

Warfare, Ethics and Jewish Law

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To what degree are Jewish law and ethics suspended during wartime? With his customary lucidity, R. Michael Broyde has identified¹ this question as central to the development of a Jewish military ethic. His unflinching answer is that “the battlefield ethics of Jewish law, as a matter of concrete practical policy, place no ‘real’ restrictions on the conduct of the Jewish army during wartime”². Thus he endorses administratively authorized torture of prisoners,³ reprisal killings,⁴ exemplary executions,⁵ and even the deliberate “killing of a dozen innocent infants in the enemy camp.”⁶

R. Broyde provides a startlingly novel halakhic basis for these opinions. He argues that wartime creates a “presumptive *hora’at sha’ab* (temporary edict/suspension of the law)” which enables duly constituted authorities to use whatever means they consider necessary for victory. All halakhic prohibitions and ethical principles, however ironclad in law or exalted in Jewish tradition, are therefore irrelevant in practice, even if they specifically relate to war.

R. Broyde’s vision of war is diametrically opposed to the vision articulated by R. Aharon Lichtenstein in an interview published in

Teḥumin.⁷ “It is most important that a person going out to war understand that he is not passing from a world possessed of one hierarchy of values to a world with a different hierarchy of values. One person, one nation, cannot split into two.” For Rav Lichtenstein, wartime must be a fully integrated category of *halakhab* and Jewish ethics. Just as we do not see the *halakhab* of *rodef*⁸ as a suspension of Jewish ethics, but rather as an embodiment of our commitment to both life and law, so too must we develop a theory of war that expresses the deepest values of our tradition.

R. Broyde’s halakhic conclusions are intellectually unconvincing as well as morally offensive.

My sympathy is entirely with Rav Lichtenstein’s vision, and I believe that R. Broyde’s detailed halakhic conclusions are intellectually unconvincing as well as morally offensive. This introductory essay is largely devoted to fleshing out that sympathy and belief within the texts of Jewish tradition. But I also hope to make a small contribution toward a Jewish moral theory of war and begin the much needed process of concretizing Rav Lichtenstein’s vision into formal halakhic principles that can guide soldiers and citizens.

¹ Michael Broyde, “The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception” (Queens College, 2006). R. Broyde published a provocative distillation of this monograph’s conclusion as an op-ed, “Jewish Law and Torture” in *The Jewish Week*, August 7, 2006. I will assume throughout that the op-ed and the monograph are in substantive agreement. As will be noted below, R. Broyde’s radical anethicalism appears only in the conclusion of his essay; an earlier article of his, “Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition,” available at www.jlaw.com, contains no hint of it.

² “Bounds,” p. 42

³ “Bounds”, n. 121; op-ed.

⁴ “Bounds”, n. 132; op-ed.

⁵ “Bounds”, .. 126; op-ed.

⁶ “Bounds”, p. 39

⁷ Interview published in *Teḥumin* 4:185 (Hebrew; translation by Aryeh Klapper).

⁸ That is, the requirement to kill a pursuer when necessary to save the pursued.

Let me acknowledge at the outset that Jewish tradition, and particularly post-biblical Jewish legal tradition, provides little direct evidence regarding the grounds on which one should morally evaluate a war, and less with regard to how one ought to behave in wars once they have started. While there is sufficient material to establish Rav Lichtenstein's broad claim, developing a halakhic code of military ethics is of necessity a creative enterprise.⁹

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The presumed reason for this striking lacuna is that the Jewish legal tradition developed largely in an era of Jewish powerlessness. That era is past, and we cannot leave *halakhab* incapable of responding to the central moral questions of our times. The resurrection of Jewish sovereignty in Israel, and the growing recognition that our full citizenship in American democracy imposes on Jewish Americans moral responsibility for American actions, have created genuine and legitimate demand for religious guidance in the area of war, both for the sovereign Jewish polity in Israel and for the fully participatory American Jewish minority.¹⁰

Those of us in Israel and the free world who are committed to Jewish law of course welcome this thirst for Torah. At the same time, we must acknowledge that there is no consensus as to the proper approach to take in areas of law that are becoming real after years of desuetude or development in intellectual greenhouses and whose existing formulations may therefore not be capable of surviving contact with reality.¹¹

This article accordingly presents aspirational guideposts for practical *halakhab*—in other words, *halakhab* as it could be if halakhic authorities and communities embraced the principles set out below. I begin with a general halakhic conception of the nature and legitimacy of war that supports R. Lichtenstein's contention that standard ethical principles apply to war. I then develop that conception's implications for the legitimacy of tactics, with specific reference to torture.

As both R. Broyde and R. Lichtenstein note, it may be that law is not the ideal regulatory mechanism for behavior during war. "Hard cases make bad law," and war is an endless series of hard cases. Military *halakhab* may correctly leave many cases, especially those involving life and death, up to the conscience of the individual soldier. In nonetheless seeking to create a legal framework for military ethics, I am following the position of R. Walter Wurzbarger, that routine *halakhab* is designed to perfect character in ordinary situations

⁹ See in this regard the dispute between *Siftei Kohan*, *Hoshen Mishpat* 73:39 and *Hazon Ish*, *Liqqutim*, *Neziqin* 16 as to whether there are questions of *halakhab* regarding which there is no binding precedent at any level of the tradition, in other words cases of genuine first impression. My position here follows *Siftei Kohan*. I owe this reference to my teacher R. J. David Bleich.

¹⁰ Furthermore, as neither Israel nor the Western democracies accepts *halakhab* as binding, but Jews nonetheless serve willingly in their armies, it is necessary to distinguish between the *halakhab* as it must be practiced by a soldier whose country and superiors do not share his commitments, and the *halakhab* as it would be practiced by an army fully committed to *halakhab*. A soldier in a country committed to *halakhab* would be obligated to disobey many contra-halakhic orders on the assumption that his actions would be upheld upon review. Soldiers in non-halakhic armies, by contrast, risk severe punishments up to and including death for disobedience of orders that contradict *halakhab* but not their army's standards, and therefore likely need disobey only if orders meet the standard of *yeibareg ve-al ya'avur*, of requiring martyrdom before committing them. See "Bounds," p. 35 and n. 109, where R. Broyde argues that obedience is the soldier's primary duty unless orders are certainly in "obvious violation of law and normative ethics"; I think this position considerably overstated, and hope in future work to more fully address the proper balance between obedience and moral responsibility in military contexts.

¹¹ Here I follow the talmudic dictum (*Bava Batra* 130b) that a legal position cannot serve as a legal precedent unless delivered in a context of practical application. While there are many ways to understand that statement, this formulation seems to me to represent a minimal consensus.

so that we can make proper decisions in extraordinary situations¹².

A. The Nature and Legitimacy of War

The primary ethical question one must ask with regard to war, of course, is what can justify the killing of other human beings. There are two basic answers:

- a. War is defined as a legitimately unethical zone, in which all interpersonal obligations and prohibitions toward one's opponents are suspended.¹³ This is the approach taken by R. Broyde.¹⁴
- b. Killing in war must be justified ethically on the same grounds used to justify killing at any other time, in other words as punishment, as atonement, or as necessary to protect a more innocent life. For example, individuals may kill when necessary for self-defense under the rules of "*rodef*" (pursuer) and "*ba ba-mah_{teret}*" (furtive trespasser). "*Rodef*" here refers to the classic case of defense against an immediate mortal threat, and "*ba ba-mah_{teret}*" to the more troubling cases of potential or presumptive threat.¹⁵ Killing in war would then be justified on the application of these categories to communal situations.¹⁶

Which of these answers accords best with the evidence?

The existence of halakhic regulations of war tends toward Rav Lichtenstein's approach, but R. Broyde argues that all such regulations are subordinate to the goal of victory, and can be superseded whenever militarily advantageous. No specific halakhic regulation can by itself demonstrate that soldiers must act on the basis of the values of general *halakhab*, or that halakhic decisors should develop martial *halakhab* in accordance with those values.

What can justify the killing of human beings?

But I think a broader philosophic argument can bear considerable weight. Saying that war is legitimately unethical means that one does not judge military tactics in accordance with any end other than victory and that one is entitled to engage in military activities which have no moral purpose, and indeed no positive purpose at all, other than military victory.¹⁷ This is true regardless of whether military victory supports or undermines the values of the victor. Under this analysis, there seems no ground for saying that wars can only be begun in support of moral aims, as they can certainly be continued for any purpose whatsoever.

If war is a halakhically unethical zone, then the halakhic legitimacy of a war should not depend on the cause for which the war is being fought. Saying that war is legitimately unethical means that one is no longer relating means to ends, and therefore the legitimacy of the means cannot depend on the legitimacy of the ends. Conversely, if the legitimacy of war can be shown to depend on

¹² See R. Wurzbarger's magnificent "Covenantal Imperatives", in *Samuel K. Mirsky Memorial Volume*, ed. Gershon Appel (New York: Yeshiva University, 1970) pp. 3-12. See also his *Ethics of Responsibility* (Philadelphia: JPS, 1994), for example pp. 26-27.

¹³ An important question beyond the scope of this article is the definition of "opponent" and "participation" in the war.

¹⁴ "Bounds," p. 42; op-ed.

¹⁵ As it happens, Maimonides believes intervention even to the point of killing is obligatory with regard to a *rodef*, but optional with regard to a *ba ba-mah_{teret}*. See *Mishneh Torah*, Laws of Theft, 9:7. These two areas of law may therefore respectively be models for the categories of "commanded war" (*mil_{hemet} mits_{vat}*) and "authorized war" (*mil_{hemet} resh_{ut}*) established by the *Mishnah* in *Sotah*.

¹⁶ I exclude the possibility that war is a separate and distinct ethical zone in which the rules are different from the normal civilian zone. Ethical principles are universal, and while the applications of those principles may legitimately vary by context, I do not see how the underlying principles can change similarly.

¹⁷ The definition of "victory" is of course problematic. Consider for instance the question of whether, under this theory, it would be permitted to launch a retaliatory nuclear strike.

the *casus belli*, then the means of war must be consonant with and proportional to the ends, and there must accordingly be space for martial ethics¹⁸.

So does the halakhic legitimacy of war depend on its cause? In other words, are there wars that *halakhab* prohibits?

The *locus classicus* for rabbinic views of war is *Mishnah Sotah* 8:7, which divides legitimate wars into two categories¹⁹ but has no term for illegitimate war. The example given of *milhemet reshut* (authorized war) is the Davidic wars of territorial expansion; the example of *milhemet mitsvah* (either commanded war or war to fulfill a commandment; see my discussion below) is Joshua's war of original conquest. This may be²⁰ because all wars are legitimate, but it may also be that the Mishnah works on the presumption that all wars are illegitimate unless they can be justified as parallel to either the

Davidic or else the Joshuan paradigms.²¹ Regardless, the Talmud²² concludes that a *milhemet reshut* can only be conducted with the authorization of the *urim ve-tummim* (oracle of the High Priest's breastplate). It follows that wars conducted without that authorization are forbidden wars.²³

*War is not a mitsvah; rather war
accomplishes a mitsvah.*

Furthermore, R. Joseph B. Soloveitchik of blessed memory argued²⁴ that even in the case of *milhemet mitsvah*, war itself is not self-justifying—the war is not a mitsvah; rather war accomplishes a mitsvah.²⁵ Similarly, Maimonides,²⁶ amplified by *Responsa Tzitz Eliezer*,²⁷ argues that war can only be fought for religious purpose.

There accordingly is ample evidence that *halakhab* sees war as justified only by its cause²⁸ and

¹⁸ My argument here assumes a largely consequentialist view of ethics. On that view, it is difficult to ethically justify a decision to go to war when one knows that there will be no ethical constraint against winning in ways that undermine and outweigh the ethical impulse that legitimated the war to begin with. Note that in some cases war can be a legitimate option for both sides in a conflict, as for example if it is grounded in an irresolvable factual dispute.

¹⁹ R. Yehudah and the sages disagree as to whether the proper division is between “*milhemet boval*” and “*milhemet mitsvah*”, or rather between “*milhemet mitsvah*” and “*milhemet reshut*”. It is unclear whether the dispute is semantic or rather substantive. I use the latter terms throughout the article following the ruling in virtually all halakhic sources.

²⁰ See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2d ed. (New York: Basic Books, 1992).

²¹ See Aviezer Ravitsky, “Prohibited Wars” in *Jewish Religious Law*, pp. 12-13 elsewhere in this edition—ed.

²² *Sanhedrin* 16a. See on this Nahmanides, “List of Alternate Negative Commandments,” toward the end. Note that *Mishnah Sanhedrin* 1:5 and all subsequent *halakhab* also require the permission of the Great Sanhedrin for a *milhemet reshut*; however, this has been understood as a political requirement to gain the consent of the population to go to battle rather than a test of the war's religious acceptability.

²³ While this point is philosophically valuable within the current construction of *halakhab* as it is, in practice it can cause great difficulty; as the *urim ve-tummim*'s current location is unknown, this rule apparently bars all Israeli wars unless they are formally defined *milhamot mitsvah*. Thus a rule apparently intended to limit wars has had the ironic effect of causing politically right-wing halakhists to expand their definition of *milhemet mitsvah*. The same issue does not arise with regard to the requirement that the Great Sanhedrin consent to such wars, as the argument is that democratic consent fulfills the same function.

²⁴ *Kavod Chakhamim: In honor of R. Dov Leventhal* (1935), pp. 95-98, and republished in *Kovetz Chiddushei Torah*. I published an English exposition of this article in *Mayim Aharonim* vol. 7 (Brookline MA: Maimonides High School, 2003).

²⁵ In this framework, the difference between a *milhemet mitsvah* and a *milhemet reshut* may be whether it is fought to fulfill a *mitsvah hyyuvit* (commandment one must fulfill) or rather a *mitsvah kiyyumit* (commandment which one receives credit for fulfilling, but which one is not blameworthy for failing to fulfill if the circumstances necessary for its fulfillment never arise in one's life). But, see, once more, the discussion below as to whether a formal mitsvah is always necessary to justify war.

²⁶ *Mishneh Torah, Hilkhot Melakhim* 4:10: “All the land that the king conquers belongs to him, and he may give it to his servants and warriors as he desires and leave for himself as he desires. In all these matters his law is law, and in all these matters his deeds must be for the sake of Heaven, and his purpose and intent must be to raise up the true religion, and to fill the world with justice and to break the arms of the wicked, and to fight the wars of God.”

²⁷ 13:100

²⁸ I assume that, technical halakhic details aside, the principles of war are the same for Jews and Gentiles. See in this regard

therefore sees military tactics as subject to ethical analysis and critique. Still, I suggest that we should not take *Tzitz Eliezer's* idealistic mission statement as determining the parameters of justified war. It seems likely that no *mitsvah* is fulfilled by defending one's own property. Accordingly, if *ba ba-mahtere*²⁹ is among the paradigms of war, some non-mitsvah causes must suffice to justify war.

My suggestion is that there is a right to normal life,³⁰ financial and religious, and one is entitled to live a normal life even if doing so will aggravate others to the point of violence. One is therefore entitled to defend oneself against that violence, and sometimes even to preempt it.³¹ Obviously, this suggestion requires a definition of the normal national life, a project which is beyond the scope of this article. I will say here only that this model would align the philosophic interests of religious Zionism with those of political Zionism, and therefore has the potential to heal the current schism between adherents of those ideologies.

Here I must note that R. Broyde concedes "it is crucial to realize that there are situations where war – in the Jewish tradition – is simply not permitted"³² and, further, "The Jewish tradition treats different permissible wars differently. The battle for vital economic need carries with it much less of a moral license than the war waged to prevent an aggressive enemy from conquering an innocent nation. Jewish law recognized that some wars are completely immoral, some wars are morally permissible but grant a very limited license to kill, and

some wars are a basic battle for good with an enemy that is evil. Each of these situations entails a different moral response and a different right to wage war. In sum it is crucially important to examine the justice of every cause."³³ While he never makes this connection explicit, it seems likely that he intends his *hora'at sha'ab* to apply with varying force, and for ethics to be suspended completely only in a "basic battle for good with an enemy that is evil." I am unaware, however, of any grounds for such a distinction within the realm of *hora'at sha'ab*, and the notion that a *hora'at sha'ab* can be limited by law is inherently contradictory.

There is a right to normal life, financial and religious.

A concession of my own is in order as well. No halakhist can deny that *halakhab* contains provisions for its own suspension and that prophets, courts, and likely other political authorities may order violations of the law for sufficient cause. With the possible exception of idolatry, *halakhab* contains no categorical prohibitions.

But in this regard war is no different than any other situation in life. To claim, as R. Broyde does, that the possibility of the law's suspension during war means that law has no relevance in principle or in practice, would be to claim that *halakhab* generally is meaningless.

Furthermore, the concept of a "presumptive *hora'at sha'ab*" that R. Broyde asserts is oxymoronic. A

Wurzbarger, *Ethics of Responsibility* (above, n. 12), pp. 7-8. Eugene Korn reports hearing R. Aharon Soloveitchik, whose enormous contributions to communal halakhic ethics through both analysis and personal example merit greater recognition and study, made this assumption when analyzing the legitimacy of tactics in the Vietnam War.

²⁹ There are of course other ways to understand *ba ba-mahtere*, ranging from complete assimilation with *rodef* to the other extreme of unjustified but excused homicide.

³⁰ The right to normal life has wide ranging halakhic implications. I first heard it used as a halakhic concept by Rav Aharon Lichtenstein as an explanation of why one is not strictly liable for damage caused by an ox with no previous history of damaging. See also halakhic discussions of the principle that "The Lord is the Protector of Fools," as well as the incisive analysis of modesty laws in R. Y. H. Henkin, *Equality Lost* (Jerusalem: Urim Publications, 1999), pp. 76-77. I apply it as well in a forthcoming analysis of the laws of parent-child relationships.

³¹ Of course, that one is entitled to do so does not mean that one always should.

³² "Bounds", p. 19

³³ "Bounds", p. 35

³⁴ Maimonides, *Mishneh Torah, Hilkhot Mamrim 2:4*

hora'at sha'ab is defined as a suspension of the law in reaction to specific circumstances.³⁴ If it can be presumed, then it is law and not *hora'at sha'ab*.

Finally, it is not at all clear to me why the Written and Oral Torahs persisted in legally regulating and ethically evaluating military behavior if all such regulations and evaluations are irrelevant. Perhaps these laws were written only so that we might expound them and receive heavenly reward, but such a contention requires evidence.

There is no compelling evidence that wartime behavior is exempt from standard halakhic and philosophic review.

In sum, it seems to me that there is no compelling practical, legal, or textual evidence that wartime behavior should be exempt from standard halakhic and philosophic review. A close reading of the “Personal Reflections on *Halakhab* and War in the Reality of our Time” that form the conclusion of R. Broyde’s essay leads me to suspect that R. Broyde knows this as well, and that his real argument is that the current world conflict is a battle between good and evil which, for specific practical reasons, requires the total suspension of law and ethics. I disagree.

B. What Tactics May Be Legitimately Used in War?

In the previous section I concluded that Judaism sees war as a particular case of *halakhab* and Jewish ethics rather than as an exception to their principles. This section will develop that conclusion with specific reference to R. Broyde’s contentions that “torture in the context of war is no more problematic than death itself”³⁵ and that “the wholesale suspension of the sanctity of life that occurs in wartime also entails the suspension of such secondary human rights issues as the notion of

human dignity [and] the fear of the ethical decline of our soldiers.”³⁶

A brief methodological excursus is in order. Some believe that *halakhab* should develop exclusively through internal analytic categories; ethics, if it plays any role at all, develops by extending halakhic principles beyond the realm of law. In this Kantian vision one must not consider the consequences of legal formulations when deciding among them. Others believe that halakhic conclusions are best arrived at through an interplay between values and law, and that, so far as is practical, one should commit to legal formulations only after fully understanding their practical impact.

I subscribe strongly to the second school. What follows, then, is an attempt to see how certain legal formulations can be used to develop a halakhic military ethic that is consistent with the values of Judaism and *halakhab* generally. Should it be demonstrated to me that my suggested formulations generate practical conclusions I find morally repugnant, and that alternative formulations are available that adequately account for the traditional evidence, I would abandon my formulations before they compelled me to abandon my moral commitments.

Halakhab permits killing in non-war settings for a variety of reasons. For example, the death penalty can be administered for reasons of retribution, punishment, atonement, or deterrence; and under a set of severely limited circumstances, zealots and family members of an accidental homicide victim can use lethal force as well. But the two models that seem most likely relevant to war are *rodef* and *ba-mah^hteret*.

R. Broyde argues that war allows killing the enemy, and anyone who may be killed may also be tortured, so long as the torture accomplishes the same ends as the killing, as “the wholesale suspension of the sanctity of life that occurs in wartime also entails the suspension of such secondary human rights issues as the notion of

³⁵ “Bounds”, ft. 121

³⁶ op-ed

³⁷ Op-ed. “Bounds” (p. 39) repeats this idea in more tentative language: “once ‘killing’ becomes permitted as a matter of

human dignity, the fear of the ethical decline of our soldiers, or even the historical fear of our ongoing victimhood.”³⁷ I don’t see the relevance of historical fear but will respond to the issues of human dignity and corruption of character.

The parallel question regarding human dignity would be whether one is entitled to torture a *rodef* or *ba ba-mahteret*,³⁸ a point about which to my knowledge there is little halakhic precedent. R. Yaakov Ettlinger³⁹ did suggest, however, that one cannot save one’s life by utterly humiliating a *rodef*.⁴⁰ A variety of rabbinic sources also acknowledge that great physical or emotional pain can be worse than death.⁴¹ There are accordingly grounds for contending that human dignity is a primary rather than a secondary issue that cannot be resolved by simple appeal to the permission to kill.

We maintain lesser prohibitions in wartime to prevent wholesale moral deterioration.

Rabbinic tradition emphasizes that “peace is necessary even in time of war,”⁴² meaning that one must not allow the state of war to erode basic values and ethical priorities. In line with this point, Judaism has been careful to limit the honor it grants military prowess. God forbade David to build the Temple because his hands had shed blood, and swords used in the most justified of wars cannot be used to build the Temple. The Talmud⁴³ further notes that the

Jewish law, much of the hierarchical values of Jewish law seem to be suspended as well, at least to the extent that the ones who are hurt are people who may also be killed.”

³⁸ Leaving aside the question of whether a disarmed prisoner can still be considered a *rodef* or *ba ba-mahteret*

³⁹ *Responsa Binyan Tziyyon* 172. Cf. R. Shlomo Zalman Auerbach *Responsa Minhat Shelomo* 1:7.

⁴⁰ It is not clear that he fully endorses this suggestion. His alternative proposal that one can only kill a direct *rodef*, and not for example a person who offers a reward for your death, is deeply implausible in all perspectives, but I would suggest other modes of accounting for the evidence he brings that require neither of his alternatives. It is also not clear that this responsum was intended to have practical legal weight.

⁴¹ See for example *Ketubbot* 104a (regarding Rabbi Judah the Prince), *Beit Lehem Yehudah*, *Yoreh De`ah* 345; *Ketubbot* 33b (regarding Hananiah, Mishael and Azaryah), *Ta`anit* 23a (regarding Honi), and the interpretational history of 1 Samuel 31:4.

⁴² *Sifri Be-Midbar* 42

⁴³ *Makkot* 10a

⁴⁴ I owe this argument to my colleague R. Eliezer Finkelman

⁴⁵ However, this argument fails to explain the cases in which halakhah permits “compelling a person until he says “I desire it,” eg. *Mishnah Arakhin* 5:6.

Torah makes equal provision on each side of the Jordan for cities of refuge, even though the West Bank had a vastly larger population, because the culture on the East Bank was endemically violent; the best explanation for this is that the East Bank culture was founded by the frontline soldiers of Joshua’s war, and participating in even the most legitimate of wars causes lasting spiritual trauma.

It may therefore be that we maintain apparently lesser prohibitions in wartime precisely because we need them to prevent wholesale moral deterioration, a point made by Nahmanides in his commentary to Deuteronomy 23:10. One may kill animals for food but not remove limbs from live animals for the same purpose;⁴⁴ the prohibition prevents us from being degraded by the permission. Deuteronomy’s regulation of the destruction of enemy trees and the treatment of female captives serves the same purpose. The Torah is conscious that war corrupts, and therefore tells us that we need to maintain boundaries even in war. That it is necessary to permit killing does not mean that we need to permit everything, as we need to protect ourselves from war as well.

There is also a philosophic sense in which torture is worse than killing. The torturer inflicts pain so as to convince the prisoner to do his or her will, whereas killing acknowledges an irreconcilable conflict of wills. One might choose torturing over killing since the prisoner will have later opportunities to exercise free will, but permission to kill in no way implies permission to torture in addition to killing.⁴⁵

Even if one accepted R. Broyde’s basic assumption, moreover, there would remain more

than sufficient grounds for banning torture halakhically in practice. First, many experienced intelligence officers believe that torture is useless. Second, legalizing torture will lead to numerous cases of torture that cannot be justified by military exigencies, such as happened at Abu Ghraib. Halakhic legislation often creates blanket prohibitions even where exceptions could be justified; according to Maimonides,⁴⁶ this is the fundamental principle of biblical legislation. If allowing torture in some cases would cause the prohibitions against causing pain and the deep halakhic concern for human dignity to be more broadly disregarded, a blanket prohibition is justified.

Judaism should raise moral standards, not legitimate the lowest common denominator.

For this reason the “ticking bomb” case generally cited by torture advocates has little if any halakhic relevance. Suppose, they say, a terrorist has hidden a nuclear explosive in New York City, which will go off within a day unless police convince a captured terrorist to tell them where it is. Shouldn't the police be permitted to torture the terrorist to find out where the bomb is, thereby saving millions of lives? Almost certainly, but, as the American legal proverb has it, hard cases make bad law.

In real life, the alleged terrorist would not have been tried, the existence of the bomb would

not be proven, and the police would likely waste precious time and resources following a lie. If a policeman actually tortured a genuine terrorist and thereby prevented a nuclear holocaust, I might recommend promotion rather than prosecution.⁴⁷ But farfetched hypothetical possibilities do not determine law.

Finally, endorsing torture fundamentally desecrates God's Name. The role of Judaism is to raise moral standards in the world, not to legitimate a lowest moral common denominator. The brutalities and savage inhumanities of our enemies must not blind us to the impressive and genuine moral commitments of our friends to human dignity, or to use the rabbinic term, *kevod ha-beriyot*. Short of a genuine threat to survival that can be met no other way, we must not respond to the former by undermining the latter.⁴⁸

Let me emphasize again in closing that the halakhic arguments above show that torture can be forbidden halakhically, not that it must be. Technical counterclaims can easily be made; for example, one might suggest that the blanket prohibition I describe could only be rabbinic, and that there is no capacity to legislate rabbinically in our day. Halakhic decisors and halakhic communities must take responsibility for the way Torah responds to moral challenges.⁴⁹ I describe *halakhab* as I believe it ought to be, and as it can be if we acknowledge that ethical principles have a critical role to play in both physical war and in *milhamtab shel Torah*.

⁴⁶ *Guide of the Perplexed* III:34

⁴⁷ Here my halakhic approach is very similar to that taken by the Israeli Supreme Court on the issue of torture in a 1999 decision. The internal halakhic term for the policeman's action is “*aveirah li-shemah*” (sin with good intent).

⁴⁸ See Jerusalem Talmud *Bava Qamma* 4:3 for a case in which the absence of a formal halakhic prohibition is taken as a desecration of God's Name that mandates a legislative response.

⁴⁹ See in this regard www.summerbeitmidrash.org