoples have intermingled and these particular nations are no longer recognizable: "R. Joshua said to him: but are the Ammonites and Moabites still in their own territory? Sennacherib, the King of Assyria, has long since come up and mingled all the nations" (M. Yadayim 4:4). Later Jewish law confirms that these peoples no longer exist as independent entities: "Their remembrance has been lost" (Rambam, Hilkhoh Melakhim 5:4). So too the weight of tradition interprets Amalek – whose memory we are commanded to blot out – as an allegory or symbol rather than a reference to any concrete group of people.⁴⁵

⁴⁴ Cited in Zemer, *ibid.* p. 208. Cf. the words of Rabbi Lt. Avraham Avidan, *ibid.* p. 210: (Chief Chaplain of Army Central Command during the Yom Kippor War): "In no case should one trust an Arab, even when he gives the impression of being a cultured human being. In wartime, when Israeli forces are attacking the enemy, they may and in fact are required by Halakhah to kill even good civilians, that is, civilians who seem to be good. This was the case about which the Sages said, 'the best among the non-Jews—kill!'"

⁴⁵ For a thorough review of treatment of Amalek in Jewish tradition, see Avi Sagi, "The Punishment of Amalek in Jewish Tradition: Coping with the Moral Problem," *Harvard Theological Review*, 87:3 (1994), pp. 323-46. Samson Raphael Hirsh, for example, writes: "Amalek is the embodiment of the worldview that sees naked power as the sole criterion for human greatness and respect, and that worships the aggrandizement of its own dominating power without suffering over those hurt... There are only two choices: the sword—requiring the sacrifice of all divine, human, spiritual, and moral values...and 'the voice'—God's voice calling out to human beings from beyond and from within themselves, the categorical imperative of the divine moral law...Declaring victory of unarmed moral power over armed, material might is the very mission of Abraham's family, which proclaims His divinity, may He be blessed, through the victory of justice in the world," in *Be'Ma'agalei Shanah* 2, p. 190. See also the relevant words of Moshe Avigdor Amiel, Chief Rabbi of Tel Aviv from 1936-46, in *Derashot el Ami* 3, p. 132: "Through what means are we to blot out Amalek, and through what means are we to blot out those who glorify the sword? How, and in what manner, are we to bring an end to the world's militarism?... The view of Judaism is that the prosecution cannot turn into the defense, evil cannot be extirpated by evil means, terror cannot be eliminated through the use of counter-terror. Therefore one cannot destroy a 'strong arm' with a 'strong

Furthermore, several laws recognize and attempt to limit suffering and destruction to "enemy" populations. An early *midrash* demands: "When approaching a city to make war on it... do not starve, deprive of water, or kill the population by means of deadly disease. [Rather] 'Proclaim peace' – great is peace, for even during time of war peace is needed, as it is written, 'Proclaim peace to [the invaded city]'" (Midrash Tanaim, Deut. 20:10). The law, building on this *midrash*, stipulates that means of escape be provided during a siege invasion: "When siege is laid to a city for the purpose of capture, it may not be surrounded on all four sides but only on three in order to give an opportunity for escape to those who would flee to save their lives" (Rambam, Hilkhhot Melakhim 6:7). Ramban, in his commentary on this law, explains: "God commanded us that when we lay siege to a city that we leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we learn to deal with compassion even with our enemies even at time of war.*"⁴⁶ A city surrounded on only three sides allows provisions and supplies to enter and non-combatants to flee to refuge, a law whose humaneness, as Michael Walzer points out, stands in stark contrast to the standard version of international siege law prevalent through modern Europe.⁴⁷ The Torah also forbids wanton destruction (*bal tashhit*) of trees and property in the context of war (Deut. 20:19), and the *halakhah* extends this principle: "Not only one who cuts down trees, but also one who smashes household goods, tears clothes, demolishes a building, stops up a spring, or destroys articles of food with destructive intent, transgresses the command, 'Thou shall not destroy.'" (Rambam, Hilkhhot Melakhim 6:10). As Rav Batiste writes: "If with regard to plants and inanimate objects the Torah commanded us to avoid unnecessary destruction...then how much more so is it forbidden to take human life."⁴⁸

On an *aggadic* level, Jewish tradition expresses a general abhorrence of violence (BT Sanhedrin 108a, Mid. Tanhuma, Lekh Lekha 7) and anxiety about participating in bloodshed even in the context of legitimate armed conflict, realizing that too often innocent people get caught in the crossfire: "Abraham was filled with misgiving, thinking to himself, Maybe there was a righteous or God-fearing man among those troops which I slew" (Gen. Rabb. 44:4; cf. Gen. Rabb. 76:2 and Mid. Tanhuma, Lekh Lekha 19). *These midrashim express tremendous misgiving about killing even in the course of self-defense, rejecting presumptive "guilt by association" and decrying the loss of innocent life when conflict is waged on a national-communal rather than personal level.*

Another *midrash* suggests that the Torah calls on us to join God in rejecting the over-generalizing hatred of war:

Deut. Rabb. 5 (Vilna ed.)

Another explanation [of 'When you come near a city to fight against it, then

arm,' and one cannot obliterate a sword with a sword... About this it is said: 'Write this in a book of remembrance;' that is to say: 'Wage war against the sword with the book.'"

⁴⁶ Ramban, *Hasahot Ha-Ramban L'Sefer Ha-Mitzvot*, Positive Commandment 5

⁴⁷Michael Walzer, "War and Peace in the Jewish Tradition," *Ethics of War and Peace*, ed. by T. Nardin, Princeton University Press, 1998. An excerpt of this article is available at:

http://www.myjewishlearning.com/ideas_belief/warpeace/War_TO_Combat/War_Ethics_Walzer.htm

⁴⁸ Batiste, *ibid.* p. 250.

proclaim peace to it' (Deut. 20:10)]; If a man injures his neighbor he never forgets it; but not so God. Israel was in Egypt and the Egyptians enslaved them with lime and bricks. After all the evil they had done unto Israel, God had pity upon them and decreed, You shall not abhor an Egyptian, because 'you were a stranger in his land' (Deut. 23:8), but pursue after peace, as it is said, 'Seek peace, and pursue it' (Ps. 34:15).⁴⁹

We are to imitate divine compassion and resist demonizing entire populations, regardless of what horrors have been inflicted upon us.

Finally, Rav Shlomo Goren – the Chief Rabbi of the Israeli Defense Forces during the fifties and sixties, and the Ashkenazi chief rabbi of Israel from 1973-1983 – invokes the concept of universal divine mercy to insist on a distinction between "civilian" and "combatant" blurred by some of his colleagues:

Rabbi Shlomo Goren⁵⁰

[Regarding] those obligatory wars that we were explicitly commanded by the Torah to wage in antiquity, in which 'you shall not let a soul remain alive'—one must not learn from them, heaven forbid, about other wars and our own time... We are commanded by the Torah to follow in the ways [of the Holy One Blessed Be He] and to have compassion for His creatures, as it is written: 'His mercy is upon all His works' (Ps. 145:9).

Rav Goren goes on to join the Book of Chronicles in avowing that God prevented King David from building the Temple because of his excessive violence and warmongering: "And the word of the Lord came to me, saying, You have shed abundant blood, and have made great wars; you shall not build a house to my name, because you have shed much blood upon the earth in my sight" (I Chr. 22:8; cf. I Chr. 28:3). Even divinely sanctioned wars launched in self-defense,⁵¹ according to Rav Goren, maintain strict standards against

⁴⁹ The rest of the *midrash* emphasizes the crowning importance of peace, as demonstrated by the ending of all blessings with peace (the *Birkat Ha-Mazon*, *Shema*, *Shmoneh Esreh*, etc.)

⁵⁰ *Meshiv Milhama* vol. 1, Idrah Rabbah, 1984, p. 14

⁵¹ *Arguably, a war of self-defense is the only war in today's world that would be considered an obligatory war (milhemet mitzvah) and thus justified according to jus ad bellum (grounds for war) criteria in the halakhah. For most authorities, a milhemet reshut (discretionary war) is not permissible without the existence of three as-of-now unrealizable preconditions: 1) approval of a Jewish King, 2) permission of the Sanhedrin, and 3) a High Priest who can consult Urim and Tumim (a breastplate that gave the High Priest miraculous indication of whether or not to wage war). Pre-emptive war, for almost all authorities, falls into the category of a milhemet reshut, which is not permissible without the above prerequisites. Pre-emptive strikes are defined differently by different authorities: 1) Attacks in a war of attrition against an enemy that kills individuals or groups of Jews, but does not launch a war against the entire nation (Hazon Ish, Orah Hayyim-Moed 114:2); 2) Attacks out of fear when ones enemies are preparing for attack and have clear aggressive intentions (Meiri, Bet HaBehirah on Sotah 43a); and 3) Strikes aimed at preventing a potential aggressor from developing military capability (Shiyurei Korban on JT Sotah 8:10). See J. David Bleich, "Preemptive War in Jewish Law," *Contemporary Halakhic Problems*, Vol. III, Ktav Publishing House, 1989, pp. 251-292.*

One could argue that the war in Iraq would fall into the category of a pre-emptive, discretionary war, and therefore would not be justified from a Jewish religious perspective at all, and at the very least would demand the highest standards for ethical military conduct. For an argument that the Vietnam War

cruelty, particularly towards the innocent.

Does Judaism recognize a category of the "innocent civilian"? Jewish law neither maintains nor rejects this category. The prohibition against collective punishment and the restrictions on siege warfare – as well as *midrashim* renouncing violence, particularly towards innocent bystanders – present a stream of thought that would answer "yes." On the other hand, exegesis about Biblical stories that stand in tension with the prohibition against collective punishment – and a few other texts that generalize about "killing all of the non-Jews" during times of war – present a stream of thought that might answer "no."

In keeping with Rav Goren's words and the other values reflected in the Jewish literature on self-defense, this piece submits that the larger narrative framework of Judaism would not permit disregard for innocent human life and dignity (*kvod ha-briot*) under any circumstances. Would a tradition that claims that God weeps over the execution of the wicked (M. Sanhedrin 6:5; BT Sanhedrin 46a) and grieves over the death of our greatest enemies – reminding us that they too are His "handiwork" (BT Sanhedrin 39b) – permit us to harm those innocent of any wrongdoing? A tradition that insists on rigorous procedural safeguards and commitment to the presumption of innocence even when witnesses have seen a suspect running away from the scene of a crime with a bloody sword: "If we punish on the strength of presumptions and suppositions, it may be that one day we shall put an innocent person to death; and it is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death" (Rambam, Hilkhos Sanhedrin 20:1)? A tradition that asserts at every turn that God's mercy extends to all created beings, and that our highest human aspiration is to emulate the reach of that compassion (eg. BT Shabbat 133b and 151b, Sefer ha-Hinukh 80 and 294)?

The definition of terrorism, as many thinkers have pointed out, is the refusal to recognize a distinction between combatant and civilian. Jewish law offers neither a "suicide pact" nor a doctrine of terror. If we – following Judaism's rejection of collective punishment and call to humane treatment even of enemies – recognize that the majority of Iraqis, Afghans, and others of Middle Eastern and Muslim descent have no intention of participating in activities threatening to American lives, *we must extend to them the protections Judaism insists on for innocent third-parties even in situations of legitimate self-defense. If we recognize the category of "innocent civilians," the rodef defense will not permit harming them – nor determining treatment of them on the basis of cost/benefit "balance of evils" calculations – for our lives may not take precedence over their lives; our blood is no redder than theirs.*

3) *The rodef must be thwarted with minimum possible harm, proportional to the threat he poses.*

BT Sanhedrin 74a

Abaye said: This applies where she could have been saved at the cost of one of the limbs [of the violator] and agrees with R. Jonathan b. Saul. For it has been

was not justified by Jewish criteria, see David Novak, *Law and Theology in Judaism*, Ktav Publishing House, 1974, p. 130.

taught: If one was pursuing his fellow to slay him, and he could have been saved by maiming a limb [of the pursuer] but did not thus save himself [killing him instead], he is executed on his account.

Deadly force must be proportional to the pursuer's immediate readiness to use deadly force. Authorities disagree over whether one is liable if he uses exaggerated force to hinder a pursuer, particularly if one kills him when one could have merely injured him. The Shulhan Arukh emphasizes the importance of moderation:

Shulkhan Arukh, Hoshen Mishpat, 421:13

Where one began [the attack], the other is exempt since he is at liberty to strike back to save himself; but *the response must be measured; where it is possible to use moderate means but he inflicts serious injury, he is guilty*. The position is the same where a person sees a Jew striking another and cannot save the latter without attacking the attacker, he may strike him to keep him from breaching a prohibition.

A *midrash* applies the minimum possible harm standard of *rodef* to armed conflict:

Sifte Hahamim, Gen. 32:8

One might argue that Jacob surely should have had no qualms about killing Esau, for it states explicitly, 'If he comes to kill you kill him first' (BT Sanhedrin 72a). Nonetheless, Jacob did indeed *have* qualms, fearing that in the fray he might kill some of Esau's men, who were not intent on killing Jacob but merely fighting against Jacob's men. And even though Esau's men were pursuing Jacob's men, and every person has the right to save the life of the pursued at the cost of the life of the pursuer, nonetheless that provision applies which states: 'If the pursued could have been saved by maiming a limb of the pursuer, but instead the rescuer killed the pursuer, the rescuer is liable to capital punishment on that account.' Hence Jacob rightly feared lest, in the confusion of battle, he kill some of Esau's men outright when he might instead have restrained them by merely inflicting injury upon their limbs.

In the *Afangar* case, in which the Israeli Supreme Court invoked the concept of *rodef*, the Court applied the limiting condition of minimum possible harm: "The leading rule is that a balance must be maintained in the amount of force the intervener employs in defense of the pursued, and exemption from criminal liability is conditional upon the employment of the minimum force required for that purpose...Otherwise criminal liability attaches for any injury caused to the pursuer and clearly for killing the pursuer."⁵²

So too, American law mandates that force used in self-defense or defense of others be "necessary to defend" or "necessary to prevent" specified harms. A defendant may not exceed "the reasonable means which were necessary to protect himself."⁵³ American law, however, tends to recognize that if liability is made too stringent, the law might

⁵²*Afangar v. State of Israel*, cited in Rakover, *Modern Applications of Jewish Law*, *ibid.* p. 448

⁵³ Alexander, *ibid.* p. 1190 and n. 155

discourage bystander intervention: "Detached reflection cannot be demanded in the presence of an uplifted knife."⁵⁴

In sum, Jewish law shares with American and Israeli secular law the principles that:

- Force is justified only in the face of imminent danger.⁵⁵ Threat may not be inferred from past conduct, but must be visible and urgent in the present moment.
- Force must be spontaneous rather than premeditated.
- Force may not hurt innocent bystanders.
- Force may not exceed what is required to save particular victims from immediate harm.

These strict limitations seem to recognize the dangers of circumventing the judicial process, as well as the jurisprudential saying that 'hard cases make bad law.' The morally problematic *rodef* defense is restricted to the smallest possible number of cases, as a last resort.

Would a Rodef Defense Permit Torture in Iraq, Afghanistan, and Guantánamo?

1. *Imminence, spontaneity, and certainty*

- **Imminence and spontaneity**

Most, if not all, of the thousands of detainees in American detention centers are not on the verge of committing an imminent, serious crime, directly or indirectly. The *rodef* defense, with its strict requirements of immediacy and spontaneity, would permit the use of force in the case of a fight between detainees or when a detainee threatens the physical safety of guards or military police. The *rodef* defense would also apply to a *true* ticking bomb case – whose rarity, even non-existence, will be addressed below. The *rodef* principle might release an interrogator from liability if he were to resort to torture spontaneously in a moment in which he had probable cause to believe the prisoner before him was a perpetrator with knowledge that could save lives in immediate danger.

The *rodef* defense would seemingly 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. It would not permit "torture" or "cruel, inhuman, and degrading treatment" to be anyone's training or job description in the military. It would not allow interrogators to get up in the morning anticipating a day of physical coercion for the sake of extracting as much information as possible from those in their custody, even if many of these detainees had once but were not currently posing a

⁵⁴ *State v. Bryant*, 671 A.2d 1058 (N.J. Super. Ct. App. Div. 1996), cited in Alexander, *ibid.* p. 1193

⁵⁵ One could argue that such a strict principle does not apply to the battlefield context, and is rather meant to limit solo renegade action on an internal society level. Even if one accepted looser rules for the battlefield, however, the "interrogation room" differs from the heat of battle in that generally interrogations are more sober and calculated given that one's "adversaries" are not armed. Interrogations take place face-to-face, not nation to nation.

threat to American lives. Nor would it allow torture to be used as a punishment, reprisal, or intimidation tactic.

The well-documented use of "torture lite" in American detention facilities – such as sexual humiliation, "stress positions," food and sleep deprivation, and sensory bombardment [[link to human dignity](#)] – does not seem to have been restricted to cases in which interrogators are fighting a clock against an immediate, serious attack, but rather seems to be systematic and ubiquitous. U.S. military personnel seem to be using physically coercive techniques not only to foil future attacks – "ticking bombs" or otherwise – but also to obtain information about who has been involved in and supported past attacks, to learn who is generally hostile to American policies, to punish, intimidate, and pacify detainees, and to send a message to detainees' families and communities back home.⁵⁶

In 1999, the Israeli General Security Services (G.S.S.) faced similar charges in a case brought before the Israeli Supreme Court, and *categorically declared that physically coercive techniques are not authorized by Israeli law*.⁵⁷ In 1987, a judicial commission of inquiry headed by former Supreme Court Justice Moshe Landau had reported that "moderate physical pressure" was defensible in cases in which an interrogator "committed an act that was immediately necessary" to save lives from grave harm. Israeli human rights organizations had monitored G.S.S. interrogations and concluded that some eighty-five percent of Palestinians interrogated had been tortured – subjected to methods almost identical to those currently being used in American military detention – and questioned whether such an enormous percentage of detainees were indeed "ticking bombs." If those being tortured were all "ticking bombs," why, asked an Israeli human rights organization shortly before the Supreme Court hearing, did interrogators take weekends off? "The lethal bomb ticks away during the week, ceases, miraculously, on the weekend, and begins to tick again when the interrogators return from their day of rest."⁵⁸

The Israeli Supreme Court acknowledged that physical coercion was being used outside of "ticking bomb" conditions, and ruled that neither the government nor the security services could establish directives authorizing the use of physical coercion *in advance*, but only as an "ad hoc...improvisation" responding to an urgent moment at hand. They also ruled that the G.S.S. could not develop physical means of interrogation before the fact, but individual interrogators could resort to force in response to concrete situations of necessity, *post factum*. The decision cites Arnold Enker:

Necessity is an after-the-fact judgment based on a narrow set of considerations in which we are concerned with the immediate consequences, not far-reaching and

⁵⁶ See, for example, "In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths," *New York Times*, May 20, 2005. Available at www.globalpolicy.org/empire/un/2005/0520bagramdeaths.htm. Cf. Seymour Hersch, *Chain of Command: The Road from 9/11 to Abu Ghraib*, HarperCollins, 2004, p. 39

⁵⁷ HCJ 5100/94 *Public Committee Against Torture in Israel v. The State of Israel*. Full text of the decision is available at: <http://www.jewishvirtuallibrary.org/jsource/Politics/GSStext.html>

⁵⁸ Yuval Ginbar, "Routine Torture: Interrogation Methods of the General Security Service," *Btselem*, Feb. 1998, p. 32. See full report at: http://www.btselem.org/English/Publications/Summaries/199802_Routine_Torture.asp

long-range consequences, on the basis of a clearly established order of priorities of both means and ultimate values... The defense of Necessity does not define a code of primary normative behaviour. Necessity is certainly not a basis for establishing a broad detailed code of behaviour such as how one should go about conducting intelligence interrogations in security matters, when one may or may not use force, how much force may be used and the like.⁵⁹

Following Enker, the Court ruled that the "necessity" defense may serve as a way of pardoning a specific interrogator from liability, but has no other normative value. The defense might mitigate the penalty incurred by the investigator, but would not excuse the torture itself. *The G.S.S. investigator, according to the Court's ruling, must conform to the same constrictions imposed on a police interrogator or ordinary citizen who would resort to the criminal law "necessity" defense when confronted with a situation of impending, serious harm.* The court specified that in the interrogator's case, "the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, *provided the danger is certain to materialize and there is no alternative means of preventing its materialization.* In other words, there exists a concrete level of imminent danger of the explosion's occurrence" (emphasis added).⁶⁰ But short of such a case, the GSS interrogator may do nothing that is not legal in a police investigation of an ordinary criminal case.⁶¹

The Israeli Supreme Court adopted a standard of imminence similar to that demanded by the *rodef* defense in Jewish law.⁶² The Court provided an exceptional, narrow "out" from

⁵⁹ Cited in *Public Committee Against Torture in Israel v. The State of Israel*, *ibid.*

⁶⁰ During the three years after this ruling, 90 Palestinians were determined to be "ticking bombs." See Amos Harel, "GSS used 'Exceptional Interrogation Means' 90 Times Since 1999 HCJ Ruling," *Haaretz*, July 25, 2002. A much higher percentage of those interrogated were subjected to the formally banned methods of physical coercion. See Yuval Ginbar, "Back to a Routine of Torture: Torture and Ill-Treatment of Palestinian Detainees During Arrest Detention and Interrogation, Sept. 2001-April 2003" Public Committee against Torture in Israel, 2003, pp. 16-22. Israeli human rights organizations (eg. Btselem and the Public Committee against Torture in Israel) differ about the extent to which the Supreme Court's prohibition has impacted interrogations on the ground. See Joseph Lelyveld, "Interrogating Ourselves," *New York Times Magazine*, June 12, 2005.

⁶¹ In the Court's words: "*There is no statutory instruction endowing a GSS investigator with special interrogating powers that are either different or more serious than those given the police investigator.. From this we conclude that a GSS investigator, whose duty is to conduct the interrogation according to the law, is subject to the same restrictions applicable to police interrogation.*" Emphasis added; see <http://www.jewishvirtuallibrary.org/jsourc/Politics/GSStext.html>

⁶² The "necessity" and "*rodef*" defenses are not identical; the former is in essence a "lesser evils" approach in which a person may justify violation of the law where it avoids a greater harm that would otherwise take place. The "*rodef*" principle permits killing when a specific *aggressor* is on the verge of a serious crime, but does not justify killing or injuring innocent people on the basis of "balance of evils" or cost/benefit logic. In contrast to the *rodef* defense, the "necessity" defense might justify harming the innocent few for the sake of the many. Pavorsky alludes to this difference and its implications; see Pavorsky, *ibid.* pp. 163-172. Miriam Gur-Arye argues that the Israeli Supreme Court should replace its "necessity" exception with a "self-defense" exception on the grounds that the "necessity" defense leaves the door open to torturing innocent people in a "choice of evils" situation (i.e. an innocent bystander who might have knowledge of the location of a bomb, family members of suspected terrorists, etc.). Though she does not make reference to *dinei rodef*, her approach is more in keeping with Jewish law than is the Supreme Court decision. See

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, but may not be granted preemptory authorization. The "necessity" defense may exculpate the interrogator in criminal proceedings, but it will not exonerate the torture, which remains wrong.

Accounts of practices in American facilities suggest that "cruel, inhuman, and degrading treatment," or "torture lite," is the norm rather than the exception, a part of detention culture and broad policy, applied to large numbers of detainees who almost certainly lack specific knowledge about future attacks.⁶³ Current U.S. practices would not satisfy the criterion of imminent peril required by both *rodef* and "necessity" defenses, according to which a particular individual must be suspected, to some reasonable degree of certainty, to have specific knowledge of imminent attacks.

- **Certainty**

Even from a purely pragmatic point of view, the factual basis that torture saves lives is not substantiated. There are as many convincing arguments that torture endangers American lives, those of both troops and civilians, as that it protects American lives, each assertion rivaling the other in its difficulty to quantify. There is also strong evidence that many of those detained are not currently and have not been previously involved in attacks nor have any intention of causing harm, in which case their torture would almost certainly be prohibited (see below).

Those who argue that torture "works" suggest that it provides vital information that can help avert deadly attacks. The Israeli Supreme Court, even as it officially banned techniques like those currently authorized by the U.S, avowed that using such techniques "has led to the thwarting of murderous attacks."⁶⁴ The French claimed to win the Battle of Algiers through the use of torture, and the British also maintained that they received "a considerable quantity of intelligence information" through coercive interrogations in Northern Ireland.⁶⁵ In 1995, authorities in the Philippines tortured Abdul Hakim Murad into disclosing information that may have foiled plans to bomb eleven commercial planes.⁶⁶ Intelligence gathered through torture may also have led to the capture of Saddam Hussein in December 2003.

"Can the War against Terror Justify the Use of Force in Interrogations: Reflections in Light of the Israeli Experience," *Torture: A Collection*, *ibid.* pp. 183-198.

⁶³ The imminence requirement might be most easily challenged with captured high-level al Qaeda members, who are most likely to have specific knowledge about future attacks. Even then, coercion would need to be a last resort rather than a standard practice.

⁶⁴ *Public Committee Against Torture in Israel v. The State of Israel*, *ibid.*

⁶⁵ For articles about torture's successes, see references in John Parry, "Escalation and Necessity: Defining Torture at Home and Abroad," *Torture: A Collection*, *ibid.* p. 164, n.52. Cf. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, New York, 2000, p. 112

⁶⁶ Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven: Yale University Press, 2002, p. 137. Cf. Joseph Lelyveld, *ibid.*

Many of torture's success stories appear more tenuous upon further probing. While governments who employ torture tend to emphasize the large numbers of lives it has saved, few are ready with concrete particular examples, and many of these examples are themselves officially contested in terms of what was revealed during the actual interrogation. Most of the information extracted from Abdul Hakim Murad, for example, seems to have been obtained by tapping into files on his laptop, captured in his Manila apartment, rather than through his violent interrogation, which included inserting burning cigarettes into his ears.⁶⁷

Many studies suggest that torture is as inefficacious as it is counterproductive. Torture often provides unreliable information, if not absolute fabrication, perhaps driven by both the victim's psychological instability while experiencing excruciating pain and his belief that he will be able to bring his torment to an end with a story – any story. One man tortured by the African National Congress confessed to murdering himself; another to murdering a man who was still alive.⁶⁸ A professional interrogator in Rhodesia reported only two incidents in his career in which valuable information was obtained through torture; both were locations of arms caches, not information about ticking bombs.⁶⁹ Many argue that in terror networks, information changes rapidly enough, and those "in the know" are well-trained enough, to lead interrogators astray by feigning disclosure of information that is in fact useless or no longer relevant; given the resistance of detainees with anything to reveal – as well as the speed of adjustments made once a high-level operative is captured – it is veritably impossible to obtain information quickly enough for it to be useful. As John Langbein, who has meticulously researched the rise and fall of the use of torture in the European criminal justice system, asserts: "History's most important lesson is that it has not been possible to make coercion compatible with truth."⁷⁰

In the end, however, most evidence about the efficacy or inefficacy of torture is anecdotal, for, as Sanford Levinson observes: "An unfortunate reality... is that we really have no idea how reliable torture is as a way of obtaining information. One cannot even imagine carrying out methodologically sophisticated tests except in a totalitarian society. With regard to the effectiveness or futility of torture, we have only anecdotes and counter-anecdotes, none of them dispositive."⁷¹

There are, moreover, forceful arguments that resort to torture and other cruel, inhuman, and degrading treatment hinders rather than serves a war effort whose success depends on securing the loyalty of the people among whom it struggles. Many journalists have documented the ways the Abu Ghraib scandal, as well as reports of sexual humiliation and desecration of the Qur'an at Guantánamo, have provoked bitter resentment throughout the Islamic world.

⁶⁷ See Lelyveld, *ibid.*

⁶⁸ Conroy, *ibid.* p. 170

⁶⁹ Conroy, *ibid.* p. 113

⁷⁰ John H. Langbein, "The Legal History of Torture," *Torture: A Collection*, *ibid.* p. 101.

⁷¹ Sanford Levinson, "Contemplating Torture," *Torture: A Collection*, *ibid.* p. 33-34

A generation from now, historians may 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. Copies of them are now sold in souks from Marrakesh to Jakarta, 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. If Osama bin Laden had hired a Madison Avenue public relations firm to rally Arab hearts and minds to his cause, it's hard to imagine that it could have devised a better propaganda campaign.⁷²

It has become a truism among journalists that abuses in American detention have fueled the engine of recruitment among terror groups. Phillip Carter reports, for example, that the Ansar al-Islam terror network in Iraq, an al Qaeda affiliate, prints pictures from Abu Ghraib in its recruitment literature. This July, a former C.I.A. analyst and deputy director of the State Department's counterterrorism office claimed on National Public Radio: "You now in Iraq have a recruiting ground in which jihadists, people who were not willing to go out and embrace the vision of bin Laden and Al Qaeda, are now aligning themselves with elements that have declared allegiance to him"⁷³

Political theorists Michael Walzer and Michael Ignatieff – rooting their claims in historical observations – have been particularly astute and eloquent in describing the deleterious and dialectical impact of harsh counter-terrorism measures like torture. Al Qaeda, Ignatieff writes, depends on provoking America into an escalatory spiral in which America succeeds in making itself hated and thus does al Qaeda's political work for them:

Preventive detention to withdraw suspicious aliens from the general population might disrupt terrorist networks, but it might so enrage innocent groups that they would cease to cooperate with the police. Torture might break apart a network of terrorist cells, but it would also engender hatred and resentment among the survivors of the torture and further increase their support among disaffected populations. There is simply no way to disentangle the technical question of what works from the political question of what impact such methods will have on the struggle for opinion that is the essence of any campaign against terror. Extreme measures, like torture, preventive detention, and arbitrary arrest, typically win the battle but lose the larger war.⁷⁴

Raids and indiscriminate round-ups, Ignatieff points out, do not tend to earn support for democratic government – whose selling point is the minimization of arbitrary violence

⁷² Phillip Carter, "The Road to Abu Ghraib," *Washington Monthly*, November 2004. Available at www.washingtonmonthly.com/features/2004/0411.carter.html

⁷³ Bob Herbert, "It Just Gets Worse," *New York Times*, July 11, 2005

⁷⁴ Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, 2004, pp. 19-20

and coercion – and thus ultimately do not reduce terrorist threats. In a war that depends on the support of moderates and allies, and not only on geopolitical control, the political impact of military operations is a matter of military necessity.⁷⁵ "An operation that crushes a cell but alienates an entire population of innocent bystanders is not a success. It is a failure."⁷⁶

From the Senate floor to the *New York Times* editorial page, arguments have resounded in recent weeks that American detention policies have tainted America's moral reputation and political legitimacy, and therefore its military effectiveness. Senators have decried that detention practices "have shamed the nation in the eyes of the world and made the war on terror harder to win;" publicized ill-treatment has become "an international embarrassment to our nation and to our ideals ... [and] a festering threat to our security."⁷⁷ The editorial page of the *New York Times* recently called Guantánamo a "propaganda gift to America's enemies; an embarrassment to our allies; a damaging repudiation of the American justice system; and a highly effective recruiting tool for Islamic radicals, including future terrorists."⁷⁸

On pragmatic rather than idealistic grounds, the military has long rejected both torture and "cruel, inhuman, and degrading treatment":

Army Field Manual 34-52 Chapter 1

The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government. Experience indicates that the use of force is not necessary to gain the cooperation of sources for interrogation. Therefore, the use of force is a poor technique, as it yields unreliable results, may damage subsequent collection efforts, and can induce the source to say whatever he thinks the interrogator wants to hear.⁷⁹

Lifelong military professions, including Former Secretary of State Colin Powell, have objected to detention policies and the new legal framework that allows them. Powell, who fought in Vietnam and helped run the first Gulf War, opposed the administration's decision to suspend the Geneva Conventions, worrying that in doing so America would weaken protections against mistreatment of American soldiers and cede the ability to oppose similar practices when used against American citizens.⁸⁰ America's detention

⁷⁵ Walzer, *Arguing About War*, *ibid.* p. 9

⁷⁶ Ignatieff, *ibid.* p. 82

⁷⁷ Charles Babington, "Critics of Guantánamo Urge Hill to Intervene," *Washington Post*, June 16, 2005 A02.

⁷⁸ "Un-American by Any Name," *New York Times*, June 5, 2005

⁷⁹ Cited at: <http://www.amnestyusa.org/stoptorture/officersquotes.html>

⁸⁰ Powell's criticism of the Bybee memo – which argued for the elimination of Geneva protections in Guantánamo and Afghanistan – is available at <http://msnbc.msn.com/id/4999363/site/newsweek>. Powell's claims: "[The Bybee memo] will reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops, both in this specific context and in general." See also the critical memo of William H. Taft, IV, legal advisor to the State Department, at <http://www.fas.org/sgp/othergov/taft.pdf>. For an expanded version of this argument, cf. Carter, *ibid.*

practices have placed current and future generations of U.S. soldiers at risk by sending a message of glibness about international law, not only to U.S. military personnel, but also to other governments and militaries throughout the world.⁸¹

Finally, there is the argument that torture, even if it could in fact save our bodies, would in the meantime corrode our souls, as citizens of liberal democracies and as conscientious human beings. Again, to quote Ignatieff's wisdom: "Terrorism is liberal democracy's nemesis, beleaguering it and deforming it even when terrorism goes down to defeat....It is the response to terrorism, rather than terrorism itself, that does democracy the most harm."⁸² When democracies are brought to their knees by terrorism, it is not in military defeat, but in eroding their own ideals through overreactions (Argentina, Colombia, Peru, America during the "Red Scare," etc.). Terrorism tends to menace democratic states most by weakening their own constitutional and ethical commitments.

In sum, torture not only may not be effective as an information gathering tool, but may also spur recruitment to terror networks, fan existing hostilities, alienate moderates and allies, endanger our soldiers, and harm our ideals.

After Prime Minister Yitzhak Rabin's assassination, many *halakhic* scholars dismissed the reasoning of Yigar Amir – who had assassinated Rabin on the grounds that Rabin was a *rodef* of the Jewish people – in part by arguing that the termination of the peace process could be as dangerous as its continuation.⁸³ The same argument could be applied to torture. To state the argument in its most circumspect form: allowing U.S. interrogators to torture, humiliate, and degrade military detainees might prove at least as dangerous to the American people as insisting that they refrain from doing so.

2) *Harm to third-party innocents.*

Jewish law, as discussed above, rejects the idea of sacrificing the one for the sake of the many on the basis of the principles "one life may not be given priority over another" and "how do you know your blood is redder."

The "ticking bomb" hypothetical relies on the notion that the person being tortured is not a mere suspect; he is a confirmed perpetrator. In real life, however, interrogators rarely

⁸¹Army Col. Stuart Herrington – a military intelligence specialist who conducted interrogations in Vietnam, Panama and Iraq during Desert Storm, and whom the Pentagon sent to Iraq to assess interrogations before Abu Ghraib – has issued a confidential Pentagon report which he declines to discuss but which was leaked to *The Washington Post* a month ago. In that report, he warned that members of an elite military and C.I.A. unit were abusing detainees in Iraq and that their activities could be "making gratuitous enemies." He also stated that prisoner abuse "is counterproductive to the Coalition's efforts to win the cooperation of the Iraqi citizenry." As Anne Applebaum puts it in a recent editorial on the ineffectiveness of torture, "Far from rescuing Americans, in other words, the use of 'special methods' might help explain why the war is going so badly." See "The Torture Myth," *Washington Post*, January 12, 2005, p. A21, at <http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html>

⁸²Ignatieff, *ibid.* p. 61

⁸³Povarsky, *ibid.* p. 180

know that they have the "right" person before them, particularly when detainees have been gathered in broad round-ups and granted few due process protections.

Not every "enemy combatant" would qualify as a *rodef* – or imminent threat – under Jewish law; there is evidence that a startlingly high percentage of U.S. detainees do not even qualify as the former. A significant percentage of innocent people have been detained in American military prisons like Abu Ghraib and Guantánamo, people who not only do not pose any pressing danger from within their holding cells, but may never have posed any hazard to Americans. As of 2003, the International Committee of the Red Cross estimated that between seventy to ninety percent of those held in Abu Ghraib were there "by mistake;" more recent official inquiries have dropped the estimate to two-thirds. At Guantánamo, official reports have estimated that forty percent of detainees never belonged there.⁸⁴ Eighty-five percent of those captured at Bagram in Afghanistan have since been released without any charges or evidence of terror links.⁸⁵ There have been reports of routine physical and psychological ill-treatment and abuse at each of these facilities.

One of the other arguments against torture – again from the historian's corner – is that torture has metastatic tendencies. Like many diseases, it is infectious; invariably, it spreads. In medieval Europe, despite extensive procedural safeguards, many innocent suspects went to the torture chamber: "The deep lesson of the past... is that the error rate will be high."⁸⁶ In application, regardless of what regulations officially contain its use, torture tends to be applied to people for whom it was not originally designated. "This is the way with torture: it is originally justified as a lesser evil, as a regrettable necessity in the struggle to extract timely information to prevent greater harms, and slowly but surely it becomes a standard technique, explicitly used to humiliate, terrify, degrade, and subdue entire populations."⁸⁷ A tragic slippery slope seems invariably to slide from the "ticking bomb" justification to taxi drivers and gas station attendants, in the wrong place at the wrong time.

America's moral and political legitimacy depends on insisting on a distinction that al Qaeda has obfuscated – that between innocent civilians and legitimate military targets.⁸⁸ From the perspective of Judaism, even if torture were proven to save lives, the *rodef* defense would not permit violence against innocents on the basis of a net saving of life; the imperative to preserve our own lives does not allow us to sacrifice the lives of other innocents. The lives of U.S. military detainees are as valuable as our lives; they too are descendants of Adam, imprinted with the divine image, their blood as red as ours.

3) *Minimum possible harm*

⁸⁴ Lelyveld, *ibid.*

⁸⁵ Tim Golden, "Army Faltered in Investigating Detainee Abuse," *New York Times*, May 22, 2005.

⁸⁶ Langbein, *ibid.* p. 93

⁸⁷ Ignatieff, *ibid.* p. 136

⁸⁸ See Ignatieff, *ibid.* pp. 128-129

The *rodef* defense requires that force used be the minimum necessary and proportional to the threat involved.

- **Defining torture: torture vs. "cruel, inhuman and degrading treatment"**

Standard treatment in American detention centers has included stripping, leaving detainees naked in isolation and in public, hooding, beating, kicking, shackling in humiliating and physically painful "stress positions" for hours on end, spitting on and urinating on detainees, food and sleep deprivation, exposure to extremes of hot and cold, bombardment with painfully bright lights and loud violent music, and threatening with dogs. These techniques have been authorized at the highest levels of the Pentagon and Defense Department in part through a dubious distinction between torture and "cruel, inhuman, and degrading treatment" (C.I.D.).

In 2002, the Justice Department's Office of Legal Counsel (O.L.C.) issued the Bybee memo to then White House Counsel Alberto Gonzales; the Bybee memo famously relies on a distinction between torture – defined as "physical pain accompanying serious injury such as organ failure, impairment of bodily functions, or even death" – and cruel and degrading treatment that does not result in permanent bodily or mental injury.⁸⁹ After much public critique of this memo for nearly "defining torture out of existence,"⁹⁰ the O.L.C. issued a revised memo in Dec. 2004, shortly before Alberto Gonzales' confirmation hearing as Attorney General. The revised memo improved upon the first memo, but retained an extremely restrictive definition of torture as "severe physical distress" of such "duration" and "intensity" that it causes "prolonged mental harm."⁹¹

Both OLC memos rely on cases in Britain and Israel to substantiate the claim that the techniques employed by the U.S. amount to cruel and degrading treatment but not torture. The memos note that in *Ireland v. the United Kingdom (1978)*, the European Commission on Human Rights (ECHR) determined that wall standing ("stress positions"), hooding, subjection to noise, sleep deprivation, and deprivation of food and drink were inhuman and degrading methods but not torture. This representation seems, at best, to misread the case at hand and elide its ambiguity and contentiousness. *In Ireland v. the United Kingdom (1976)*, the European Commission of Human Rights, by a unanimous decision, ruled that these five techniques amounted to torture. The Irish government then appealed the decision to the European Court of Human Rights – not yet satisfied with the decision since no one had been held accountable for the use of acknowledged torture, and no legal sanction had been issued to ensure these techniques would not be used in the future by

⁸⁹ The full text of the Bybee memo is available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

⁹⁰ See for example, Andrew Sullivan, "Deconstructing Bybee," *The Daily Dish*, Feb. 10, 2005. See http://www.andrewsullivan.com/print.php?artnum=dish&dish_inc=archives/2005_02_06_dish_archive.htm l. Cf. Peter Brooks, "The Plain Meaning of Torture? Literary Deconstruction and the Bush Administration's Legal Reasoning," *Slate*, Feb. 9, 2005. Cf. <http://slate.msn.com/id/2113314/>.

⁹¹ The revised memo is available at <http://www.usdoj.gov/olc/dagmemo.pdf>. Marty Lederman, a constitutional lawyer who worked for the Office of Legal Counsel until 2002, analyzes the difference between the two memos at <http://www.acsblog.org/international-affairs-623-marty-lederman-on-understanding-the-olc-torture-memos-part-i.html>.

other governments within the Court's jurisdiction. In a decision that stunned the Irish government and the international law community, the *Court* then overturned the *Commission's* ruling that the five techniques amounted to torture, ruling that they instead were inhuman and degrading treatment, but not torture. The Court's reversal of the original decision was rendered after three days of hearings in which no witnesses were present.⁹²

*In a case against Israel in 1997, the U.N. Committee against Torture – the body responsible for enforcing the Convention Against Torture, to which the U.S. is a party – ruled that a similar list of methods (shackling in painful positions, hooding, sounding of loud music, sleep deprivation, threats, exposure to cold air), particularly when used in combination, produce pain and suffering severe enough to be described as torture.*⁹³ This decision helped sway the Israeli Supreme Court to outlaw categorically both torture and cruel, inhumane, and degrading treatment in 1999, although the Israel Supreme Court did not agree that these particular techniques amount to torture rather than to cruel, inhuman, and degrading treatment.

Short-term and long-term studies of those subjected to similar methods ("stress positions," sleep deprivation, hooding, isolation, and sensory bombardment) by the KGB and the British in Northern Ireland suggest that such techniques produce excruciating pain and swelling, temporary states of psychosis and mental disorientation that have a tendency to become permanent, and other potentially long-term physical and mental effects, including loss of motor coordination, blackouts, hallucinations, violent headaches, nightmares, anxiety attacks, insomnia, chronic depression, and suicidal tendencies. Of fourteen Irish men subjected to the "five techniques" in 1971, two died of heart attacks in their forties and the others still suffer from a range of other permanent and debilitating physical and psychological symptoms.⁹⁴

A study of KGB interrogation methods produced by two consultants for the American Defense Department in 1956, and published in the American Medical Association's *Archives of Neurology and Psychiatry*, describe prisoners who had been held in isolation, forced to remain in fixed positions all day, and deprived of sleep:

The prisoner becomes increasingly dejected... He gradually gives up all spontaneous activity within his cell and ceases to care about his personal appearance and actions. Finally he sits and stares with a vacant expression....Ultimately he seems to lose many of the restraints of ordinary

⁹² See Conroy *ibid.* pp. 136-137 and 185-187.

⁹³ CAT/C/SR.297/ADD.1, *Conclusions*, paragraphs 4-6. A summary of the U.N. decision is available at: <http://www.unhchr.ch/tbs/doc.nsf/0/b51bae20771d616a80256513005275ab?Opendocument>. The U.N. Rapporteur on Torture had already advised: "Together [these methods] may be expected to induce precisely such pain or suffering, especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end. Under those circumstances, they can only be described as torture." E/CN.4/1997, 10 January 1997, par. 121, p. 29. Citations from Btselem's 1998 report, "Routine Torture," *ibid.* p. 23, available at http://www.btselem.org/English/Publications/Summaries/199802_Routine_Torture.asp.

⁹⁴ See Conroy *ibid.* pp. 6, 45, 127.

behavior...It usually takes from four to six weeks to produce this phenomenon in a newly imprisoned man... Some prisoners may become delirious and have visual hallucinations... If he is given an opportunity to talk, he may say anything which seems to be appropriate, or to be desired by his listener, for in his confused and befuddled state he may be unable to tell what is actually true from what might be or should be true. He may be highly suggestible, and he may 'confabulate' the details of any story suggested to him... *The effects of isolation, anxiety, fatigue, lack of sleep, uncomfortable temperatures, and chronic hunger produce disturbances of mood, attitudes, and behavior in nearly all prisoners. The living organism cannot entirely withstand such assaults...All of them...lead to serious disturbances of many bodily processes; there is no reason to differentiate them from any other form of torture.*⁹⁵

In short, the particular interrogation methods currently authorized and employed in U.S. detention induce severe enough pain – especially when used in combination and with frequency – to be determined torture by both the U.N. Committee against Torture and the European Commission of Human Rights. Studies confirm that these methods cause excruciating pain and both short-term and long-term mental harm.

Furthermore, rather than causing minimal possible harm, the overwhelming evidence is that the U.S. is currently inflicting as much pain as it can get away with without being charged for war crimes. As the Bybee memo for the Justice Department's Office of Legal Counsel asserts, "The criminal statute penalizes only the most egregious conduct...*only the worst forms of cruel, inhuman, or degrading treatment or punishment.*"⁹⁶ Similarly, Alberto Gonzales, in a memo to President Bush in 2002, suggests that one good argument for suspending the Geneva Conventions is to lessen the possibility of prosecution under the war crimes statute for treatment of detainees during military interrogations. Granting detainees prisoner of war status, Gonzales worries, might increase the danger of prosecution for "vague" offenses prohibited by the Geneva Convention such as "outrages upon personal dignity" and "inhuman treatment."⁹⁷

- **The slippery slope: evidence from the field**

Moreover, human rights activists who have worked with interrogators, victims, and policy-makers for decades insist that *the distinction between torture and cruel, inhuman, and degrading treatment is even harder to maintain in an actual interrogation room*, for the natural tendency is to drive pressure up:

These practices are not separate and distinct categories of acts, but rather lie in an unbroken continuum. In practice, it is all too easy for cruel treatment to slide into torture. This is so for many reasons. The body becomes inured to pain, which prompts interrogators to ratchet up the pressure. Interrogators in the real world vie

⁹⁵ Emphasis added, cited in Conroy, *ibid.* 127-128.

⁹⁶ Emphasis added. The full text of this memo is available at: <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

⁹⁷ The full text of Gonzales' memo is available at: <http://www.msnbc.msn.com/id/4999148/site/newsweek/>.

to be the one to 'break' the prisoner, rather than leave the glory to the next shift. Once an official has internalized permission to treat someone with cruelty, as a matter of human nature it becomes difficult to gauge what is then too cruel. Even a measure that is not inherently cruel, if used briefly, can become excruciating.⁹⁸

How does one enforce a standard of "minimum possible harm" in an actual interrogation session? How pressure someone so far and no further?

Furthermore, *how does one know when compliance has occurred?* Interrogators confirm the difficulty of discriminating compliance from resistance, for how differentiate a suspect who has told you all he knows from one who is withholding information or doesn't have any information to disclose? Henry Shue writes sardonically about the impossibility of ensuring "that while avoiding irreparable damage, the antiseptic pain will carefully be increased only up to the point at which the necessary information is divulged, and the doctor will then immediately administer an antibiotic and a tranquilizer."⁹⁹ Torture – argues the voice of real-world experience – is never used with such "surgical precision," regardless of what restrictions regulate its use.

In practice, experienced interrogators concede the difficulty of maintaining any red lines once one crosses over into physical coercion. Even were U.S. interrogators to restrict themselves to those methods currently authorized by the Pentagon, however, they would violate the standards set by the U.N. Committee Against Torture – which oversees the Convention Against Torture, a treaty to which America is a signatory – as well as the minimum possible harm standard of the rodef principle.

- **Alternatives to torture**

What *would* "minimal possible harm" look like in an interrogation session? Are there alternative ways to get the information we need to protect ourselves?

Many military interrogators argue that physical coercion is neither effective nor necessary, for prisoners cooperate most readily when their confidence has been earned.¹⁰⁰ Army Col. Stuart Herrington – a military intelligence specialist who conducted interrogations in Vietnam, Panama and Iraq during Desert Storm, and whom the Pentagon sent to Iraq to assess interrogations there in 2003 – is one of the many voices of experience to claim that torture is "not a good way to get information." Nine out of ten people, he claims, can be persuaded to talk without "stress methods;" the "batting average" for religious fanatics might be lower ("perhaps six out of ten"), but physically coercing the remaining four will not procure any more information: "They'll just tell you anything to get you to stop."¹⁰¹ Newly released FBI documents claim that in

⁹⁸ Dinah Pokempner, Deputy General Counsel of Human Rights Watch, personal correspondence with author, Feb. 2005.

⁹⁹ Shue, *ibid.* p. 58

¹⁰⁰ For a list of Army, CIA, and FBI agents who stress the inefficacy of torture, see: <http://www.amnestyusa.org/stoptorture/officersquotes.html>.

¹⁰¹ Cf. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, New York, 2000, p. 44, Ignatieff, *ibid.* p. 71, and Lelyveld, *ibid.*

Guantánamo, "every time the FBI established a rapport with a detainee, the military would step in and the detainee would stop being cooperative."¹⁰²

There *are* "softer approaches" with demonstrated effectiveness, both inside and outside of the interrogation room. Antiterrorism teams in Germany and Italy infiltrated terrorism cells by issuing amnesty to those who came forward with information.¹⁰³ Cyril Cunningham, who served in the Ministry of Defense of the United Kingdom from 1951-1961, once wrote: "The best interrogator I ever met...had the demeanor of an unctuous parson."¹⁰⁴ L. St. Clare Grondona, a British interrogator of German prisoners during World War II, claims that – because he and his fellow interrogators had been instructed that they absolutely could not use physical duress – they became "as wily as they were resourceful," using methods that were "processes of 'painless extraction' seasoned with legitimate guile. More often than not a 'guest' would be unaware that he had given us useful data."¹⁰⁵

Journalist Joseph Lelyveld recently interviewed Jack Cloonan, a retired F.B.I. agent known for his "uncanny success." Cloonan was responsible, for example, for interrogating Abdel Ghani Meskini, a young Algerian involved in the "millenium plot" to set off a bomb in the Los Angeles International Airport around January 1, 2000. Cloonan softened Meskini into talking within a day. His approach? He asked Meskini if he'd had a chance to pray, pointed the way to Mecca, and provided him with halal food. He talked with him about his parents and reminded him of the concern they must be feeling for him. He took on the role of "surrogate father" and persuaded Meskini that his actual father would want him to help prevent a bloodbath.¹⁰⁶

No one argues that such gentle tactics will always be effective. If torture and cruel treatment exist along a continuum, so too do some of the tactics used by governments like Israel that have attempted to ban "cruel, inhuman, and degrading treatment" altogether. Lelyveld describes the "new generation" of Israeli interrogators who have been trained in the aftermath of the 1999 Supreme Court decision. As Lelyveld documents – based on interviews both with Israeli human rights organizations and Israeli security personnel – many Palestinian prisoners are still routinely subjected to threats of physical abuse, isolation, sleep deprivation, and extremes of cold. But then they are placed in cells with Palestinian collaborators who lure them into speaking. "He may suspect as much, but he's so glad to be speaking softly with fellow Palestinians after the shouting, curses, and crude sexual innuendoes to which the interrogators frequently resort, he usually talks. The cell, of course, is bugged. No one has touched him. This sort of approach, I was told, is just as effective as the old stress positions."¹⁰⁷ As Danny Rothschild – formerly a high official in Israeli security service, now a security consultant in Israel and the United States, told

¹⁰²Quoted in Anne Applebaum's editorial, "The Torture Myth," *Washington Post*, January 12, 2005, p. A21, at

<http://www.washingtonpost.com/wp-dyn/articles/A2302-2005Jan11.html>

¹⁰³ Ignatieff, *ibid.* p. 71.

¹⁰⁴ Cited in Conroy, *ibid.* p. 44

¹⁰⁵ Conroy, *ibid.*

¹⁰⁶ Lelyveld, *ibid.*

¹⁰⁷ Lelyveld, *ibid.*

Lelyveld: "The results are the same. Which shows you could have done without brutal interrogation."

Physical coercion, once standard fare in domestic police interrogations, has all but disappeared in the American police precinct, despite arguments before the Supreme Court that police could not protect the public without "breaking" the resistance of suspects resistant to disclosing information.¹⁰⁸ Through its applications of the Fifth, Eighth, and Fourteenth Amendments, the Supreme Court has succeeded in deterring police interrogators from engaging in the "third degree" and compelled them to seek evidence and information through non-violent means.¹⁰⁹ The Court has insisted that confessions must be "voluntary" and elicited through "due process" to be admissible as evidence, a principle whose applications – in addition to securing Miranda rights for defendants – inhibit police interrogators from removing defendant's clothing,¹¹⁰ using threats and deceptions,¹¹¹ isolating a defendant from friends and family,¹¹² and interrogating a suspect with little food or sleep.¹¹³ These cases emphasize, on the one hand, the need for public security, the resistance of most suspects to disclosing information, and the recognition that "whatever fortifies the suspect or seconds him in his capacity to keep his mouth closed is a potential obstacle to the solution of crime."¹¹⁴ Yet they also stress that successful law enforcement and crime investigation does not demand physical violence, and may be achieved through "persistent cross-questioning," "patience," "self-assurance," "entreaty," and "cajolery."¹¹⁵

U.S. police interrogators – like other military interrogators who abide by international prohibitions against torture – have evolved methods to question suspects and extract information necessary for public safety without resort to physical brutality and degradation. Given that alternative, effective means are available to gather intelligence to protect American lives, torture would not be permitted by the *rodef* principle's "minimum possible harm" standard, given that alternative, effective means are available to gather intelligence to protect American lives.

¹⁰⁸ *Culombe v. Connecticut*, 367 U.S. 568 (1961): "The argument that without such interrogation it is often impossible to close the hiatus between suspicion and proof, especially in cases involving professional criminals, is often pressed in quarters responsible and not unfeeling. It is the same argument that (367 U.S. 568, 588) was once invoked to support the lash and the rack. Where it has been put to this Court in its extreme form, as justifying the all-night grilling of prisoners under circumstances of sustained, week-long terror, we have rejected it. *Chambers v. Florida*, 309 U.S. 227, 240-241. "The Constitution proscribes such lawless means irrespective of the end." See <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=367&invol=568>.

PT¹⁰⁹ TPSee Jerome H. Skolnick, "American Interrogation: From Torture to Trickery," *Torture*, Oxford University Press, 2004.

PT¹¹⁰ TP*Malinski v. New York*, 324 U.S. 401 (1945) deals with a case in which a defendant was held naked for three hours while being questioned in a hotel.

PT¹¹¹ TPRogers v. *Richmond*, 365 U.S. 534 (1961) and *Lynnum v. Illinois*, 372 U.S. 528 (1963)

PT¹¹² TP*Ward v. Texas*, 316 U.S. 547 (1942)

PT¹¹³ TPC*Lewis v. Texas* 386 US 707, 709-710 (1967) and *Ashcraft v. Tennessee*, 322 U.S. 143, 150-151 (1944).

¹¹⁴ *Culombe v. Connecticut*, *ibid.*

¹¹⁵ *Miranda v. Arizona* 384 US 436 (1966) and *Culombe v. Connecticut*, *ibid.*

Conclusion: The rodef Defense Does Not Permit Routine Torture

The *rodef* defense requires that action taken in self defense or defense of others must be intended to save a particular victim from imminent, probable harm rather than prior conduct or anticipated threat; such action must be spontaneous rather than premeditated, may not harm any third-party or innocent bystanders; and must cause minimal possible harm to the *rodef* himself.

Physical coercion is neither the least harmful nor most effective means of obtaining the information we need to protect ourselves. There is little demonstrated proof that torture, the ultimate shortcut, "works." There is evidence that torture causes great harm— not only to the victims, but also to the interrogators, soldiers, and citizens of the society that permits it.

The *rodef* defense would allow the killing of a suicide bomber strapped with explosives and might allow ad hoc physical coercion in a true "ticking bomb" case, but in all other cases would support international law's absolute prohibition against torture and "cruel, inhuman, and degrading treatment." The "necessity" defense in Israeli and American law, and the "*rodef*" defense in Jewish law, might enable a temporary override of the prohibition against torture in a "ticking bomb" situation without nullifying the absolute prohibition against torture.¹¹⁶

In tandem with this acknowledged "ticking bomb" exception, it is worth recalling Henry Shue's prudent words that "the distance between the situations which must be concocted in order to have a plausible case of morally permissible torture and the situations which actually occur is, if anything, further reason why the existing prohibitions against torture should remain and should be strengthened," by preserving torture as an international crime, regardless of exigent circumstances.¹¹⁷ By abstracting to the philosophical plane, the "ticking bomb" hypothetical all too easily allows us to overlook the thousands of real victims who have been and are currently being tortured and degraded in U.S. custody, few of them "ticking bombs" by any definition, and all too many of them innocent of any crime or threat to American lives.

Over against the "ticking bomb" scenario, the present era calls up another nightmare scenario, posed by Feodor Dostoevski in *The Brothers Karamazov*:

I challenge you—answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny

¹¹⁶ Both Michael Walzer and Jean Bethke Elshtain have proposed similar arguments that torture should never be granted prior license or normative sanction, but that interrogators ought, in a "ticking bomb" moment, to choose to live with "dirty hands" rather than lose their "last remaining chance to save lives in imminent peril," thus violating without annulling an absolute moral prohibition out of temporary consequentialist considerations. See Michael Walzer, "Political Action: The Problem of Dirty Hands" and Jean Bethke Elshtain, "Reflection on the Problem of 'Dirty Hands,'" both in *Torture: A Collection*, *ibid.* pp. 61-75 and pp. 77-89.

¹¹⁷Shue, *ibid.* p. 58

creature—that little child beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me, and tell the truth.

Jewish law joins Dostoevski's Alyosha in answering with a soft but audible "no." We are not to build our joy and safety on the agony of other innocents, even when they are too distant to confront us with their personal stories and particular pain. We are not to adopt the sort of "collateral damage" logic that would justify horror to the few for the sake of the well-being of the many; we may not destroy innocent lives – entire, infinite worlds – so that we may live more securely. We may not "set aside one life for another," for Judaism reminds us that our blood is no redder than that of other human beings, equally beloved by God.

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