

CONVERSATION:
Halakhah and Morality in Modern Warfare

Warfare, Ethics and Jewish Law

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“Purity of Arms” and Purity of Ethical Judgment

Benjamin Ish-Shalom

Only the Good Die Young?

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Warfare, Ethics and Jewish Law

Aryeh Klapper

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

Jewish tradition provides little direct evidence regarding the grounds on which one should morally evaluate a war.

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_{va}*) 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

Wurzburger, *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, Hilkehot 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

“Purity of Arms” and Purity of Ethical Judgment*

Benjamin Ish-Shalom

Conscience and Hard Cases

Man is a moral creature.¹ Every person with a conscience confronts moral dilemmas in all areas of activity: family life, commerce, medicine, etc.² Among other things, a person's humanity is measured by the extent to which he applies value judgments in all he does. Moral, religious, cultural, and national values inspire the development of a person's worldview and generate systems of rules that guide one's decisions in routine matters and, even more so, in difficult situations.

Moral dilemmas, then, are a regular part of life. Occasionally, however, one is forced to confront a dilemma in which life itself is in the balance: only one person will survive; who will it be? Human beings are unique in that they do not make those decisions directly and automatically, impelled solely by survival and self-defense. We restrain and filter those instincts through our reason, our sense of justice, and our recognition of responsibility and moral obligation.

A person is often called upon to decide between competing values. In extreme circumstances such as war, one must confront a clash between one's values and one's natural survival instinct. Survival, of course, is also the most basic right, the right of both individuals to live. The true moral test, then, is not to be

found in the clear, well-plowed fields of good and evil. The conflict usually is not between the clearly good and the clearly bad, for in such instances the decision is simple. The true dilemmas arise in the grey areas, which require that we decide between competing positive values. In such situations, the question of “purity of arms” becomes one of purity of moral judgment.

Moral judgment cannot be limited to moral principles and halakhic rules without regard to other objective and subjective factors.

A person studying the *halakhah*, the morals, and the ethics of warfare while seated behind a desk in an air-conditioned room cannot be equated with a soldier who, putting his life on the line and standing face-to-face with an enemy, is called upon to decide in a split second whether to open fire. The moral judgment against which a fighter's decisions and conduct are evaluated cannot be limited to moral principles and civil and halakhic rules, without regard to the many factors, subjective as well as objective, involved in the complex circumstances at hand. That is the case with respect to decisions by an individual soldier, by a unit commander, or even by senior military or political leaders confronting immediate, near-term, or more remote risks. The balancing of competing

* Translated from the Hebrew by Joel A. Linsider.

¹ The theories regarding the nature and source of human morality are varied, but the broad consideration afforded these issues is itself evidence of the widespread premise that human beings are, in fact, moral. For several interesting approaches, see Erich Fromm, *Psychoanalyse und Ethik* (Zurich, 1954), pp. 228-244; id., *The Heart of Man, Its Genius for Good and Evil* (New York: Harper and Row, 1964), pp. 17-23; Ben-Zion Rappoport, *Teva va-ruah – mehqarim filosofiyim* [Nature and spirit – philosophical studies] (Jerusalem, 1953), pp. 148-154; Sinai Oko, *Al ha-ofi ve-ha-tov, filosofiyah shel hinukh* [On character and the good: a philosophy of education] (Jerusalem, 1974), pp. 64-66; Konrad Lorenz, *The Waning of Humaneness*, trans. from the German by Robert Warren Kickert (Boston: Little, Brown, 1987); Aharon Ben-Ze'ev, *Yashar mei-ha-lev – regasbot be-hayyei yom yom* [Emotions in Everyday Life] (Tel-Aviv: Zemorah-Bitan, 1998), pp. 335-382.

² Alistair V. Campbell, *Moral Dilemmas in Medicine: A Coursebook in Ethics for Doctors and Nurses* (New York: Churchill Livingstone, 1984) Ch. 1.

considerations is not an exact science and is likely to differ from person to person and from case to case. Each decision may well prove controversial. In situations of this sort, even the law is not always helpful. The legislator cannot anticipate everything, and, in murky situations, the law may be interpreted in one way or another.

Discussion of military ethics, therefore, is essential—both to set the parameters of the area under discussion and to define the moral dilemmas and moral demands that warfare may pose. Although that discussion cannot produce unambiguous solutions to the dilemmas that arise on the battlefield, it can provide soldiers and decision makers with the conceptual and analytical tools they need to make reasoned, value-based decisions.

Does this mean that the unique character of the battlefield and the extraordinary nature of warfare as a state of crisis unlike any other warrant applying moral rules that depart from the norm—or even suspending moral obligations altogether? Or do we say, despite the foregoing considerations, that no human activity is exempt from moral obligation and that warfare is not subject to its own special rules?

War is a unique situation, subject to correspondingly distinctive rules.

These questions underlie the debate between Michael Broyde³ and Aryeh Klapper,⁴ each of whom has nicely grounded his position in halakhic sources and academic literature. I will maintain here that one must never accept the view that entirely abandons the rules of morality in time of war. As noted earlier, the measure of man's humanity is the making of value-based judgments. From that perspective,

we are dealing here not only with a question of norms but also with one of identity: one's identity is inextricably tied to his morality.

That said, it is impossible to disregard the fact that war is a unique situation, subject to correspondingly distinctive rules. Denial of that fact is itself a moral failing, for it disregards reality in a way that can lead to dreadful results. One who abandons morality in time of war denies, unforgivably, the demands of humanity; but one who ignores the uniqueness of warfare likewise manifests an unhuman obtuseness. A morally proper approach will strive to balance the relevant factors and circumstances and, at the end of the day, recognize the limits on moral judgment and the complexity of the circumstances that preclude the doing of absolute justice. That sort of approach will recognize the legitimacy of a decision based on a moral assessment that balanced the pertinent values and aimed to discharge one's moral obligation even at the cost of unavoidable evil.

“Purity of Arms” Faces the Test of Reality

The principle of “purity of arms” (*tobar banesheq*)—a foundational principle in the training of Israel Defense Forces (IDF) soldiers and officers—states that “a soldier shall use his weapons and force to the degree needed to subdue the enemy, but will exercise restraint to avoid unnecessary injury to a person's life, his person, honor, or property.”⁵ How is that principle to be embodied in practice? Let me offer some concrete illustrations of the dilemmas that arise in dealing with civilian non-combatants who happen to be in a war zone:

1. During the 1948 War of Independence, Gush Etsion—a bloc of Jewish settlements south of Jerusalem—was under heavy attack by the forces of the Arab Legion. Unable to withstand the attack, the settlements, centered around Kefar Etsion, called for support, and a unit of thirty-five soldiers was dispatched to assist them. The unit

³ Michael J. Broyde, *The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception* (Flushing, NY: Center for Jewish Studies, Queens College, City Univ. of NY, 2006).

⁴ Aryeh Klapper, “Warfare, Ethics and Jewish Law” in this edition of *Meorot*.

⁵ Asa Kasher, *Etiqab tseva'it [Military Ethics]* (Tel-Aviv: Ministry of Defense, 1996), Appendix 1, p. 232.

tried to approach from the west, between the hills, thereby maintaining the element of surprise that might enable so small a force to exercise a decisive influence on the course of battle.

En route, the unit was discovered by an old Arab. The soldiers evidently agonized over how to treat him. Taking him prisoner was ruled out, for it would interfere with and endanger the unit in the ensuing battle. To free him was risky, for it was likely that the old shepherd would report to the Arab Legion on the unit's movements, denying them the benefit of surprise and thereby endangering them. The third option was the terrifying prospect to kill the old Arab—an option that stood at odds with all of the soldiers' values and moral instincts. They accordingly decided to leave him alone and send him on his way. The old Arab quickly reported to the Arab forces and villagers on the unit's movements, and the soldiers found themselves surrounded by about two thousand Arabs. The tragic result was the death of all thirty-five soldiers; the death, injury, or capture of many residents of Kefar Etsion, and the loss to the enemy for many years of an entire region south of Jerusalem, with all its settlements. The area was recovered only after its recapture in the Six-Day War of 1967.⁶

Is the life of an old Arab worth more than the lives of Jewish soldiers and citizens?

From a historical perspective, one can doubt both the reasonableness and the morality of the decision to free the Arab. One may ask whether the life of an old Arab—a non-combatant, but still part of the enemy population, loyal to the enemy, and therefore likely to endanger our forces—is worth more than the lives of Jewish soldiers and citizens. Was his blood redder than theirs?

We can pose the question, of course, only after the bitter consequences of the decision have become known. At the time the dilemma was confronted and the decision made, one could not have been certain that these would be its results. One may assume that the soldiers in the unit were uncertain about the degree of risk they were facing. In the face of such uncertainty, can killing a helpless non-combatant be morally justified? And even if hindsight shows that the soldiers erred in their assessment of the situation, can it not be said that when they were called upon to make the decision, they acted in accordance with the dictates of morality in releasing the old man? The case, I believe, exemplifies the sort of dilemma whose resolution cannot be assessed from a distance. In such a case, the assessment of the risk, the subjective sense of danger, and the operational circumstances are vital factors that must be taken into account in reaching a decision; accordingly, only the soldiers and officers on the spot can make that decision. Had the soldiers in this instance decided to kill that Arab shepherd, history might have been entirely different. The soldiers might have remained alive, won the battle, and prevented the fall of Gush Etsion and the associated casualties. But how would we then judge the episode?

The commander of the *Palmaḥ* at the time, Yitshaq Sadeh, wrote as follows of the decision not to kill the old Arab:

There can be no doubt that armed Arabs would not have acted in the same way had they encountered a Jew on the road. And that is true not only of Arabs; we know how members of other armies act in similar circumstances. But our fighters are not only courageous; they are also noble and humane in the extreme. They wage war with courage and with love of humanity. Many more of us will fall in this war; we will lose those who are precious and near to us; but the road leads to victory, to life, to creativity, to the future.⁷

⁶ For an account of the soldiers who fell (who came to be known as “the thirty-five”), see *Lamed bei asher nafelu be-harei Ḥevron...* [Thirty-five who fell in the hills of Hebron...], collected and recorded by Endah Finkerfeld (Jerusalem, 1950), pp. 13-34.

⁷ *Id.*, p. 33.

2. In the context of the ongoing struggle against terrorism, an elite paratroop unit received an intelligence report that a terrorist cell was staying at a house in a Palestinian village in which a family was living. Their mission was to capture the terrorists or attack them if there was no other way to neutralize them. The unit surreptitiously approached the house on foot and, knowing that there were civilians in the house as well, refrained from opening fire. Using a loudspeaker, they called on the terrorists to come out and surrender; in response, the terrorists immediately opened fire, killing one of the soldiers. In the ensuing exchanges of fire, some of the terrorists were able to escape.

A few months later, the commander of the same unit received an intelligence report that the terrorists who had escaped in the previous incident were hiding out in an apartment in a relatively large residential building and planning an attack. Once again, the unit under his command approached the building and the question of how he would act this time arose. Would his previous experience lead him to adopt more aggressive tactics, even though he knew that some of the civilians living in the building would be injured? Or would he again endanger his soldiers and follow the same procedure as last time, albeit more cautiously? The principle of avoiding injury to civilians was so ingrained that the commander decided to incur risk in order to avoid civilian casualties, and he acted as before; his conscience simply could not tolerate endangering civilians. He called on the terrorists to come out and suddenly a woman carrying a baby appeared at the door of the apartment. After a brief silence, the terrorists opened fire from behind the woman's back, and several soldiers were injured. From an operational point of view, the conduct of the Israeli force incurred a high price, but did the commander nevertheless act properly from a moral point of view? Is it right to expose a fighting force to risk in order to avoid injury to a civilian population that provides cover to terrorists?

3. A similar question arose in a case that had extremely serious consequences. In the course of the IDF action in Jenin, as part of "Operation Defensive Shield" following the slaughter at a hotel in Netanya during Passover, the Defense Minister decided that infantry rather than fighter helicopters would be used in the attack in order to avoid civilian casualties. The result was the death of twenty-three IDF soldiers.

What should he do when a Palestinian ambulance approaches the roadblock carrying a pregnant woman in need of getting to an Israeli hospital?

4. An equally serious dilemma can confront a young, nineteen-year-old soldier at a roadblock set up in response to intelligence warnings of an anticipated terrorist attack. What is he to do when a Palestinian ambulance approaches the roadblock carrying a pregnant woman in urgent need of getting to an Israeli hospital? How should the soldier behave in light of the fact that recently a pregnant woman was caught in an ambulance carrying on her body an explosive belt for the purpose of exploding it in an Israeli population center? How does he balance his obligation to respect human dignity and the rights of citizens against his obligation to defend the security of the state and its citizens, at a time when he himself is subject to the risk that the woman is a terrorist who might detonate her explosives while the ambulance is being inspected, killing the soldier and everyone around?

These difficult cases and others like them raise a line of penetrating moral questions: How does one judge moral decisions reached under fire or in the face of grave risk? What does "purity of arms" mean in such situations? Is it permissible to endanger the lives of soldiers in order to protect the lives of enemy civilians? Conversely, what permits injuring civilians? Can residential buildings used as Katusha launching sites or terrorist hideouts be attacked from the air in the absence of certainty that terrorists will be in the building at the time of the attack? Under what conditions, if any,

may property and infrastructure posing no immediate threat be legitimately attacked? Are civilians within war zones guaranteed freedom from attack in all circumstances?

Is there a distinction between moral rules applicable to conventional warfare and those applicable to fighting terror?

With conventional warfare having been transformed into terrorist conflicts and with struggles between states having given way, in many instances, to struggles between states on the one hand and terror organizations on the other, another question arises more starkly: Is there a distinction to be drawn between the moral rules applicable to conventional warfare and those applicable to fighting terror? How is the analysis affected by the fact that the principal purpose of terror groups is to attack civilians in a manner unconstrained by any moral limitations, to the point of employing civilians as human shields?

In the face of questions such as these, is there any guidance that can be of use at the critical time? Is it enough to rely on moral intuition and on conscience? Or is there an essential need to study and develop defined rules of action, even if they do not always provide solutions to the demands posed by the complexities of reality?

The Sanctity of Life: Rules and Values

The discussion's point of departure must be the recognition that the sanctity of human life—all human life, including that of the enemy—is a fundamental value. Our heritage grounds that fundamental value in the belief that man was created “in the image of God” and in the absolute command “thou shalt not murder.”

⁹ R. Tsevi Yehudah Berlin (Netsiv), *Ha`ameq Davar*, Genesis, Introduction.

¹⁰ See R. Shlomo Yosef Zevin, *Le-or ha-balakhab* [In the light of *halakhab*] (Jerusalem, n.d.), “*Ha-milhamah*” [Warfare], pp. 9-84; A. Shapira, “*Al ha-megamah le-hagbalat ha-milhamah ve-iddunah*” [On the tendency to limit and sublimate warfare], *Iyyunei miqra u-parshanut* 7 (2005), p. 335.

¹¹ Aviezer Ravitzky, “*Ha-im pitehab ha-mahshavah ha-bilkehatit musag shel milhamah asurah*” [“Prohibited Wars in Jewish Religious Law], in *Heirut al ha-luhot* [Freedom Inscribed] (Tel-Aviv: Am Oved, 2000), pp. 39-158. English translation in this edition of *Meorot*.

Of interest in this context are the remarks of R. Tsevi Yehudah Berlin (Netsiv) in his book *Ha`ameq Davar*. In his introduction there to Genesis, he notes that according to *Avodah Zara* 25a the prophets referred to Genesis as *Sefer ha-Yashar* (“the book of the upright”) because the Patriarchs Abraham, Isaac, and Jacob were called “upright.” He writes as follows:

It was praiseworthy of the Patriarchs that, in addition to being righteous and lovers of God to the greatest possible degree, they were also upright. That is, they acted [uprightly] toward the nations of the world, even though they worshipped vile idols. They nevertheless showed them love and were concerned about their well-being, thereby maintaining [God's] creation. We see this in the extent to which Abraham our father prayed for Sodom. Even though he despised them and their king to the utmost because of their wickedness,...he nevertheless wished their continuous existence.⁹

At first glance, the sanctity of life should dictate reservations about conducting any war, and the Jewish heritage indeed includes a variety of such reservations.¹⁰ But it is not my intention here to consider the essential legitimacy of warfare or the preconditions to a just war.¹¹ I will focus only on how the principle of “purity of arms” has taken shape in the *halakhab* and in accepted Israeli jurisprudence.

I stressed earlier the weight afforded to conscience and moral values in confronting dilemmas that arise in battle and the difficulty of passing judgment on the decision made by a soldier under fire. In that context it is important to clarify that even if the soldier may not incur criminal liability for an act or omission in the face of mortal danger, he may still be held morally accountable. Specifically, Israeli law provides for situations in

which an adult who violates the law is nonetheless not held criminally liable:

A person shall not bear criminal responsibility for an act that he was impelled to perform under a perceived threat of substantial danger of injury to life, liberty, person, or property, whether his or another's, and that he was forced to perform on that account.¹²

This law, exempting a person from criminal responsibility on grounds of compulsion even in a case of murder, was not part of the British law that preceded Israeli law, and even today it

Exemption from criminal liability does not mean exemption from moral responsibility.

differs from accepted practice in the Anglo-American legal tradition. But exemption from criminal liability does not mean exemption from moral responsibility. That was part of the rationale provided for the law when it was debated in the Knesset. A person acting under threat and exposed to mortal danger is not a criminal in the accepted sense of the term. In the course of that debate, M.K. Dedi Zucker argued as follows:

We are not resolving this moral dilemma; we are dealing only with the question of criminal responsibility. Our position is that punishing a person in a case such as this makes no sense, for the criminal law does not demand heroics. One who commits a crime in these circumstances is not a criminal type...and the law therefore proposes,

for that reason, to exempt someone who kills one person in order to save the life of another, to exempt him from [criminal] liability.¹³

The *halakhab* gives broad consideration to how far one must go in jeopardizing oneself in order to save the life of another. Under the rubric of “do not stand by your fellow’s blood,”¹⁴ the Talmud at several points takes up the obligation to rescue another from danger.¹⁵ The decisors limit the obligation on the basis of the risk imposed on the rescuer. Asked whether a person was obligated to sacrifice one of his limbs in order to save the life of another, Rabbi David Ibn Zimra (Radbaz) replied as follows:

...Moreover, it is written that “its ways are ways of pleasantness,” and the laws of our Torah must coincide with reason and logic. How could we think that a person would blind his eye or cut off his arm or leg to prevent his friend from being put to death? Accordingly, I see no reason for such a law, though [doing so] manifests the quality of piety [*hasidut*; also, “kindness”]. And happy is the lot of one who can bring himself to do so. But if there is a risk that [sacrificing the limb] will result in death, then he is “a pious fool,” for [avoiding one’s own] possible [death] takes precedence over avoiding his fellow’s certain [death].¹⁶

This suggests that a person is not obligated to give up one of his limbs in order to save his fellow, even though one who does so is praiseworthy. But if the rescue entails risk to the rescuer’s life—even only the possibility of such risk—one is not obligated to incur that risk, for “who says your blood is redder?”¹⁷ Only where the rescue is almost certain and the risk to the rescuer’s life is low does “do not stand by your fellow’s blood” require

¹² Penal Law 34:12 (1977).

¹³ Remarks of M.K. Zucker regarding Amendment No. 39 to the Penal Law. *Divrei ha-keneset* [Proceedings of the Knesset], vol. 124, p. 2297, #39 (25 July 1994).

¹⁴ See Lev. 19:16; *Sanbedrin* 73a; Maimonides, *Mishneh Torah*, *Hilkebot Rotseiah u-shemirath ba-nefesh* 1:14; *Shulhan Arukh*, *Hoshen Mishpat*, sec. 426.

¹⁵ In addition to the foregoing, see *Yerushalmi*, *Terumat* 8:4 (46b); *Bavli*, *Bava Metsi`a* 62a.

¹⁶ *Responsa of the Radbaz*, part 3, sec. 1052 (1967 ed.).

¹⁷ *Id.*, part 5, sec. 1582.

¹⁸ *Id.*, On the basis of this ruling, the Knesset enacted the “Do Not Stand by Your Fellow’s Blood” Law (1998).

jeopardizing oneself.¹⁸

None of this discussion applies to a warfare situation, however, for war, by its very nature, entails recruitment of people who will subject themselves to danger for the sake of others. Accordingly, warfare requires other rules, as R. Eliezer Waldenberg rules:

I have been asked what the law in this matter would be in wartime: is a soldier obligated or permitted to place himself in possible danger in order to rescue his fellow soldier from certain danger, as, for example, when one is lying wounded in a dangerous area, exposed to enemy fire, and if he is not quickly removed from the area, he will certainly die of his wounds. At first glance, this would seem to be subject to the conclusion reached earlier...but after further consideration, it appears that a warfare situation is different. Just as warfare itself has been permitted...even though it endangers large numbers of people, so, too, one of its rules is that each person on the battlefield is obligated to give up his life in order to rescue his fellow from the danger he has been placed in on account of the war.¹⁹

R. Waldenberg's decision is that the rules of war differ from the laws that apply in times of peace. War is a unique category, one that by its very nature requires a readiness to endanger one's life, yet that does not imply an overall abandonment of the constraints imposed by morality. R. Waldenberg's position is grounded, however, in the fundamental position taken by Netsiv, comprising two elements: first, in time of war, a person is not to be punished for killing, "for that is the way

of the world"; and, second, that the *halakhot* applicable to the community and the conduct of the state differ in their essence from the laws that pertain to the individual.²⁰ These are certainly interesting and important distinctions, but here, too, we must read his words closely: he determines that in warfare, a person is not punished, for "When is a person punished? When it is proper to act in a brotherly manner?"²¹ This is no abandonment of the demands of morality.

Rabbi Goren frames the difference between law and morality explicitly, referring to "halakhic justice" and "moral justice."

R. Shlomo Goren frames the difference between "law" and "morality" even more explicitly, referring to "halakhic justice" and to "moral justice."²² In his book "*Meishiv Milhamah*," he considers the actions of Simeon and Levi against the people of Shekhem (Gen. 34) and determines that even though they were legally entitled to kill the Shekhemites (as Maimonides rules²³), we are nevertheless speaking of human life and it is necessary to take account as well of moral considerations—in his words, "the teaching of the pious" (*mishnat hasidim*), for "it, too, is Torah, and in capital cases it partakes of the nature of *metahalakhab*."²⁴

Warfare amidst a Civilian Population

As noted, warfare constitutes an exception to the basic premise that one need not jeopardize his life for the sake of his fellow. In warfare, one's task is to protect one's fellows' lives even at the cost of endangering one's own. The question is whether this departure from the fundamental principle of "who said your blood is redder" applies as well

¹⁸ *Responsa Tsits Eli'ezer*, part 12, sec. 57.

²⁰ He puts it this way: "We learn from this that war differs in two ways: First, that this is the way the world operates; second, that laws regarding the community and the conduct of the state differ [from those pertaining to an individual]." See *id.*

²¹ *Ha'ameq Davar* (above, n. 9), on Gen. 9:5.

²² R. Shlomo Goren, *Meishiv Milhamah, She'eilot u-teshuvot be-inyanei tsava, milhamah u-vittahon* [Responsa on military, warfare, and security matters] vol. 1 (1983), p. 14.

²³ Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 9:14.

²⁴ R. Goren (above, n. 22), p. 28.

with respect to enemy civilians. To what extent is the civilian populace of a war zone protected from attack, and to what degree is it proper to endanger oneself to avoid such attack?

In light of our earlier determination regarding the sanctity of human life—including that of the enemy—as a fundamental value, it is evident that there should be a general guideline forbidding attacks on to a civilian populace not involved in fighting. But in light of the complexity of contemporary warfare, in which guerilla forces and terror organizations operate in the midst of a civilian population that at least sometimes affords them protection and even active assistance, the matter must be considered from all pertinent perspectives. As a predisposition guided by the foregoing moral principles, one must avoid injuring civilians not involved in combat in the absence of a clear need to do so; that is, unless there is no other way to avoid injury to our forces or populace.

We must distinguish between various levels of uninvolvedness.

But we must distinguish between various levels of “uninvolvedness.” Does one become involved in combat only by bearing arms and actively fighting? Should not the provision of shelter or support to terrorists be considered “involvedness”? And what is the rule regarding a populace forced to support terror and itself acting under terrorist threat? Does that compulsion afford the populace immunity even though they are endangering our forces and citizenry?

We may distinguish three categories of responsibility, depending on the level of

involvement and the level of danger:

1. The Talmud determines that the ability to prevent a crime or, at least, to protest against it, constitutes a degree of responsibility that incurs divine punishment if not human: “Anyone able to protest [the blameworthy conduct] of a member of his household who fails to do so is blamed together with his household; of the people of his city—is blamed with the people of his city; of the entire world—is blamed with the entire world.”²⁵ That he is liable not under human law but only under divine law resembles the distinction drawn between “legal righteousness” and “moral righteousness.”

Can it be argued that just as the soldier is called upon to exercise moral restraint even where the law permits him to kill, so, too, warfare conditions warrant an authorization that points in the opposite direction: where attacking a civilian population is likely to save the lives of our soldiers and citizenry, the attack is morally justified even if not legally justified?

2. There may be cases in which a populace that shelters terrorists may bear a higher degree of responsibility and be considered terrorists themselves. A basis for this can be found in the *midrash*, in *Sifra*, *Torat Kohanim*:

Rabbi Simeon said: But did the family sin? Rather, it is to teach you that any family that includes an unauthorized tax farmer are all unauthorized tax farmers; [any family] that includes a robber are all robbers, for they provide cover for him.²⁶

3. Attacking civilians may be justified under the rubric of *rodef* (lit. “a pursuer”; the term refers broadly to the right of self-defense against a person coming at one to kill or injure).²⁷ A distinction may be drawn between a willing, knowing *rodef* and a *rodef* acting under compulsion, lacking intention and, accordingly, not culpable. A civilian population that endangers the lives of our military

²⁵ *Shabbat* 54b.

²⁶ *Midrash Sifra (Torat Kohanim)* 95 (on Lev. 20:5).

²⁷ *Mishnah, Sanhedrin* 8:7. See also Marilyn Finkelman, “Defense and Defense of Others in Jewish Law: The *Rodef* Defense,” 33 *Wayne L. Rev.* 33, 1257-1287; Dov Frimer, “*Ha-Gedarat Din Rodef*” [Defining the law of *rodef*], *Or ha-Mizrah* 32 (1984), p. 309.

forces and civilians can be considered to be a *rodef* against whom one has a right of self-defense. That right, of course, is subject to all the restrictions applicable to the law of *rodef*, which require exhausting all measures for neutralizing the danger before actually attacking the life or person of the *rodef*.

That said, is there justification for attacking a civilian populace that is cooperating with terrorists if they are cooperating under duress and lack any real choice in the matter? The Talmud refers at several points to a case that illustrates this problem, involving a fetus *in utero* jeopardizing the life of its mother. In such an instance, “R. Huna said: A minor who is a *rodef* [the mother] is saved with his life.” In other words, the fetus should be killed in order to save the mother, for the fetus is considered a *rodef* even though it is acting neither willingly nor knowingly. The fetus lacks any culpability but is nevertheless treated as a *rodef* because it is jeopardizing the mother’s life.²⁸

Summary

The foregoing discussion demonstrates the complexity of the issue at hand and the

impossibility of declaring unequivocally that the rules of morality apply or do not apply in time of war. The absolute nature of the moral imperative precludes abandoning it even in warfare. At the same, the complex situations encountered in war require distinguishing between the demands of morality on the one hand and the imposition of legal penalties on the other. Not every situation in which a moral stance (“the teaching of the pious”) is warranted is one in which a failure to take such a stance should be punished. Moreover, situations will arise in which what one person perceives to be a moral decision will be perceived by another as immoral.

The question of whose blood is redder—that of enemy civilians or of our own soldiers—continues to trouble us, and it will often be evaluated with reference to the balancing that was conducted before a decision was reached. It is important to emphasize again that protecting the lives of our soldiers and civilians is the highest moral duty, taking precedence over all other obligations. Sadly, in such cases, even though each individual is an entire world,²⁹ the number of people harmed on each side, and the degree of their complicity, will have a bearing in assessing the moral quality of the decision.³⁰

²⁸ *Sanhedrin* 72b. See also Dov Frimer, “*Ha-rodef le-lo ashmah*” [The non-culpable *rodef*], *Or ha-mizrah* 34 (1986), p. 94.

²⁹ *Mishnah*, *Sanhedrin* 4:5.

³⁰ See A. Shochetman, *Sikkun hayyalei tsabal le-shem meni`at pegi`ah be-ezrahei oyev* [Endangering IDF soldiers to avoid injuring enemy civilians], *Netiv* 91 (2003), p. 20 and *Netiv* 92, p. 28; Y. (Gerald) Blidstein, “*Pe`ilot kelappei ukhlusiyah ezrahit oyenet be-balakhab bat zemanaimi*” [Operations against hostile civilians in contemporary *balakhab*], *Medinah, mimshal, ve-yabasim beinle`umiyim* 41-42 (1997), p. 155; N. Gotel, “*Lehimah be-shetah revui ukhlusiyah ezrahit*” [Warfare amidst a civilian population], *Tehumin* 23 (2003), p. 18

Only the Good Die Young?

Michael J. Broyde

There are, in grand outline, five basic views about the substance of the Jewish law of war as articulated by the *halakhib* authorities of the last generation.

The first is the view of R. Elazar Menachem Shach, the great leader of the Ponovezh Yeshiva for decades. His view is that there are no unique rules of how to fight a war, and that war is simply the general rules of self-defense writ large.¹

The second is the view of R. Shaul Yisraeli, which is that *halakhab* has no unique rules of war, and it accepts secular law norms as valid. Like many areas of *halakhab*, this, too, is governed by *dina de-malkhuta dina* writ large.²

The third is the view of R. Shlomo Goren, that *halakhab* has indigenous rules for waging war that, although covered by layers of dust from generations of disuse, are present and need to be fleshed out.³

The fourth is the view of R. Ovadia Yosef, who acknowledges that there are indigenous rules of war within *halakhab*, but thinks that they are not related to the State of Israel, but govern Jewish soldiers in any army.⁴

The fifth view is that of the Satmar Rebbi, R. Joel Teitelbaum, that fighting of Jewish wars is prohibited by rabbinic decree after the three Talmudic oaths until the coming of the Messiah.⁵

To my complete surprise, a close read of R. Klapper's article—which cites not a single Jewish source on how to fight a war—reveals that he adopts the view of R. Shach from Ponovezh. R. Klapper's ultimate insight is that “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.” In this model he posits that one look to categories such as the law of pursuer or the right of a home owner to protect his house.

In my view R. Shach's position is mistaken and at tension with many classical talmudic and medieval sources.⁶ With the exception of other than R. Klapper, I can find no other serious *halakhib* authority who assumes that the *halakbot* of war are identical to the rules of personal self-defense. Yet there is quite a list of contemporary *poseqim* who disagree.⁷ This article is not the place for that discussion.

As I have elsewhere noted, I find R. Shaul Yisraeli's approach to be both logical and entirely consistent with the sources.⁸ It also, in my view,

¹ R. Elazar Menachem Shach, *Be-Zot Ani Boteah*, pp.10-35 (1969)

² R. Shaul Israeli, “*Pe`ulot Tsevatot le-Haganat ha-Medinah*” [Military activities of national defense], first published in *Ha-Torah ve-ha-Medinah* 5/6 (1953-54): 71-113, reprinted in his *Amud ha-Yemini* (rev ed., Jerusalem, 1991) as Ch. 16, pp. 168-205.

³ R. Shlomo Goren, “Combat Morality and the Halakhah,” *Crossroads* 1:211-231 (1987); *She`eilot u-Teshuvot Meishiv Milamah* (3 volumes)

⁴ See e.g. R. Ovadya Yosef, *Yehaveh Da`at* 2:11 and 2:14 as well as many other cases. In truth, I had not grasped the extent to which Rav Ovadia adopts this view, even as I had sensed it, until I read an excellent article by Shlomo Fischer in the *Cardozo Law Review*. See Shlomo Fischer, “Excursus: Concerning the Rulings of R. Ovadia Yosef Pertaining to the Thanksgiving Prayer, The Settlement of the Land of Israel, and Middle East Peace,” *Cardozo Law Review* 28 (October 2006): 229-244.

⁵ *Al ha-Geulah ve-al ha-Temurah* (1970) (particularly pp. 80- 85).

⁶ See for example, Maimonides, *Mishneh Torah*, *Hilkebot Melakhim* 6:5 and 6:7 as well as Nahmanides, Notes to Maimonides' *Sefer ha-Mitsvot*, *Aseh* 4; *Minhat Hinukh* 527; *Arukh Ha-Shulhan He-Atid*, *Melakhim* 76:12. Many more citations that deal with battlefield ethics outside of the confines of general Jewish law in a non-military context could be offered.

⁷ A list of citations would not be useful here. Rather, it is sufficient to note that nearly every article published on military

works in the real world. R. Goren's view—which he himself acknowledges is an innovation, and which even his disciples agree is not mainstream *halakhab*⁹—has been subject to the deep, withering criticism of being either messianic in thrust or not well grounded in binding sources, or both.¹⁰ After writing my original article, I saw that R. Moshe Feinstein seems to arrive at the exact same conclusion as R. Yisraeli. He states in passing:

Certainly, when one is drafted into the army and obligated to serve in the army as a matter of secular law [the act of killing] is not a sin.¹¹

It is thus the law of the land that determines these matters and not Jewish law.

It is clear to me that the vast majority of contemporary *poseqim* agree with R. Shaul Yisraeli, and for that reason, even as there are numerous *sefarim* that deal with religious life in the army, not a single one of them discusses battlefield ethics *halakhab le-ma`aseh*. Why? Because the Israeli army obeys international law, and that is all *halakhab* requires in war.¹²

Thus, I find while the totality of R. Klapper's view can be to be one found among the *poseqim*, but it is not normative.

* * *

R.. Shach's view, now seconded by R. Klapper, produces the type of analysis advocated by Dr. Benjamin Ish-Shalom, who seems to lean toward risking Jewish life rather than possibly killing an enemy non-combatant.

Dr. Ish-Shalom's article contains the sad story of the thirty-five Israeli soldiers sent to relieve the besieged outpost in Gush Etsion during the Israeli war of independence. They were traveling at night and encountered an elderly Arab shepherd. The dilemma here, according to Dr. Ish-Shalom, is hard. Do you kill him, thus saving the mission, or let him go, running the risk of his betraying the mission and causing all thirty-five soldiers to die? Dr. Ish-Shalom, in sympathy with what he senses is the ethical tradition in Judaism, seems to favor the decision that was made—to let the shepherd go. The story, of course, had a tragic ending. The shepherd informed on these soldiers—as was his patriotic duty as a Jordanian—and the thirty-five young men were ambushed and massacred.

In my view, Dr. Ish-Shalom is mistaken both as a matter of *halakhab* and Jewish ethics. Although the fog of war is dense in these situations, knowing all that we know now, Jewish law favors the killing of the elderly shepherd and the saving of the thirty-five soldiers. Understanding why is crucial. In wartime, Jewish law recognizes that the general

ethics in the last fifty years assumes so, even without explicitly saying so. Let me give a few examples, where dozens could be cited. *Iggerot Mosheh Yoreh De`ah* 2:158 addresses the question of whether a *kobein* who kills in war-time may participate in blessing the congregation. His analysis can only be understood if one rejects R. Shach's approach. The same can be said for the analysis found in *Yeharveh Da`at* 2:14. This is also true for *Tsits Eli`ezer* 12:57 and 13:00. There are more than 70 articles dealing with *halakhot* of war in *Tehumin*, and not a single one of them adopts R. Shach's view as the normative view. The same is true for the many articles found in the classic periodical, *Ha-Torah ve-ha-medinah*, dating from the 1950's.

⁸ See Michael J. Broyde, *The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception*, (Flushing, NY: Center for Jewish Studies, Queens College, CUNY, 2006); Michael J. Broyde, "A Jewish View of World Law," *Emory Law Journal* 54:79–93 (spec. ed., 2005); and Michael J. Broyde, "Just Wars, Just Battles and Just Conduct in Jewish Law: Jewish Law Is Not a Suicide Pact!" in Lawrence Schiffman and Joel B. Wolowelsky, eds., *War and Peace: Proceedings of the 2004 Orthodox Forum* (forthcoming).

⁹ See Arye Edrei, "Divine Spirit and Physical Power: R. Shlomo Goren and The Military Ethic Of The Israel Defense Forces" *Theoretical Inquires into Law*, Vol. 7, (Jan. 2006), pp. 255-286.

¹⁰ See notes 5 through 9 above

¹¹ *Igrot Moshe, Yoreh Deah* 2:158 s.v. *ubedavar*. I have no doubt that R. Feinstein arrived at this conclusion completely independently of R. Yisraeli, to whom he never refers in any of his responses. R. Feinstein was not a regular reader of contemporary Israeli *poseqim*.

¹² That also explains why, in those rare cases where the Israeli army is deployed against Israeli civilians, *poskim* freely speak. *Halakhab* and not international law governs such cases.

ethical prohibition to kill usually innocent people may sometimes be suspended in the face of military need. Although at the margins there are matters in dispute, in hindsight it is clear that this elderly shepherd was a combatant, engaged in activity that is war-like, and whose presence endangered the mission and lives of all the soldiers. Neither R. Goren nor R. Yisraeli would argue with this assessment. Indeed, if the soldiers' decision was motivated by a sense of Jewish ethics, such ethical sense was—with hindsight—mistaken. Showing such “moral” compassion on those who seek to kill you is a direct violation of *halakhab*.¹³

Of course, in the real world the fog is sometimes dense, and determining the facts is very hard. Moreover, it could well be that other factors were at play in that sad incident. But there is nothing in the corpus of Jewish law that forbids one from killing a person found on the field of battle who is reasonably suspected of being a spy.

* * *

Thus the three basic theses articulated in of my initial article are worth repeating:

First, war in the halakhic tradition entails the killings of people that in the absence of a war would be regarded by Jewish law as an act of murder. War is thus not the law of pursuer writ large, and it is not the rules of *ba ba-maheret* albeit in a bigger home. War permits the killing of otherwise innocent people.

Second, who may be killed in wartime during battle is not directly limited by *halakhab*, other than by noting that the term “war” and “battle” entails a duly authorized chain of command decision to kill people and that this decision relates to the needs to win the war. I maintain that one may, as needed and authorized by the chain of command, kill one's own civilians or soldiers, or the enemy's soldiers or civilians. The general halakhic

calculus that prohibits the killing of innocent civilians does not apply in wartime.

Third, conduct during combat may be limited by treaty between nations, and such treaties are binding according to Jewish law.

It is equally important to emphasize what I did not say. I have never claimed that Jewish law thinks torture is a wise policy or effective. Such decisions are best left to military experts. Although this matter is missed by many casual commentators, there is an important distinction between what Jewish law thinks is permissible and what is a wise publicly policy. Merely because Jewish law rules that the sovereign may implement a policy does not mean that it ought to implement that policy. Whether these are wise or effective policies is beyond my expertise.

War is not the law of the pursuer writ large.

R. Klapper doubts that there are any cases where torture actually is effective in the real world. The question of whether torture serves a valid military purpose and provides valuable military information is one of vigorous debate in academic, military, and intelligence circles. For an exploration of the real-world questions at stake, see e.g. Mark Bowden, “The Dark Art of Interrogation,” *The Atlantic* (October 2003). See also the Israeli government's 1987 *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity* (known as the Landau Commission report), which concluded that moderate physical pressure was sometimes a useful and permissible tactic in terrorist interrogations. So too, the 1999 Israeli Supreme Court decision on the use of torture by Israeli security services never questioned the general efficacy of torture. I am thus inclined to believe that there are situations where torture is both useful and effective, although determining the exact circumstances and method of application should be left to military experts. Of course, in any situation where experts determine that torture is an ineffective interrogation

¹³ Maimonides, *Mishneh Torah*, Laws of Murder, 1:9.

technique, then it would become forbidden as a matter of Jewish law.

Second, I do not maintain that *halakhab* does not govern conduct in war time, but merely that the content of the applicable *halakhab* is quite different from the typical *halakhab* regarding the sanctity of life. Thus, I agree with R. Lichtenstein's formulation of the hierarchy of *halakhab* in war time. Yet I disagree with R. Klapper about the content of that *halakhab*. In the same vein, I did not understand R. Klapper's criticism of my use of the phrase '*hora'at sha`ab*'. I wrote:

The basic thrust of this introductory section of the paper is that war has, by its very nature an element of *hora'at sha`ab*, in which basic elements of "regular" Jewish law are suspended—once 'killing' becomes permitted as a matter of 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 also may be killed.

This term, used in this context, is only a reference to general reality, which is that wartime allows for the suspension of many provisions of Jewish law.

Third, R. Klapper's invocation of *kevod haberiyot* is laudable. In normal circumstances it provides a valuable rabbinic basis for prohibiting much conduct that undermines human dignity and for prohibiting torture outside the military setting. But he provides no talmudic proof that such is not suspended in wartime. As I show at some length in another article¹⁴, it is logical to assume that license to kill in wartime when such is unavoidable to achieve a proper military goal also grants a license to suspend any other rabbinic (and Torah) commandments when such suspension is militarily necessary to triumph, including torture.

Other than R. Klapper's lack of comfort with this view, he cites not a single source to support his own view. Rabbinic logic inclines otherwise. As a general matter, Jewish law requires that one die rather than violate one of three cardinal sins: murder, sexual violations, and pagan worship. The license to wage war in the Jewish tradition includes the right to kill people whose killing, *but for the war*, it would be a violation of the prohibition of "Thou shall not kill." The right to kill these individuals as necessary in the course of warfare includes the lesser right to torment them when doing so such is needed to conduct the war.

Where experts determine torture to ineffective, it would be forbidden by Jewish law

R. Klapper also raises two secondary objections to the use of torture. The first is that permitted torture will lead to prohibited torture, which perhaps is correct but is no more persuasive than the argument that prohibits killing in wartime since it would lead to illegitimate killing. One is hard-pressed to consider seriously the possibility that the prohibition to torture in wartime is grounded in a secondary rabbinic prohibition as the appearance of impropriety (*mar'it ayin*), particularly given that the talmudic sages repeatedly rule that such concerns do not apply to public communal conduct.

Second, R. Klapper posits that torture is a desecration of God's name such that even if permitted by general mandates of Jewish law, should be prohibited by as a *hillul ha-Shem*. Indeed, not every act permitted by Jewish law is wise, and it could well be that there are situations where the use of permitted torture would be a desecration of God's name more serious than the terrible desecration of God's name associated with the triumph of evil over good. However, that cannot be put forward as a general rule of Jewish law as such and would require examination on a case-by-case basis, balancing the risk of doing something morally odious and the resulting *hillul ha-Shem*

¹⁴ *The Bounds of Wartime Military Conduct in Jewish Law: An Expansive Conception* (see note 8). Online version can be found in PDF form at <http://www.yasharbooks.com/Torture.pdf>.

against the possibility that virtue will succumb to vice, the light of day will turn to the black of night, and God's presence on the earth will be diminished by the darkness.

* * *

R. Klapper's final observations about whether the greater includes the lesser as a general matter of Jewish law seem misplaced. In the laws related to what type of conduct a rabbinical court judge may authorize under his exigency jurisdiction¹⁵ there is an elaborate discussion among the *poseqim* as to whether one may actually kill a person in certain cases of exigency jurisdiction, or merely cut out his tongue or blind him or amputate his arm.¹⁶

Many halakhic authorities aver that *halakhab* does not always permit a rabbinical court to exercise rabbinical jurisdiction to kill people, yet it permits any and all conduct short of killing. Notwithstanding R. Yaakov Ettlinger's suggestion to the contrary, logic would seem to permit the utter humiliation of a *rodef* if necessary to save the life of one who is innocent. Furthermore, it seems an explicit *halakhab* that if one has to choose between killing a *rodef* to save the life of the innocent or merely inflicting grave injury or pain on a *rodef*, the latter is mandatory and the former a Torah prohibition.¹⁷ Cogent evidence can be put forward to adduce that torture is viewed in *halakhab* as a less severe violation of the rights of a person than is his death. If so, in situations where one may kill a person as a matter of *halakhab*, it is preferable only to torture if torture accomplishes the same goal. That is certainly true in war.

As to R. Klapper's observation that I am a Kantian in outlook, the truth is that I am neither a Kantian nor a utilitarian nor a critical legal studies fellow nor one who examines law through the lens of economics. Rather, I am deeply committed to the sources of Jewish law providing answers to both mundane and

complex questions—and when the sources are in conflict one must examine them and determine which interpretation most logically fits the best understanding of the texts at issue and the reality of the world we live in. If I had to summarize my legal philosophy in one word, I would say it is “halakhic.”

The data of Jewish ethics are derived from the Law which fixes the essential character of all of Judaism

By extension, my legal philosophy inclines me to a different ethical framework than R. Klapper's. I do not generally distinguish between the legal and the ethical within *halakhab*. To me, the halakhic categories delineate as well as illuminate the ethical sphere. Most often, the halakhically permissible is ethical and the halakhically impermissible, unethical. Sometimes *halakhab* specifically formulates a moral floor, and the righteous, or ethical, are encouraged to go beyond the bare minimum. Sometimes *halakhab* encourages only the pious to be strict. Sometimes conduct is labeled permissible but the spirit of the sages frowns on it.

All these are cases where Jewish law encourages more than the minimum. But I am deeply reluctant to impose external moral and ethical frames of reference onto the corpus of Jewish law. The *halakhab* speaks for itself. Even deriving an ethical framework from within the *halakhab* that ultimately constrains and contradicts explicit law is fraught with difficulty. The first article in the initial first issue of *Tradition* stated very well the focus of Jewish law as the base for Jewish ethics:

Indeed, the data of Jewish theology and ethics are usually derived from the Law which fixes the essential character of all of Judaism. Unfortunately, however, many who are presently called upon to resolve questions of Jewish law are often oblivious to the antinomies which are

¹⁵ *Shulhan Arukh*, *Hoshen Mishpat* 2

¹⁶ See *Sefer Meirat Einayyim*, *Hoshen Mishpat* 2:3-5 and Responsa of Maharam of Lublin, 138.

¹⁷ See *Shulhan Arukh*, *Hoshen Mishpat* 425:1

implicit in their subject. Altogether too frequently they seize upon one or another of two or more possible antithetical values or interests between which the *Halakhab* veers, and they assume there must be an exclusive commitment to that single norm. The dialectic of the Talmud, however, reveals quite the contrary. Implicit in almost every discussion is a balancing of the conflicting values and interests which the Law seeks to advance. And if the *Halakhab* is to be viable and at the same time conserve its method and its spirit, we must reckon with the opposing values where such antinomies exist. An equilibrium among them must be achieved by us as objective halakhic experts rather than as extremists propounding only one of the antithetic values.¹⁸

I believe that criticism is applicable here as well. Jewish tradition values as positive almost all the values that both R. Klapper and Dr. Ish-Shalom value. However, the total balance formed by Jewish law in the area of the *halakhot* of war does not view the values they advocate as ultimate ones.

“Those who are kind to the cruel, ultimately become cruel to the kind” is a well known rabbinic statement, and I fear that R. Klapper and Dr. Ish-Shalom have violated it. Jewish

law recognizes that a just war is not a chess game between two sides of equal ethical value, in which the player who happens to have the white pieces goes first and alternating moves ensue in accordance with the applicable rules. In order for war to be permissible in the Jewish tradition, there must be a determination that one’s cause is just and the cause of the other side is evil and wrong. That determination is not made based on how one fights the war, but on factors that exist prior to the war’s beginning. In a situation where a just society is fighting an evil society, *halakhab* recognizes that the lives of those who are on the side of justice are in the final analysis more precious than those who are supporting the causes of evil. A policy of requiring the sacrifice of the lives of additional lives on the justice side is not called upon as a matter of *halakhab*.

* * *

The great American philosopher Billy Joel reminds us that “only the good die young.” R. Aryeh Klapper seems to have elevated that well sung refrain into a rabbinic maxim of military ethics, and Dr. Ish-Shalom seems to echo Yitshak Sadeh’s pride that Israeli soldiers made a noble moral choice even though that decision led to the sacrifice of to glorify it as if the sacrifice of thirty-five young Israeli men. I disagree. Any time a choice must be made between endangering our own soldiers and torturing the enemy’s fighters or killing civilians on the battlefield, Jewish law permits the latter when the government determines that such is a wise policy.

¹⁸ R. Emanuel Rackman, “The Dialectic of the Halakhah,” *Tradition* 3:2 (1961), pp. 131-32.