M e o r o t

A Forum of Modern Orthodox Discourse

(formerly *The Edah Journal)*

Shevat 5767

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Meorot

A Forum of Modern Orthodox Discourse

STATEMENT OF PURPOSE

Meorot: A Forum of Modern Orthodox Discourse (formerly *The Edah Journal*)

Statement of Purpose

Meorot is a forum for discussion of Orthodox Judaism's engagement with modernity, published by Yeshivat Chovevei Torah Rabbinical School. It is the conviction of *Meorot* that this discourse is vital to nurturing the spiritual and religious experiences of Modern Orthodox Jews. Committed to the norms of *halakhah* and Torah, *Meorot* is dedicated to free inquiry and will be ever mindful that "Truth is the seal of the Holy One, Blessed be He."

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Directions for Submissions

Meorot invites submissions of original scholarly and popular essays, as well as new English translations of Hebrew works. Popular essays should be between 800-2000 words. The journal particularly welcomes halakhic, philosophic, and literary studies relating to *qedushah* in modern experience, the religious significance of the State of Israel, Jewish ethics, emerging Torah conceptions of and opportunities for women, *Talmud Torah* as an intellectual and spiritual discipline, pluralism, and Judaism's relation to gentiles and contemporary culture.

Submissions to *Meorot* should be sent online to meorotjournal@yctorah.org, or mailed in duplicate to Editor, *Meorot*, c/o YCT Rabbinical School, 475 Riverside Drive, Suite 244, New York, N.Y. 10015. Submissions should include a one paragraph abstract and one line biography of the author. Paper submissions should be accompanied by a diskette with essay in RTF, TXT or MSWORD format. Notes should appear as footnotes. Communications should be directed to the above email address.

Reader responses should be sent to the editor at meorotjournal@yctorah.org for possible electronic publication at the journal's website.

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Introducing *Meorot*

Welcome to the inaugural issue of *Meorot: A Forum of Modern Orthodox Discourse*. When Edah closed last summer, Yeshivat Chovevei Torah Rabbinical School was offered the unique opportunity to sponsor the publication of Edah's journal. *The Edah Journal* began publication in *Marheshvan* 5761 (November, 2000), and since then it has become one of the most widely-read and highly-regarded English-language journals devoted to issues of Orthodoxy and modern religious life.

Under the leadership of its editor, Dr. Eugene Korn, the journal has addressed some of the most important and sensitive issues facing our community in an honest, thoughtful and balanced manner. The articles published are always intellectually rigorous and thought provoking. The journal's most outstanding characteristic, however, has been its commitment to create a forum for the many voices in the spectrum of Modern Orthodoxy. Indeed, many believe that its most successful issues have been those that, like the current issue of *Meorot,* present divergent perspectives on a single issue. In the words of *Tosafot* (*Niddah* 20b, *s.v. Agmirei*): דמתוך כך ידקדקו בדבר ופעמים שהראשון טועה ויצא הדבר לאורה—"Through such repeated asking [of the same halakhic question to multiple authorities] the two sides pay scrupulous attention to the matter and when there are times where the first one has made an error this process will allow the matter to come to light." The guiding principle of this journal has been and will continue to be that only through open and honest discourse will the greatest truth emerge.

We have chosen the name *Meorot* as the new name for the journal to reflect this principle. The Torah teaches us that on the fourth day of creation, God created not just the sun, a single, large luminary, but *meorot*—many luminaries, each one an object of beauty, each one shedding its own distinctive light. The light of the sun is strong, but it can also be glaring, and there are times when we must see a certain object by moonlight or by starlight to fully appreciate its subtleties and its hidden beauties. And then there are times when none of these luminaries will do, times when we have to look into the hidden recesses of a matter and only the more focused light of the candle, the אור הנר that is יפה לבדיקה, can provide the necessary illumination.

With the continued publication of *Meorot,* we are committed to continuing to provide a forum where each of the luminaries in our community can shed his or her distinctive light, bringing beauty and illumination to our religious and intellectual world, and ensuring that through this process the greatest truth will come to light.

Rabbi Dov Linzer, Yeshivat Chovevei Torah Rabbinical School
Chair, Editorial Board

❖

Meorot represents a partnership between what was previously *The Edah Journal* and its new sponsor, Yeshivat Chovevei Torah Rabbinical School. YCT is the perfect partner for the journal, since YCT is committed to the very values that have guided *The Edah Journal* during its six years of publication: a thriving interpretation of Orthodoxy open to all *klelal yisrael,* the religious ideal of Orthodox Jews participating in modern pluralistic society, an uncompromising dedication to truth, and a reflective Orthodoxy that grapples with modernity's challenges.

Since *The Edah Journal* began publication, its website has attracted more than 10,000 readers each month from the academic and Jewish communities. Although we have changed name, *Meorot* will hew closely to the same philosophy and editorial policy that made *The Edah Journal* so successful.

I am pleased to welcome new members to the *Meorot* editorial board. R. Dov Linzer will chair the board and R. Nathaniel Helfgot of YCT has assumed the role of Associate Editor, taking over from R. Naftali Harcsztark, who continues to serve on the board. Dr. Michael Berger of Emory University, and R. Adam Mintz of Queens College, CUNY have also joined our editorial team.

Eugene Korn
Editor, *Meorot*

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Meorot
A Forum of Modern Orthodox Discourse

Editor's Introduction to the *Shevat* 5767 Edition

Eugene Korn

Welcome to the *Shevat* 5767 edition of *Meorot!* As both R. Dov Linzer's and my prior statements indicate, *Meorot* is proud to continue the editorial philosophy of its predecessor, *The Edah Journal.* To emphasize this continuity, we have designated this edition as Volume 6, Number 1, positioning it as the successor to the last edition of *The Edah Journal* (5:2).

The renowned political theorist Michael Walzer has observed that "Jewish war, for the last two thousand years, is a mythical beast. None of the rabbis after Akiva had any experience of war making. This is one of the meanings of exile: Jews were the victims, not the agents, of war." At the dawn of the twenty first century, however, Jews willy-nilly find themselves in a different historical and moral position. The State of Israel has been tragically trapped by her hostile neighbors in a brutal and unrelenting condition of war. And in the participatory democracy of America, Jews are called upon to fight, command soldiers, vote for officials and even help decide policy of when and how Americans fight her enemies. This new historical reality has forced moral and religious questions onto the Jewish agenda: Is there a Jewish theory of war, and if not, can Jews forge a coherent theory today? When is it *Jewishly* permitted to take up arms against another? Do the normal moral and halakhic constraints of civilian life apply in any way to the warfare? Is intentional warfare against non-combatants every justified? Is there any behavior towards enemy combatants that is "out of bounds" according to Jewish values and law? No longer can serious Jews ignore these questions. Much of this edition of *Meorot* is devoted to exploring these urgent issues.

Catholics, Protestants, Moslems and secular democrats have all experienced the reality of war as agents, and each of their traditions has developed theories (e.g. just and unjust war) and guidelines of warfare. Jewish tradition has but the rudiments of such a philosophy, i.e., chapter 20 of Deuteronomy, commanded war ("*milhemet mitsvah*") and permitted war ("*milhemet reshut*"), but a robust theory and normative guidelines await development out of these sources. Perhaps the essays contained in this edition will contribute toward that contemporary enterprise.

Just war theory distinguishes between *ius ad bellum*—justificatory conditions for going to war—and *ius in bellum*—guidelines for conduct in war that render the fighting morally acceptable. *Meorot* is proud to publish Aviezer Ravitsky's critical study, "Prohibited Wars in Jewish Religious Law," which takes up Jewish considerations of *ius ad bellum*. One of the finest minds of our generations, Professor Ravitsky is now recuperating from severe head wounds sustained in a recent traffic accident. We at *Meorot*—indeed the entire Jewish world—pray fervently for his complete and speedy recovery, and that he is able to continue his prodigious contributions to Jewish culture and spiritual life. Ravitsky attempts to rebut Walzer's claim that there is no category of forbidden war in Jewish tradition. He argues that prohibited war is the default, and therefore the prevalent, category. Commanded and permitted wars constitute exceptions, and today only defensive wars could be properly authorized by Jewish tradition.

Dov S. Zakheim analyzes major questions of *ius in bellum*, whether the torture and abuse of prisoners is efficacious and permitted according to Jewish authorities, as well as how Israeli and Jewish soldiers in other armies should comport themselves. What are the Jewish legal and value guidelines for treatment of POW's? Implicit is the question of to what degree the Geneva Conventions and internationally accepted norms bear on determining proper Jewish behavior in war today. Zakheim traces the attitudes toward determining proper Jewish behavior in war today, outlines the attitudes in *Tanakh* and Talmud toward prisoner abuse, and considers the dilemmas of risking ones life to save another and the risks associated with redeeming hostages.

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1. 1 "War and Peace in Jewish Tradition" in *The Ethics of War and Peace: Religious and Secular Perspectives,* T. Nardin, ed. on: Princeton Univ. Press, 1996), p. 96.

Fundamental to this inquiry is the Torah axiom that all humans are created in the Image of God and therefore each person possess intrinsic sanctity and dignity.

He analyzes contemporary halakhic positions on torturing terrorists in the hope of preventing future terrorism and the efficacy of physical abuse to obtain military intelligence. Perhaps unique is the seemingly insoluble dilemma of "the ticking bomb" and Zakheim explores whether that case requires a different set of norms. Lastly, the author asks whether Jewish wartime standards reflect a higher universal ideal that the Jewish people, as a covenantal nation charged to be an *Or la-Goyim* (a light unto the nations) should teach all humanity.

Continuing the theme of war in Jewish tradition, Aryeh Klapper, Benjamin Ish-Shalom and Michael J. Broyde discuss how *halakhah,* ethical values and subjective factors operate in a Jewish conception of war. R. Klapper argues passionately for the maintenance of the prohibition of murdering innocents in the war theatre, while attempting to rebut his perception of R. Broyde's conception of war as an "anethical" zone. Prof. Ish-Shalom insists that the immediacy and fog of war require that subjective factors be taken into account in assessing battlefield conduct. No one confined to the *beit midrash*—or any other arena far removed from actual fighting—can properly decide correct wartime behavior. Neither halakhic directives nor ethical rules are determinative. R. Broyde clarifies his position in arguing that war is not an anethical zone, but one with halakhic standards different from those of civilian life. Ish-Shalom and Broyde approach the discussion from different perspectives, yet both curiously agree that for understanding the Jewish guidelines for war, *halakhah* must be supplemented by extra-halakhic considerations, both empirical and normative.

R. Michael J. Harris has written a thoughtful response to my article that appeared in the last edition of *The Edah Journal* (5:2), where I argued that *Hazal* and later rabbinic authorities understood the moral problematics of the divine commandments to exterminate Amalek and the Canaanite nations, and were moved by moral considerations to render those *mitsvot* inoperative on a literal level. Harris argues for the legitimacy of a limited "divine command morality" in Jewish tradition, and I respond to his arguments. As much of our discussion concerns the wartime killing of innocent women, children and non-combatants of those nations, our interchange is directly relevant to the earlier essays on war in Jewish tradition.

January 2007 marks the 100th anniversary of the birth of Abraham Joshua Heschel, arguably the most influential Jewish theologian of the twentieth century. Prof. Alan Brill analyzes R. Heschel's poetry and rabbinic thought, recently made more accessible to English readers by translations from Heschel's original Yiddish and Hebrew works. Brill illuminates Heschel's "Torah of the heart," his mastery of rabbinic sources and his understanding of *Torah min ha-shamayyim* (the divine Torah) that is ever open to pluralistic interpretations, personal creativity and human innovation. Ultimately Brill critiques Heschel's conception of Torah, finding it oblivious to historical forces and largely deficient in elements of authority, obedience and crystallized divine commandments.

Prof. Marc B. Shapiro offers a review essay covering three recent books about R. Ovadiah Yosef's singular impact on both Torah observance and Israeli politics. Shapiro finds R. Ovadiah's charisma unparalleled amongst contemporary rabbinic authorities and his encyclopedic knowledge of Torah texts near superhuman, yet he finds R. Ovadiah lacking in consistency and creative thinking. Shapiro also limns R. Ovadiah's history of, and tensions with, the *Ashkenazi haredi* worlds.

R. Aviad Stollman reviews *A Lifetime Companion to the Laws of Jewish Family Life* by Deena R. Zimmerman, one book of a growing public library of volumes devoted to women's halakhic issues in sexual and family life. Stollman probes the limits of the book as well as the reluctance to advocate autonomous decision-making that frequently pervades this genre of literature. I trust you will enjoy the variety and depth of the articles in this edition of *Meorot,* and I invite you to join the *Meorot* community by sending your responses to meorotjournal@yctorah.org.

Meorot
A Forum of Modern Orthodox Discourse

"Prohibited Wars" In Jewish Religious Law

Aviezer Ravitsky

Abstract: This article argues that for most of Jewish history, Jewish wars were more a matter of theology than politics, but the recovery of Jewish military power in Israel has brought about a new departure in halakhic thought. Jewish law starts from the position that the very act of waging war is prohibited, and thus any war that does not fall into one of the classic categories of obligatory war (*milḥemet mitsvah*) or permitted war (*milḥemet reshut*) is to be considered a prohibited or unjust war from the vantage point of Jewish law. Considerations of good and evil for rendering a war prohibited are found in halakhic literature, and those considerations dictate that even a halakhically permitted war requires moral justification. Lastly, rabbinic authorization is required before any war may be waged, and such authorization can be found today only for a clearly defensive war.

Biography: Aviezer Ravitzky is chairman of the Department of Jewish Thought at Hebrew University. In 2001 he was awarded Israel's most prestigious award, the Israel Prize, for his research in Jewish philosophy. A senior fellow at the Israel Democracy Institute, he is also the author of several books including *Messianism, Zionism and Jewish Religious Radicalism*, *History and Faith: Studies in Jewish Philosophy* and, most recently, *Religious and Secular Jews in Israel: A Kulturkampf?*

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"Prohibited Wars" In Jewish Religious Law*

Aviezer Ravitsky

The Jewish religious tradition distinguished between two types of war: obligatory and permitted. "Obligatory war" (*milḥemet mitsvah*) encompasses the biblical wars against the seven nations inhabiting the Promised Land, the war against Amaleq, and the Jewish nation's defensive wars. It is, accordingly, a clearly defined and recognizable class (at least after Maimonides' codification). Not so the second category, "permitted war" (*milḥemet reshut*), which is more open-ended and depends on assessments of changing circumstances. Moreover, the mounting of a permitted war requires a coordinated effort on the part of two governmental institutions: the political authority (the king) initiates the war, but it acquires legitimacy only after being officially affirmed by the spiritual-judicial authority (the Sanhedrin).

Do these two categories exhaust the field, or do they leave room for a third category: an illicit war, neither obligatory nor permitted but prohibited and sinful? The question may be worded differently: what considerations should the Sanhedrin, the high court, take into account in deciding whether to permit or forbid a war? Should the court take account of tactics and strategy? Of theological factors? Of ethical and moral considerations? Should some wars be forbidden *ab initio*, because the enemy is immune from attack, the anticipated losses (on one side or the other) are excessive, or the war's purposes are illegitimate?

Michael Walzer, the senior theoretician of the morality of war[1]—has argued in a landmark article that the Jewish religious tradition knows only two categories of war but that "the missing category is the banned or forbidden war." It is true, Walzer writes, that a notion of prohibited war was suggested by R. Samuel David Luzzatto (1800-1865), but Luzzatto had few heirs within the halakhic community and the prohibition did not catch on. Walzer concludes his article with a call to formulate a distinction between permitted and forbidden wars, between just wars and unjust wars.[2]

I was invited to react to Walzer's observations at a conference sponsored by the California Ethikon Institute. In doing so, I noted several concepts of forbidden war that had already been developed within the halakhic community,[3] and the present article expands on those points and examines them from a new perspective. In particular, I will try to show how the Jews' modern recovery of military power on the one hand, and their renewed exposure to the horrors of warfare on the other, brought about a new departure in halakhic thought. The new thinking revived concepts that had lain dormant since the Middle Ages, drawing from them potential notions of forbidden war, and it made use of ideas and statements whose influence had long been curtailed, developing in their light a third category of warfare alongside the permitted and the obligatory. In effect, there has been movement in two opposing directions. It is widely recognized that the modern reentry of the Jews into political and military history reactivated dormant notions of holy war, of inheritance and of conquest.[4] At the same time, that very return to

* English translation from the original Hebrew by Joel Linsider

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

[2] Michael Walzer, "War and Peace in the Jewish Tradition," in Terry Nardin, ed., *The Ethics of War and Peace: Religious and Secular Perspectives* (Princeton: Princeton Univ. Press, 1996), pp. 95-114.

[3] My shorter response was published as "Prohibited War in Jewish Tradition," in Nardin, *Ethics* (above, n. 2), pp. 115-127.

history generated ideas of forbidden war, emphasized the horror of battle, and made permitted war subject to ethical considerations.[5]

Scope of the Inquiry

Naturally enough, questions of war and peace occupy relatively little space in the literature of *halakhah* and Jewish religious thought. Exiled from their land and ousted from sovereignty, the Jews for the most part regarded their national wars as hypothetical, associated with the biblical past or messianic future, and Jewish sages were called upon primarily to deal with real-life questions and to provide spiritual guidance. Moreover, many sages consciously relegated Jewish warfare to a point beyond historical reality—to an age of prophet and Redeemer, of priests and *urim ve-tummim*[*] of king and Sanhedrin. Correspondingly, there emerged even in antiquity the theological prohibition on military activism during the period of the exile—"the Holy One Blessed Be He adjured Israel not to rebel against the nations of the world"[6]—and, over the ages, many rabbis forbade conquest of the Land of Israel in the current (as distinct from the messianic) age.[7]

But war prohibited for theological or circumstantial reasons is not the subject of this paper. What I want to consider here is the prohibition of war for ethical reasons: not because of circumstances of exile and submission but because of a determination, involving considerations of good and evil, that the war is unjust rather than just. The distinction, to be sure, is not universally acknowledged, and some distinguished authorities have understood the oath of passivity in exile in moral terms. In the early twentieth century, for example, R. Abraham Isaac

The return to history generated ideas of forbidden war and made permitted war subject to ethical considerations

Kook wrote that "it is not worthy of Jacob [Israel] to conduct a state in an age when it must engage in bloodshed, when it requires skills of wickedness." In other words, R. Kook sees the withdrawal from political and military history not merely as decree or oath; it is, rather, a normative moral demand—"until that happy time comes when it will be possible to conduct a state without evil and barbarity."[8] The founder of the Mizrachi (religious Zionist) movement, R. Isaac Jacob Reines, likewise appears to reject out of hand any distinction between theological factors and ethical factors related to prohibited wars. In his view, the prohibition of warfare during the time of exile reflects the essential opposition between the culture of the sword and the culture of the book.[9] But following that path would make our task too easy. We are interested here not in an idealized withdrawal from the military experience itself, but in the distinctions between one war and another;

[4] This development has been discussed in detail, in both scholarly literature and in journalism, by opponents and proponents alike. The innovative thinking related to "forbidden war," in contrast, is for the most part out of sight and must be uncovered.

[5] Contrary to the stereotypical expectation, this development did not take place within a single, defined, ideological group and is not necessarily bound up with a particular political viewpoint regarding land and peace.

[*] The stones on the high priest's breastplate, through which God's will might be ascertained in some circumstances—***translator's note***.

[6] *Babylonian Talmud*, *Ketubbot* 111a.

[7] Bahya ben Asher, *Commentary on the Torah* (Jerusalem, 1958), on Gen. 32:6; Isaiah Horowitz, *Shenei Luhot ha-Berit* (Jerusalem, 1963), 3, p. 48. See the appendix to my book, *Messianism, Zionism, and Jewish Religious Radicalism* (Chicago: Univ. of Chicago Press, 1996). See also Samuel Mohilever, *Sefer Shivat Ziyyon* (Warsaw, 1900), 1, p. 9.

[8] Abraham Isaac Kook, *Orot* (Jerusalem, 1963), 14; cf. id., *Olat Re'ayah* (Jerusalem, 1962), 1, p. 377.

[9] Isaac Jacob Reines, *Or Hadash al Ziyyon* (Vilna, 1902), p. 19b. See Elie Holtzer, *Nationalism and Morality: Conceptions of the Use of Force Within Ideological Streams of Religious Zionists*, doctoral dissertation submitted to the Hebrew University of Jerusalem, 1998, pp. 185-198. Cf. Yosef Eliyahu Henkin, *Sefer Lev Ibera* (New York, 1957), p. 115. See also the extreme prohibitory stance adopted by R. Moses Feinstein in *Iggerot Mosheh* (Benei-Beraq, 1965), *Hoshen Mishpat*, 2, sec. 78: "It is my opinion that

between a war permitted in the real world and a war forbidden.

Let me limit the discussion from another point of view. I will examine not the question of battlefield ethics but the more fundamental question of whether one should go to war at all; not the halakhic limitations on how warfare should be waged (*jus in bello*) but whether a particular war itself is justified (*jus ad bello*).

Nations comporting themselves properly are made immune from attack by a Jewish army.

Once again, so sharp a distinction will not be universally acknowledged. For example, R. Samuel Edels (Maharsha; seventeenth century) commented as follows on the talmudic requirement that the king consult with the Sanhedrin before going to war: "They take counsel from the Sanhedrin regarding how to wage warfare in accord with the Torah, regarding various aspects of war."[10] Maharsha thus believes that the king must consult in advance with the Sanhedrin not only on whether to go to war but also—indeed, perhaps solely—on how the war should be waged. Similarly, some have seen the many limitations placed by the *halakhah* on the conduct of war as a deliberate step in the direction of disapproving and preventing war itself.[11] In what follows, however, I will direct my attention to the Jewish prohibition of certain wars for ethical reasons in contemporary, historical times.

Prohibited Wars

Let me begin with some specific questions: Who is legitimately regarded as an enemy? What are legitimate purposes of a war? What are the limits on "legitimate" killing (such that killing in excess of those limits would void the war *ab initio*)? Can we glean from the literature any defined halakhic prohibitions related to these issues? Naturally, this will be a selective inquiry: contrary to the claim, presented earlier, that the *halakhah* contains no concept of prohibited war, I will attempt to uncover traces of such a concept—but only that. Thereafter, I will consider a broader interpretation of the classical sources, suggesting that halakhic assessments of these issues proceed almost entirely from a fundamental premise of a prohibition on war.

A. Against Which Enemies May War Be Declared?

According to a widespread halakhic notion, war may be declared only against nations that violate the seven Noahide commandments, that is, nations that fail to fulfill the minimum religious-moral demands, the universal norms that make human beings and human society human (according to the Jewish religion). Nations comporting themselves properly, however—refraining from bloodshed, incest, idolatry, robbery, and so forth—are thereby made immune against attack by a Jewish army.

Maimonides ruled that "war is not to be waged against anyone unless he has first been offered peace; this applies equally to permitted wars and to obligatory wars."[12] True, Maimonides' concept of

warfare, which entails a risk to life, requires a specific command, through *urim ve-tummim* and the Sanhedrin, even in a case of obligatory war (!) such as the war against Amaleq; and this is proven from the fact that David and Solomon, and all the other righteous kings, did not go to war against Amaleq. This is clearly proven, admitting of no disagreement. Only when Israel was attacked by idolaters such as Antiochus the Greek king and needed to be rescued did they go to war during the time of the Second Temple."

[10] Maharsha, *Hiddushei Halakhot ve-Aggadot* (included in the standard editions of the Babylonian Talmud), *Sanhedrin* 16a. See Yosef Glicksberg, "The Sanhedrin's Authority Over Making War" (Hebrew), *Torah she-Be`al Peh*, 13 (1971), p. 181.

[11] Yehudah Shaviv, *Bezir Avi'ezer* (Alon Shevut, 1990), p. 114. But see G. Blidstein, "Operations Against a Hostile Civilian Population in Contemporary *Halakhah*" (Hebrew), *Medinah, Mimshal vi-Yahasim Beinle'umiyim*, 41-42 (1997), pp. 155-169.

[12] Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 6:1.

[13] But see Shelomo Goren, *Meishiv Milhamah* (Jerusalem, 1986), 3, p. 259.

"peace" encompasses the enemy's political and social subservience,[13] along with its acceptance of the seven universal commandments. But what of a nation that was already living in accordance with the required religious-moral code, and had not taken it on simply to avoid attack? "In the opinion of our master [Maimonides]…those who already fulfill the seven commandments may not be attacked."[14] That was the understanding of R. Abraham Isaiah Karelitz (the *Hazon Ish*), the halakhic mentor for the Haredi community in the Land of Israel during the preceding generation. His wording suggests this view applies to any nation living *de facto* in accord with the universal code, and not merely to "resident aliens" who formally submit to that code *de jure* before a Jewish court.[15] Note that according to the traditional view, idolatry is associated with overall moral degradation. But Maimonides held that Muslims were not idolaters, and the halakhic process that began with the Tosafists (during the twelfth century) and concluded with R. Menahem ha-Me'iri (at the end of the thirteenth century), reached a similar result with respect to Christians.[16] Against whom, therefore, can a Jewish army declare an offensive war?[17]

In fact, the *Hazon Ish*, in developing the concept that nations may be immune from Jewish military action, presented the idea not as an unusual innovation but as the common halakhic opinion widely accepted among medieval Jewish sages.[18] He attributed it not only to Maimonides but also to representatives of competing schools, such as R. Abraham Ibn Da'ud (Ra'abad) and Nahmanides;

[14] Isaiah Karelitz (*Hazon Ish*), *Bei'urim ve-Hiddushim al ha-Rambam* (printed with Maimonides' *Mishneh Torah*) (Jerusalem, 1957), *Hilkhot Melakhim* 5:1.

[15] Yehudah Amital, "Maimonides on Israel's Wars" (Hebrew), *Tehumin* 8 (1987), p. 460. Cf. the comments of R. David Isaac Mann, *Be'er Miryam* (Kefar Hasidim, 1984), *Hilkhot Melakhim* 6:5, p. 128: "It is obvious to Maimonides that there can be no peace with transgressors of the seven commandments, there is no peace, says the Lord regarding the wicked…; accordingly, without the seven commandments there is no peace here, and there is no reason to avoid war." See also R. Samson Raphael Hirsch, who emphasized, in his commentary on Deut. 20:10, that even the seven Canaanite nations would be offered peace "on the condition of giving up idolatry and returning to the seven [Noahide commandments]. The complete annihilation out of the Land ordered in [Deut 20:] 17-17 was only if they refused to accept these terms of peace, and, keeping the polytheistic ways of life wished to assert themselves in the Land." (S. R. Hirsch, *The Pentateuch – Translation and Commentary*, English version by Isaac Levy (New York: Judaica Press, 1971, Deuteronomy, pp. 391-392. See also Noam Zohar, "Morality and War: A Critique of Bleich's Oracular Halakha," in Daniel H. Frank, ed., *Commandment and Community* (Albany: State Univ. of New York Press, 1995), p. 251; J. David Bleich, "Response to Noam Zohar," in id., p. 263. My article "Prohibited War in Jewish Tradition" (above, n. 3) was written before the Zohar-Bleich debate. See also the comments of R. Yisra'eli in note 17, below; and Maimonides' observations on gentile sages who observe the seven Noahide commandments "because they are rationally compelling" (*Mishneh Torah*, *Hilkhot Melakhim* 5:11; cf. *Hilkhot Berakhot* 10:11) and appear on that account to have a place in the world to come. See, further, Jacob Levinger, *Maimonides as Philosopher and Codifier* (Hebrew) (Jerusalem: Mosad Bialik, 1989), p. 23; D. Hanshqe, "On the Unity of Maimonides' Thought" (Hebrew), *Da`at* 37 (1996), pp. 48-50 (and the bibliography there), though he discusses individuals rather than nations and societies.

[16] Jacob Katz, *Halakhah and Kabbalah* (Jerusalem: Magnes Press, 1984), pp. 291-310; Yaakov Blidstein, "The Me'iri's Attitude Toward Gentiles" (Hebrew), *Ziyyon* 51 (1986), pp. 153-166; Moshe Halbertal, *Between Torah and Wisdom: Rabbi Menachem ha-Me'iri and the Maimonidean Halakhists in Provence* (Hebrew) (Jerusalem: Magnes Press, 2000) (chapter 3 translated into English as "'Ones Possessed of Religion': Religious Tolerance in the Teachings of the Me'iri," *The Edah Journal* 1,1 [2000], found at http://www.edah.org/ backend/JournalArticle/halbertal.pdf . See also A. I. Kook, *Iggerot Re'ayah* (Jerusalem, 1962), 1, p. 99: "The principle is in accord with the view of the Me'iri, that all nations restrained by decent interpersonal practices are already considered as resident aliens with respect to all human obligations."

[17] Interestingly, R. Sha'ul Yisra'eli, head of the Merkaz ha-Rav yeshiva, understood Nahmanides to take a similar position: "Nahmanides wrote that idolaters…who transgress the seven commandments may be the targets of warfare….It follows that nowadays, when most civilized nations of the world are not idolaters, and may observe the other Noahide commandments as well, the law of permitted war no longer pertains." In other words, only defensive warfare may be waged against them. ("Retaliatory Operations in Light of *Halakhah*" (Hebrew), ed. Yehudah Shaviv, *Be-Zomet ha-Torah ve-ha-Medinah*, 3 [1991], p. 279.) See also Joseph Kaspi, *Mishneh Kesef* (Kharkhov 1902), 2, p. 293: "God has commanded us to be merciful to all persons of whatever nation…except for the seven [Canaanite] nations, for they are as evil beasts."

[18] For the Tosafists' view of the issue, see *Tosafot*, *Avodah Zarah* 26b, s.v. "*ve-lo*." See M. Ha-Kohen, *Halakhot ve-Halikhot* (Jerusalem, 1975), pp. 197-198.

indeed, he maintained, the latter two sages eased the terms on which Maimonides conditioned that immunity. While Maimonides afforded protection against Jewish attack only to nations already subject to moral discipline, Ra'abad and Nahmanides extended full immunity even to nations that accept the seven Noahide commandments in fear of the impending war! Moreover, Maimonides required the enemy not only to observe the seven commandments but also to submit to Jewish political authority, but Ra'abad and Nahmanides required only acceptance of the seven commandments, easing the way to immunity. But the ointment contained a fly:

Just war is not limited to the battle for rights; it extends to the battle for good

the *Hazon Ish* may have held that the latter two added a requirement to those imposed by Maimonides, conditioning immunity on the enemy's acceptance of the seven commandments in an official manner, by declaration before a Jewish court. (The *Hazon Ish* words it as "accepting the status of a resident alien."[19]) Maimonides, in contrast, required only disciplined conduct in practice (in the words of the *Hazon Ish*, "those who *already fulfill [the] seven commandments* may not be warred against"[20] [emphasis supplied]).

Relatedly, R. Kook held the view that even in ancient times, when the sages of the Sanhedrin were called upon to decide whether to allow the king to initiate a permitted war, the decisive factor for them was the extent of the potential enemy's corruption and the moral danger it posed:

> The matter was given over to the court to assess the moral condition of the idolaters [against whom the king proposed to declare war], for not all forms [of idolatry] were the same. But because of our many sins, the details of these matters are not clear to us, owing to our minimal use of these procedures in practice since losing our national sovereignty.[21]

In other words, under the limitation implied by the *Hazon Ish*, an offensive war against a nation restrained by the seven commandments would be a prohibited war; and under R. Kook's limitation, an offensive war against a pagan nation not sunk in moral degradation, though perhaps not prohibited *ab initio*, would be forbidden in practice by the Sanhedrin once the king came to seek its approval.

And so we have an initial assessment of the question of prohibited war. Of course, we should not blur the analytic distinctions between religious discourse of this sort and modern liberal discourse. Just war is not here limited to the battle for rights (such as the rights to life and to liberty); it extends as well to the battle for good (in a monotheistic context). Similarly, immunity from warfare here depends on a person's religious-moral state, not on one's essential human condition, and it is not only the individual who is evaluated as a moral being, but the group or the nation as well.

B. For What Purposes May War Be Waged?

It goes without saying that the *halakhah* permits—indeed, requires—fighting a defensive war, a war "to save Israel from an enemy that is attacking it."[22] That sort of war does not require the Sanhedrin's approval and all are called upon to fight in it, "even a bridegroom from his chamber and a bride from her wedding canopy." But what of a war for the conquest of the Land of Israel in contemporary times? And what of an expansionist war intended to "enhance the glory and fame" of a King of Israel? Have any of the halakhic sages developed norms related to prohibited wars in these contexts?

[19] See above, n. 14.
[20] Id. It may be that the *Hazon Ish* himself did not draw all these distinctions, but his comments speak for themselves.
[21] A. I. Kook, *Iggerot Re'ayah* (above, n. 16), 1, p. 140. See also Amital, "Israel's Wars) (above, n. 15), p. 461
[22] Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 5:1.

The commandment to conquer the Land of Israel was codified by Nahmanides as a commandment with biblical force binding on all generations,[23] but the nature of that mandated "conquest" is the subject of dispute. Some understand it to include the use of military means, a war of conquest in its simple sense. In our times, R. Zevi Yehudah Kook and his disciples have taken this view.[24]

The Land of Israel is to be conquered only by permissible means

Others, however, have emphasized that halakhic discourse has long recognized a notion of "conquest" through non-military means, such as development and settlement. In their view, even Nahmanides was speaking not of "a commandment of military conquest but of settling and becoming rooted in the Land." R. Sha'ul Yisra'eli, for example—a highly authoritative scholar for religious Zionists—writes that the commandment of military conquest "was a one-time [event, limited to] the conquest in the time of Joshua, the subject of an explicit commandment by the master of prophets [Moses]";[25] since then, however, that commandment has been neither applicable nor binding. This suggests that the biblical account represents not a historical model for all time but an exceptional event, outside the regular course of history.

According to the view that the Jewish nation is not *required* to conquer the Land of Israel by warfare, is it nonetheless *permitted* to do so? R. Nahum Rabinowitz, head of the *hesder* yeshiva in Ma`aleh Adumim, is an outstanding proponent of the view that forbids such activity.[*] In his opinion, the Land of Israel is to be "conquered" only "by permissible means, and warfare on our part is not permitted unless enemies threaten or attack us" (that is, unless the war is preventive or defensive). Rabinowitz infers from Nahmanides' remarks that even Joshua's war of conquest was the result of a flawed state of affairs, an exceptional measure necessitated by Israel's having sinned in their dejected response to the scouts' discouraging report on the Land (see Numbers 13-14). Accordingly, nothing in Nahmanides' writings can provide "an anchor for the view that warfare was permitted for the sake of conquering the Land. Worst of all, such an interpretation tends to treat the shedding of blood lightly. That disregard [for human life] undermines the very basis of society and threatens the entire project of [the State of Israel as] the beginning of the Redemption."[26] Rabinowitz appears to be speaking here of bloodshed on both sides.

These views, too, are of course subject to dispute.[27] But for that very reason—and because of their author's rigorous examination of the sources he adduces—they reveal another possible manifestation of "prohibited war" in the Jewish tradition, one that portrays even the biblical command to make war as the consequence of sin.

[23] Nahmanides, *Annotations to Maimonides' Sefer ha-Mizvot*, published with *Sefer ha-Mizvot* (Tel-Aviv, 1957), commandment 3 (s.v. "*she-hishmit ha-Rambam*"). For a detailed discussion, see Sha'ul Yisra'eli, *Erez Hemdah* (Jerusalem, 1957), sec. 1-2; Michael Z. Nehorai, "The Land of Israel in the Teachings of Maimonides and Nahmanides" (Hebrew), in Moshe Halamish and Aviezer Ravitzky, eds., *The Land of Israel in Medieval Jewish Thought* (Hebrew) (Jerusalem: Yad Yizhaq Ben-Zvi, 1991), pp. 129-136; Aviezer Ravitzky, *Al Da`at ha-Maqom* (Jerusalem: Keter, 1991), pp. 42-46.

[24] Z. Y. Kook, *Mi-Tokh ha-Torah ha-Go'elet*, ed. H. A. Schwartz (Jerusalem, 1983), p. 123: "Regarding the commandment to conquer the Land of Israel, we bear the obligation, the commandment is issued to us, to enter into a state of war to do so, even if we are killed!" See also Shelomo Aviner, "Taking Possession of the Land and the Ethical Problem" (Hebrew), *Arzi*, 2 (1982), p. 111; Jacob Ariel, "Things as They Are" (Hebrew), *Zefiyah*, 1 (1984), p. 36; Hanan Porat, "The Dispute With R. Amital Regarding the Land of Israel" (Hebrew), *Nequdah*, 56 (1982), pp. 27-28. Cf. Shelomo Yosef Zevin, "War in Light of *Halakhah*" (Hebrew), *Torah she-Be`al Peh* 13 (1971), p. 147; Eliezer Waldenberg, *Ziz Eli`ezer* 3, sec. 9, par. 2.

[25] Sha'ul Yisra'eli, "Reply to a Question" (Hebrew), *Af Sha`al – Mizvah min ha-Torah*? (Jerusalem: Oz ve-Shalom Publications, 1978), p. 4. Cf. id., Erez Hemdah (above, n. 23), sec. 1.

[*] A *hesder* yeshiva is an institution whose students combine yeshiva study with military service***—translator's note***.

[26] Nahum Rabinowitz, "Nahmanides and Maimonides on the Commandment of Possessing the Land" (Hebrew), *Tehumin*, 5 (1984), p. 184. Cf. Nehorai, "The Land of Israel," (above, n. 23), pp. 123-137.

[27] See, for example, Ariel, "Things as They Are" (above, n. 24), pp. 174-179.

R. Kook likewise saw the biblical war for the conquest of the Land of Israel as the result of sin (that of the Golden Calf); but for the Israelites' transgression, "the nations dwelling in the Land of Israel would have made peace with Israel…and warfare would not have prevailed. The influence [of good] would have proceeded through ways of peace, as in messianic times…but sin caused that to be delayed by thousands of years."[28] (As early as the fourteenth century, Gersonides had argued that Israel's future acquisition of the Land would take place "in a manner such that there would no longer be war.[29])

A permitted war needs to be morally justified

But what of permitted wars waged by the kings of Israel? Does not Maimonides permit, as Walzer stresses, even an aggressive, expansionist war initiated by the king (with the advice and consent of the Sanhedrin), a war intended solely for political purposes, "to enhance [the king's] glory and fame"? Not necessarily, some would respond;[30] one such is R. H. H. Herschensohn, who wrote as follows even while supporting the establishment of the Hebrew Brigades in 1915-1917, during the First World War:

> Because an *unjust* war transgresses the prohibitions against pillage, murder, robbery, and suicide, the terminology used is that of permission in the face of [otherwise applicable] *prohibition*…and because of that concern, it is taught that "They may not wage permitted war except by [authorization of] a court of seventy-one (*Sanhedrin* 20a), that is, a court's determination is needed to *permit* it. (Emphasis supplied)[31]

Or, as R. Aharon Lichtenstein (head of the *hesder* yeshiva in Alon Shevut) later argued, in the context of the debate over the war in Lebanon (1982):

> A permitted war is not, God forbid, a war that may be initiated arbitrarily or on the basis of pragmatic considerations alone. Initiating such a war entails a moral assessment of the circumstances no less than a political one…it rests as well on value-based criteria not anchored in explicit *halakhot* but required as a matter of conscience.[32]

The war's *raison d'état*, R. Lichtenstein added, is indeed political, but "the reasoning and justification" for the war offered before the Sanhedrin cannot disregard the "moral plane." And as Prof. Gerald Blidstein recently noted, the requirement that even a permitted war be morally

[28] A. I Kook, *Orot* (Jerusalem, 1976), p. 14.

[29] Levi ben Gershon (Gersonides), *Commentary on the Torah*, Deut. 7:9.

[30] R. Abraham De Bouton (sixteenth century; author of the *Lehem Mishneh* commentary on Maimonides' *Mishneh Torah*) already limited the concept to deterrent warfare: "so that they fear him and do not attack him." See Efrayim Enber, "War in the Jewish Tradition" (Hebrew), *Medinah, Mimshal, vi-Yahasim Beinle'umiyim* 26 (1987), p. 3; J. David Bleich, "Preemptive War in Jewish Law," *Tradition* 21, 1 (1983), p. 12. See also Isaac A. Herzog, *Resp. Heikhal Yizhaq* (Jerusalem, 1960), *Orah Hayyim*, sec. 38. Some have emphasized the biblical statement "When you go to war against your enemies" (Deut. 20:1): "That it says 'against your enemies' [implies] that you are not to wage permitted war against nations with which you are at peace, but only against your enemies." (Me'ir Leibush Malbim, *Malbim on the Torah* [Jerusalem, 1957], p. 762; cf. S. R. Hirsch, *Commentary* [above, n. 15], Deut. 20:1.)

[31] Hayyim H. Hirschensohn, *Malki ba-Qodesh* (St. Louis, 1909), pp. 93-94.

[32] Aharon Lichtenstein, "Human Morality and Divine Morality" (Hebrew), *Arakhim be-Mivhan Milhamah* (Alon Shevut, 1982), p. 18. Cf. id., "Morality of War" (Hebrew), *Tehumin*, 4 (1983), p. 184; Yaakov Blidstein, *Political Concepts in Maimonidean Halakha* (Hebrew) (Ramat-Gan: Bar-Ilan Univ., 1983 (pp. 216-220).

[33] Blidstein, id., p. 220, n. 18. And see the comments of R. David Bonfils (thirteenth century) "It is improper to rob the other nations of their portions; and [the Land of Israel] was given to Israel only because it was in the hands of the Canaanites, who did not themselves merit it. (*Novellae on Tractate Sanhedrin*, ed. Lipschitz [Jerusalem,1968], p. 91a.)

[34] Above, n. 21.

justified is consistent with the positive overtones of the term "permission" in the geonic literature."[33]

In fact, R. Kook's comments cited above[34] imply as much; and the idea appears as well in the remarks of R. Hayyim David Halevy, late Chief Rabbi of Tel-Aviv: "The court would examine in a fundamental way the king's request [for authority] to go to war, to determine if it were *justified* and what degree of *risk* it entailed, and in accordance with that [assessment] it would [or would not] grant his request."[35] (Emphasis supplied.)

Moreover, this may be the very reason for requiring that the king obtain the Sanhedrin's consent before going to war, a requirement that makes waging war the joint endeavor of the political and judicial branches of government. Let me elaborate on this specifically in the context of the radical theory of government developed in the fourteenth century by R. Nissim of Gerona (Ran), a theory that endowed the political sphere with much broader authority than did other halakhic approaches.

R. Nissim greatly expanded the king's judicial power, allowing him to depart from the law of the Torah when times and social circumstances so required. True, he wrote, only the Torah's justice represents the ideal law ("the genuine law of truth"; "righteous justice"); but often it is "the king's justice" that represents realistic law.[36] And true, the Torah's justice is the eternal, divine justice, the sole mechanism through which Israel will attain spiritual exaltation and supernal bounty; but the king's justice is effective and dynamic social justice in the here and now, for it is equipped to accommodate itself to changing circumstances and thereby to ensure the welfare of the people. Consistent with his approach, Ran found it especially necessary to emphasize, even in the context of warfare, the king's exalted station and the power vested in him "to assemble the people and send them out to wherever he will, and that is one of the attributes of kingship."[37] But given that view of things, it becomes especially pertinent to ask why the king ("whose power is great") should be required to consult with the high court ("whose capacity is limited by the law of the Torah"). Why should this unusual requirement be imposed specifically with respect to the issue of going to war? It has been suggested that in the particular context of warfare—which entails the risk of bloodshed—it is essential to make every effort to align realistic justice with ideal justice and to avoid severing political interest and "the need of the hour" from "righteous justice."[38]

(That effort provides a model to be imitated in other areas as well, in which realistic political law should be brought ever closer to ideal religious law: "Even though the king's law is closer to reason and to the needs of the hour, and it flows from his exclusive authority, there is a special commandment that the king align his justice with the law of the Torah to the extent possible."[39])

This is even more the case under Maimonides' view, which never accepted a clear separation of powers between the political and spiritual realms. Maimonides demanded that the king himself direct all his actions not only toward the welfare of

[35] H. D. Ha-Levy, "Military Service in *Halakhah*" (Hebrew), *Torah she-Be`al Peh*, 13 (1971), p. 178.

[36] R. Nissim ben Reuben, *Derashot ha-Ran*, ed. A. L. Feldman (Jerusalem 1977), Discourse 11, pp. 189-199, 201-203. See also Aviezer Ravitzky, *Religion and State in Jewish Philosophy: Models of Unity, Division, Collision, and Subordination* (Jerusalem: The Israel Democracy Institute, 2002), pp. 57-84.

[37] R. Nissim ben Reuben, *Hiddushei ha-Ran* (no publication data), Sanhedrin 20b, p. 201.

[38] Cf. Shimon Federbusch, *Mishpat ha-Melukhah be-Yisra'el* (Jerusalem, 1954), p. 199: "The moral strain in the law governing the declaration of war appears first and foremost in the rule denying the right of the king and the military to declare war, for they typically crave victorious combat, and assigning that right exclusively to the spokesman for religion and justice, so it may determine whether the war is justified from the moral point of view."

[39] Glicksberg, "The Sanhedrin's Authority" (above, n. 10), p. 186. Cf. R. Abraham Borenstein (*admor* of Sokhachov), *Avnei Nezer* (Jerusalem, 1987), *Orah Hayyim*, sec. 310.

[40] Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 4:10. Cf. Rabinowitz, "Nahmanides and Maimonides" (above, n. 26);

society but also toward the betterment of the world on the religious and spiritual plain—"to raise up the religion of truth and to fill the world with righteousness, breaking the might of the wicked and fighting the wars of God."[40] Many have interpreted this as opening the door to requiring the king himself, and not just the Sanhedrin, to take account of values and subordinate his practical objectives to them.

C. Is It Permitted to Declare a War of Unlimited Destruction?

According to one halakhic tradition, it is forbidden to declare a highly destructive war in which unlimited fatalities (enemy or Jewish) can be expected. The statements on the point are terse, but they deserve special attention in the present age of weapons of mass destruction. Moreover, they provide a nice example of how this type of analysis might be conducted within the context of religious literature, for the issue we are examining arose not as a moral or conceptual question but because of the need to interpret an authoritative text. Over time, however, it has gained more far-reaching significance.

The Babylonian Talmud cites a statement by the sage Samuel: "A kingdom that kills up to one in six is not punished."[41] To whom was the statement referring? According to the interpretation of the *Tosafot* (which differs from that of Rashi), the reference is to the fatalities of a (permitted) war. And who are those fatalities? Some understand them to be Jewish soldiers: "We learn from this that the maximum number of losses that may be taken in a permitted war according to the Torah is one sixth of the entire fighting population.[42] However, others vehemently oppose that interpretation, expressing dismay at the very thought: "God protect us from that opinion…all those who chatter about the '[acceptable] level of losses' are only spoilers in the vineyards [cf. Song of Songs 2:15]. God save us from them and their followers.").[43]

The halakhah starts from a principled position that the act of waging war as a prohibited act.

According to Maharsha's commentary, the statement applies to the number of enemy fatalities (in a permitted war).[44] If the number of enemy fatalities reaches "one in six," a Jewish king is not punished; but he is punished if the number exceeds that level. Punishment, of course, implies that there was an offense—either because the war was forbidden from the outset, in view of its foreseeable results, or because the war was waged without restraint. And note that even if we are appalled at this sort of quantitative assessment regarding human life, it should be seen as a direct admonition against a war entailing mass destruction of human life. As noted, an admonition of that sort has special meaning today, in the face of available weapons of mass destruction. As R. Moses Sofer (*Hatam Sofer*) put in the nineteenth century: "He [the king] has no authority to wipe out an entire race or type [of humanity]."[45] That is, he may not commit genocide in any form.

R. Yehudah Gershuni, a leading contemporary Torah sage, went even further, applying the ban on excessive killing not only to an aggressive permitted war but even to a defensive one! Only in the biblical holy war against the Canaanite

Amital, "Israel's Wars" (above, n. 15); Gerald Blidstein, "Holy War in Maimonidean Law," in Joel L. Kraemer, ed., *Perspectives on Maimonides* (New York: Oxford Univ. Press, 1991), pp. 209-220.

[41] Babylonian Talmud, Shevu`ot 35b.

[42] R. Shelmoh Goren, Meishiv Milhamah (above, n. 13), 1, p. 14; 3, p. 354.

[43] R. Nahum Rabinowitz, "Nahmanides and Maimonides" (above, n. 26), p. 184.

[44] Maharsha (above, n. 10), Sanhedrin 16a. See also Naftali Zevi Yehudah Berlin, Ha`ameq Davar (Commentary on the Torah) (Jerusalem, 1984), Gen. 9:5; Deut. 20:8.

[45] Moses Sofer, Hatam Sofer (Vienna, 1865), 1, p. 208. See also Shaviv, Bezir Avi'ezer (above, n. 11), p. 102; Yosef Ahituv, "The Wars of Israel and the Sanctity of Life" (Hebrew) in Yeshiyahu Gafni and Aviezer Ravitzky, eds., Sanctity of Life and Martyrdom (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 1992), p. 263.

[46] Yehuda Gershuni, "On Power and On War" (Hebrew), *Tehumin*, 4 (1983), p. 59. The *Hazon Ish* likewise understands the

nations and against Amaleq, he maintains, was it permitted to kill all the enemy; in any other war, doing so is prohibited.[46] The ruling has obvious implications for nuclear deterrence and even more for the actual use of nuclear weapons.

Let me note one reservation. The preceding discussion rests on the following premises: if a punishment is specified, there must be an offence; if there is an offence, there must be a categorical prohibition; and if there is a categorical prohibition, the threat of the prohibited act must itself be prohibited as well (for otherwise, the threat would be seen as empty). But there exist exceptional, morally ambiguous circumstances in which these logical moves become problematic or at least cease to be self-evident. We have seen as much in contemporary inquiries into the ethics of nuclear deterrence: "The threat of something disproportionate is not always a disproportionate threat" (Paul Ramsey);[47] "Nuclear weapons explode the theory of just war. They are the first of mankind's technological innovations that are simply not encompassable within the familiar moral world." (Michael Walzer).[48]

Prohibition on War as Point of Departure

The modern Jewish situation (since the establishment of the "Jewish Brigades Group during the Second World War") and the State of Israel's wars have given rise to a more general and systematic outlook regarding war and its limitations. According to this view, the *halakhah* starts from a principled position that regards the very act of waging war as a prohibited act. "For every war entails concern about being killed and about killing…and both of these concerns are tied to biblical [i.e., not merely rabbinic] prohibitions."[49] Accordingly, specific religious authorization is needed before any war at all may be waged, and this sort of authorization can be found today, as noted earlier, only with respect to a clearly defensive war. This point of view can account in an interesting manner for the development of only two categories of war (obligatory and permitted) within the Jewish tradition even though a third category, prohibited war, seems needed. It suggests that the prohibition is the norm, the "default option," the starting point for the entire inquiry. Obligatory and permitted wars constitute two exceptions drawn against that prohibitory background.

R. Yehudah Shaviv states it as follows:

> The people of Israel know of three types of war: *prohibited* war, *permitted* war, and *obligatory* war. The *halakhah* speaks of the latter two types but has no need to speak of the first, for any war that does not fall in one of the second two categories is *necessarily prohibited*. The prohibition is that of spilling blood; for if the Torah forbids an individual to spill an individual's blood, how much more so is the community forbidden to spill a community's blood. (Emphasis added).[50]

Other contemporary rabbis have written explicitly about the matter.[51] Like their predecessors mentioned earlier, they can straightforwardly respond to the question Walzer poses in his article, that is, "…who, at this late date, could issue the prohibitions [against warfare]?…God…is not

talmudic statement to be speaking of punishment for one who kills more than one-sixth of the enemy. (*Yoreh De`ah*, sec. 157, par. 4.)

47 Paul Ramsey, *The Just War: Force and Political Responsibility* (New York: Scribner, 1968), p. 303.

48 Walzer, *Just and Unjust War* (above, n. 1), p 282.

49 R. Yehudah Amital, "Israel's Wars" (above, n. 15), p. 460.

50 Shaviv, *Bezir Avi'ezer* (above, n. 11), p. 85.

51 Zevin, "War in Light of *Halakhah*" (above, n. 24), p. 10. In truth, Rabbi H. H. Hirschensohn was the first to speak in these terms. In anticipation of the establishment of the Hebrew Brigades during the First World War, he developed the idea that "the wording 'permitted' [war] is used to remove a particular war from the rubric of prohibition, lest we think that because warfare in itself entails murder of others and risk to oneself, it is never permitted… Because an unjust war entails [transgression of] the prohibitions against pillage, murder, robbery, and suicide, the terminology used is that of permission in the face of otherwise applicable prohibition." *Malki ba-Qodesh* (above, n. 31), 1, p. 92.

known to have announced any specific (or general) prohibitions"[51a]

Moreover, there is an important sense in which halakhic inquiry into these issues can be expected to lean more toward prohibition than do many contemporary philosophical analyses. Modern liberal thought regards human beings as autonomous with respect to their bodies and their lives. Accordingly, it is likely to regard the participants' freely-arrived-at decision to go to war as dispositive of the issue. Indeed, some have argued from this perspective that if warfare is waged through the free choice of the participants on both sides (such as knights in a joust or mercenaries), and the participants are free to end the conflict at any time of their choice, it should not be seen as criminal or unjust. Walzer writes:

> Some wars are not hell…We take [the choice of young men who voluntarily fight] as a sign that what they are choosing cannot be awful, even if it looks that way to us…their subsequent fate, even if it is very painful, cannot be called unjust…Given that freedom [of choice on the soldiers' part], they might have fought very bloody battles and the spectacle would not lead us to say that war was a crime…they died of their own free will….What is important here is the extent to which war (as a profession) or combat (at this or that moment in time) is a personal choice that the soldier makes on his own and for essentially private reasons.[52]

This harsh stance is controversial even in the secular liberal context: Does the willingness of people to be killed make the killing permissible? Do people who fight of their own free will really "die of their own free will," or might they be fighting out of a conviction that they will survive and prevail? But in the religious-halakhic context, the stance is simply impossible, for religious thought does not consider one to be the master of one's body and life. It follows that human autonomy does not extend so far as to permit a person to freely choose to submit to danger or forfeit life. Can a freely-entered-into agreement purge the cosmic sin of shedding blood? ("No expiation can be made for the land for the blood that is shed therein" [Num. 35:33].) It follows that even war "games" or attacks on mercenaries, despite the participants' having freely chosen to engage in warfare, are to be considered a physical and moral abomination.

Authorization can be found today only with respect to a clearly defensive war.

And yet, surprisingly enough, we find R. Sha'ul Yisra'eli grounding the entire notion of legitimate war in a concept of human (non-Jewish) autonomy over one's body. In his view, the halakhic authorization to wage war draws its force from international conventions that contemplate warfare:

> There is *general* agreement in the world that war is one of the ways through which conflicts among nations may be resolved. Only in our time are there efforts to have law recognized as unlawful, but the time is not yet ripe and nations are unwilling to assume that sort of mutual obligation. Accordingly, international convention can be regarded as the basis for considering war to be *one of the lawful means*. (original emphasis)[53]

But once it is granted that war would be prohibited in the absence of international consent, how can that consent possibly permit it? Can universal agreement to violate a prohibition against spilling blood nullify the prohibition? It is at this point in the argument that R. Yisra'eli introduces the concept of the non-Jew's dominion over his life and his body. The Jew partakes of the divine realm on high and accordingly lacks dominion over his

[52] Walzer, *Just and Unjust War* (above, n. 1), pp. 25-28.
[53] Sha'ul Yisra'eli, *Amud ha-Yemini* (Tel-Aviv, 1966), p. 77.

life and body. Not so the gentile, the Noahide, who exists entirely in this world and therefore has full autonomy over his life and death. "It follows from all this that a Noahide's waiver of the prohibition against bloodshed will be effective," and, accordingly, so will be the agreement of Noahides to permit making war. Yosef Ahituv has trenchantly criticized this use of a metaphysical (and meta-halakhic) distinction between "Israel" and "human," between Jew and gentile.[54] But our interest here is limited to the use that has been made of the concept of autonomy in grounding the concept of legitimate war.

The modern theoretician of war demands the personal consent of each individual at each moment the war is waged. R. Yisra'eli, in contrast, requires only the nations' general consent—a consent that may be inferred, in his opinion, from the very fact that they are accustomed to waging wars. He thus draws an analogy between the situation within a particular state, where national agreement is dispositive and the consent of each individual need not be obtained, and the situation among states, where international agreement determines matters and, once again, there is no need for each individual to consent: "just as the applicable internal law of the state is determined by agreement, so is the applicable law among nations determined by agreement."

Does this international consent really exist? Have all nations undertaken in advance to use warfare as a means of resolving conflict? I don't think so. On the contrary; international agreements declare that war is permitted only against an aggressor, that is, against one attempting to resolve a conflict through warfare. The unfaithfulness of many nations to this agreement cannot transform their acts into "one of the lawful means" and afford them *de jure* legitimacy any more than the existence of numerous thieves—people unfaithful to the agreement prohibiting theft—can afford *de jure* legitimacy to theft. But the claim regarding the

International agreements declare that war is permitted only against an aggressor.

universality of war can be reformulated by reference to the principle of self-defense: warfare is not rendered permissible by the prevalence of forbidden acts of war themselves; it is rendered permissible by the destructive consequences of violence if we sit on our hands and do not defend against it. As R. A. I. Kook wrote, "It would have been absolutely impossible, at a time when the nation of Israel's neighbors were all predatory coyotes, for only Israel to have refrained from making war; for in that event, they all would have gathered and, God forbid, would have wiped out Israel's remnant."[55] Either way, we may conclude that if international practice with respect to such matters should someday change, the halakhic authorization for permitted war would expire of itself, with no need for new religious legislation.[56]

The Interpretive Challenge: Between Jews and Christians

Because of the historical reality of exile, Jewish sources dealing with war concentrate more on historiosophic, theological, and anthropological issues and less on concrete ethical guidance for wartime. Jews showed interested in what the

[54] Ahituv, "The Wars of Israel" (above, n. 45), p. 269. See also A. I Kook, *Da`at Kohen* (Jerusalem, 1993), sec. 199, p. 383.

[55] A. I. Kook, *Iggerot Re'ayah* (above, n. 16), 1, p. 140. Cf. id., *Ma'amrei ha-Re'ayah* (Jerusalem, 1984), p. 508. On the halakhic plane as well, R. Kook understood the authorization to spill blood during warfare as a *hora'at sha`ah* (a temporary, emergency departure from otherwise applicable halakhic norms) (*Mishpat Kohen* [Jerusalem, 1966], pp. 153-154). Accordingly, all the views presented in this section draw heavily on him. R. David Frankel (nineteenth century; commentator on the Talmud of the Land of Israel and author of *Qorban ha-Edah*) hinged the law of war on the halakhic requirement to protect a person pursued by an attacker: if the Torah commanded us to rescue an individual victim from a pursuer, thereby necessarily authorizing the killing of the pursuer, how much more so must it be said to authorize the steps needed to rescue a community. (*Sheyyarei Qorban al Talmud Yerushalmi*, Sotah 8:10.) See also S. Arieli, *Mishpat ha-Milhamah* (Jerusalem, 1972), p. 13.

[56] R. Yisra'eli himself drew this conclusion.

phenomenon of war meant, wondered about the factors that led people to take up the sword, and asked whether war represented humanity's nature or its fall. They dealt less with the political and practical questions related to warfare itself.

As Walzer points out in his article, did not Jews—rabbis as well as laity—in fact experience war throughout the exile? Naturally enough, there are some interesting exceptions to the foregoing statement. Let me present a few of them. The Jews of Spain, for example, enlisted in aid of the conquering Muslims and served them as a guard force. Later, some of them bore arms and defended their towns. R. Samuel Ha-Nagid was a general in the Kingdom of Granada, a warrior and officer who set down his military experience in song and verse. In northern Europe, some Ashkenazi rabbis report on mighty battles waged by persecuted Jews against the crusaders. R. Solomon ben R. Samson vividly described the army of the Mainz community, who "wore armor and bore weaponry, old and young alike"[57] and rose up against their enemies. R. El`azar ha-Roqeiah tells of "an incident in which a large force besieged the city of Worms on the Sabbath, and we permitted all the Jews to take up their arms."[58] He depicted the Jewish heroes as feudal knights, clad in iron armor. Even if we question the factual accuracy of the accounts, we must give weight to the Jew's self-consciousness and self-image as warrior.

So, too, *Sefardi* and *Ashkenazi* sages alike occasionally make laudatory statements about the Hasmoneans and their military accomplishments. R. Abraham Ibn Ezra, for example, writes of "that mighty king, Judah the Hasmonean, who triumphed over the Greeks though at the outset he had neither wealth nor horses."[59] Similar statements appear in the writings of R. Abraham Ibn Da'ud in Spain[60] and R. Eliezer of Belgensi in Germany.[61] Prof. Hayyim Hillel Ben-Sasson's research uncovered an abundance of such illuminating data.[62]

For most of Jewish history, Jewish wars were more a matter of theology than of politics.

Still, these are the exceptions. For most of Jewish history, it was only gentile wars that constituted actual historical reality. Jewish wars were more a matter of theology than of politics. They were waged in sacred writings, set in the distant past; or as birth pangs of the Messiah, set in the distant future. When a Jew waged concrete war, it was against his evil impulse, not against an actual historical enemy. Peace was similarly viewed through a utopian lens, illuminated by the vision of the end of days; it, too, was considered primarily under the rubric of theology.

It is no wonder, then, that post-biblical Jewish sources tend openly to spiritualize biblical texts that speak of war and the sword.[63] The biblical "my sword and my bow" (Gen. 48:22; Ps. 44:7) become, in Aramaic translation, "my prayer and my plea."[64] Isaiah's references to "a mighty man of

[57] A. M. Haberman, ed., *Gezeirot Ashkenaz ve-Zorfat* (Jerusalem, 1990), pp. 30, 97.
[58] El`azar ha-Roqeiah, *Sefer ha-Roqeiah* (Jerusalem, 1960), *Hilkhot Eruvin*, sec. 196, 85.
[59] Commentary on Zech. 9:9-16.
[60] Abraham Ibn Da'ud, *Divrei Malkhei Bayit Sheini* (Mantua, 1514), p. 62.
[61] Commentary on Haggai 2:7-9.
[62] Hayyim H. Ben-Sasson, "The Uniqueness of the Jewish Nation as Seen in the Twelfth Century" (Hebrew), *Peraqim*, 2 (Jerusalem, 1969), pp. 166-168; 177; 214-216.
[63] The following observations are based on the discussion in my book, *Al Da`at ha-Maqom* (above, n. 23), pp. 21-22.
[64] Onqelos on Gen. 48:22; *Midrash Tanhuma*, *Be-Shalah*, par. 9. Cf. *Mekhilta de-Rabbi Yishma`'el*, 14:10; *Babylonian Talmud*, *Bava Batra* 123a.
[65] *Babylonian Talmud*, *Hagigah* 14a; *Megillah* 15b.
[66] *Midrash Tehillim* 45:4.

war" and "those who bring war to the gates" pertain not to armed men in the simple sense but to "those who engage in the argumentative warfare of studying Torah."[65] The hero's sword is understood to mean his Torah;[66] biblical generals become sages and heads of the Sanhedrin;[67] "weapons are the righteous," and even "David's heroes" are manifestations of the King of Israel's mighty spirit "when he is studying in a yeshiva."[68]

This spiritualized internalization of the sources dealing with warfare and might is very widespread in aggadic (as distinct from halakhic) *midrash*.[69] It took on new forms in the Middle Ages, when Jewish philosophers interpreted the scriptural verses as referring to the inner battle among the forces within the soul,[70] while kabbalists read the texts as speaking of divine attributes.[71]

An instructive contrasting parallel may be drawn between these phenomena in Jewish literature and the spiritualized interpretation of scripture developed by Christians. Christianity began with a gospel of *pacifism*. That is the simple meaning of various New Testament statements, most notably the Sermon on the Mount; and early Christians saw themselves in that light and were so portrayed by others.[72] Later, after Christianity had become the Roman Empire's official religion, it developed the doctrine of the "*just war*." Augustine, the leading exponent of the idea, relied on statements of the prophets taken literally, but he had to interpret New Testament statements non-literally.[73] He, too, did so through spiritualization and internalization; but he applied that technique not to verses that spoke of war but to those that spoke of pacifism. All of these verses were interpreted to refer to a person's inner life, to the depths of one's spirit, and not to historical reality.[74] That is the response of a religion that had only recently mounted the political stage and acquired power and dominion, in contrast to a religion that had been removed from that stage for many generations

A third phase in the Christian doctrine of war developed in the Middle Ages, during the Crusades; it involved the transition from "*just war*" to "*holy war*."[75] Here, too, we can observe a degree of contrasting parallelism between Christian and Jewish literature. Jewish memory begins with "holy war" against the idolatrous Canaanite nations. Later, however, the *Mishnah* (*Yadayim* 4:4), and Maimonides following its lead, effectively made the ancient Israelite holy war irrelevant to both the present and the future,[76] and even the historical memory as shaped by the sages has Joshua himself sending dispatches to the Canaanites, offering them the option of making peace. As a practical matter, then, "obligatory

[67] *Yalqut Shim`oni* 2, 141.

[68] *Babylonian Talmud*, *Mo`ed Qatan* 16b. See Shelomo Goren, "Might in Jewish Teachings" (Hebrew) *Mahanayim* 120 (1969), pp. 7-13; Reuven Kimelman, "Nonviolence in the Talmud," *Judaism* 17 (1968), pp. 316-334; D. S. Shapiro, "The Jewish Attitude Towards Peace and War," in L. Jung, ed., *Israel of Tomorrow* (New York, 1946), pp. 220 ff.

[69] See Goren, id.

[70] See, e.g., Jacob Antoly, *Malamed ha-Talmidim* (Lik, 1866), pp. 22b, 31b, 85b; Moses Ibn Tibbon, *Peirush Shir ha-Shirim* (Lik, 1874), p. 14b.

[71] See, e.g., Joseph Giqatillia, *Sha`arei Orah*, *She`arim* 3-4 (interpreting the divine name "*Zeva'ot*").

[72] Geoffrey F. Nuttall, *Christian Pacifism in History* (Oxford: Blackwell, 1958); John Ferguson, *War and Peace in the World's Religions* (London: Sheldon Press, 1977), pp. 101-122.

[73] L. B. Walters, Five Classical Just-War Theories (Hartford CT, 1971); J. Bryan Hehir, "The Just-War Ethic and Catholic Theology," in Thomas A. Shannon, ed., *War or Peace* (Maryknoll NY: Orbis Books, 1980), pp. 3-15.

[74] Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge; New York: Cambridge Univ. Press, 1975), pp. 16-39; Walters, *Just-War Theories* (above, n. 74), pp. 61-62; Nuttall, *Christian Pacifism* (above, n. 72), p. 106.

[75] On the revival of the holy war idea among seventeenth- and eighteenth-century Protestant believers, see Michael Walzer, *The Revolution of the Saints: A Study in the Origins of Radical Politics* (London: Weidenfeld and Nicolson, 1966), pp. 270ff.; John Hick, "Christian Doctrines in the Light of Religious Pluralism," *International Religious Foundation Newsletters*, 3 (1988).

[76] *Mishnah*, *Yadayim* 4:4; Maimonides, *Sefer ha-Mizvot*, pos. 187. See Ha-Kohen, *Halakhot ve-Halikhot* (above, n. 18), pp. 180-203. For an elaboration of this point, see Eugene Korn, "Moralization in Jewish Law: Genocide, Divine Commands and Rabbinic Reasoning," *The Edah Journal, Sivan* 5766 at www.edah.org/backend/JournalArticle/KORN_5_2.pdf***–ed.***

war" exists only in a case of "saving Israel from an enemy," that is, a defensive war; and defensive war corresponds to the "just war" of the European literature, not any longer to the "holy war."

Finally, does the Jewish religious literature allow for a human reaction that might forbid, on moral grounds, even a divinely commanded war? Walzer directs our attention to the religious obligation to obey such a command even if it runs contrary to human notions of morality. He cites the Talmudic account in which King Saul raises a moral argument to justify his failure to obey the divine command to wipe out Amaleq: "even if the adults sinned, in what way did the children sin?"[77] God's response is "do not be excessively righteous." Human moral qualms are here afforded no legitimacy whatsoever.

The Mishnah and Maimonides made the holy war irrelevant to the present and the future.

But that is not the entire picture. In many other midrashic stories about war, the sages interpreted scriptural texts in ways that enhanced the status of a human protest against war and granted it legitimacy *vis à vis* the divine command Indeed, they went so far as to endow one such protest with enduring authority as a fundamental principle.

Let me cite two examples associated in the *midrashim* with two ideal figures: Moses and the Messiah. The story associated with Moses appears in various versions; here is the late, expansive version in *Midrash Tanhuma* 96:3:

> "One finds that the Holy One Blessed Be He revoked his decree for the sake of peace." When? In saying to Moses: "When you shall besiege a city a long time…" [Deut. 20:19], the Holy One Blessed Be He told Moses to destroy them….But Moses did not do so, saying, rather: Should I now go and attack both those who sinned and those who did not sin? Instead, I shall go to them offering peace…. [But] when [Moses] saw that the enemy did not come offering peace, he attacked him. Said the Holy One Blessed Be He: I said "you shall utterly destroy them" [Deut. 20:16], but you did not do so; by your life, as you said, I shall do, as is written: "When you draw near to a city to fight against it, then proclaim peace unto it" [Deut. 20:10].

Moses, like Saul after him, pressed an autonomous moral claim against the heavenly command. (Compare Moses' "Should I now go and attack both those who sinned and those who did not sin" with Saul's "Even if the adults sinned, in what way did the children sin?") But Moses' protest was acknowledged on high,[78] and, in its wake, the *halakhah* was determined for all time:

> "When you draw near to a city to fight against it, then proclaim peace unto it."

A similar point is made in *Midrash Tehillim* 120 with respect to the Messiah:

> "I am all peace; but when I speak, they are for war" [Ps. 120:7]. What is the meaning of "I am all peace"? The Holy One Blessed Be He said to the Messiah, "You shall break them with a rod of iron" [Ps. 2:9]. The Messiah said: "Master of the Universe, no; in peace will I start to speak with the gentiles." It therefore says, ""I am all peace; but when I speak, they are for war"

These *midrashim* vindicate the stance of the autonomous human conscience, as if to suggest an undefined space for a human response barring a divinely ordered war. It is no surprise that R. Isaac

[77] *Babylonian Talmud*, *Yoma* 22b.

[78] The difference between the stories, of course, rests on Amaleq's demonic image and the command to wipe him out. It may also involve the difference between Saul's midrashic image and those of Moses and the Messiah. The latter could not be told "Do not be excessively wicked," as Saul was told after killing the priests of Nob (see *Babylonian Talmud*, id.) and therefore could not be brushed off, as Saul was, with the statement "Do not be excessively righteous."

Aramah, a fifteenth-century Spanish sage, later argued that the Torah's commandment to first call out in peace means more than a formal call for the enemy to surrender. According to Aramah, the command instructs Israel to turn to the enemy with "placating and pleading words, in the most pleasing way possible, to turn their hearts around…*for that is what is required by the human idea of peace, and the divine idea will confirm it*" (emphasis added).[79]

It is as if the Holy One was prepared from the outset to welcome a human initiative to forbid war, anticipating that the initiative would become the basis for a leading concept of "prohibited war" in *halakhah*—i.e., any war not preceded by efforts at peace.

[79] Isaac Aramah, *Aqeidat Yizhaq* (Israel, 1974), sha`ar 81, p. 105.

Meorot
A Forum of Modern Orthodox Discourse

Confronting Evil: Terrorists, Torture, The Military and *Halakhah*

Dov S. Zakheim

Abstract: The international outcry and the rulings of both the United States Supreme Court and Britain's Law Lords regarding prisoner abuse have serious implications for Jews in the military, whether that of Israel, America, or elsewhere. The uncertainties relating to the actual information that might be gleaned from prisoners subjected to torture, and the likelihood that such abuses would generate both *hillul ha-shem* and *eivah*, the latter resulting in danger to Jews everywhere, militate against the use of torture in all but the most extreme circumstances. Only when it is absolutely clear that a prisoner possesses information that could result in the near-term loss of life, the so-called case of the "ticking bomb," is it arguable that prisoner abuse might be tolerated.

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Confronting Evil: Terrorists, Torture, The Military and *Halakhah*

Dov S. Zakheim

On July 29, 2006, the Supreme Court of the United States handed down a landmark decision, *Hamdan v. Rumsfeld, Secretary of Defense et. al.*, holding that, contrary to orders handed down by the Bush Administration, the U.S. government was bound by the provisions of Geneva Conventions with respect to all terrorism suspects held in American custody.[1] The Court rejected an appeals court ruling that "the Conventions do not apply because Hamdan was captured during the war with al-Qaeda, which is not a convention signatory, and the conflict is distinct from the war with signatory Afghanistan." The Court then pointed out that "there is at least one provision of the Geneva Conventions that apply here even if the relevant conflict is not between signatories." Common Article 3, which appears in all four Conventions, provides that, "in a conflict not of an international character occurring within the territory of one of the High Contracting Parties [i.e. signatories] , each party to the conflict shall be bound to apply, as a minimum," provisions protecting "[p]ersons… placed *hors de combat* by...detention." It added that "Common Article 3…affords some minimal protection, falling short of full protection under the Conventions to individuals associated with neither a signatory nor even a non-signatory who are involved in a conflict 'in the territory of' a signatory."

The Court was addressing the constitutionality of special military tribunals that the Department of Defense had established. But in ruling that Common Article 3 governed the law of the United States, it also upheld the binding nature upon U.S. law of other provisions of that article which states, among other things, that "as a minimum," detainees shall "in all circumstances be treated humanely." Common Article 3 continues by explicitly prohibiting "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."[2]

The question of prisoner abuse continues to roil the United States, Britain and Israel in particular, as well as much of the rest of Europe, where it has been alleged that terrorists are being held and tortured in secret prisons. Reports by organizations such as Human Rights Watch and Amnesty International regularly accuse United States servicemen and women of prisoner abuse, while the photographs taken at Abu Ghraib prison, and reports of abuses at other prisons, have seriously tarnished America's reputation throughout the Middle East, and elsewhere.

Although in the first instance, halakhic decisors have addressed the issue of prisoner abuse as it affects the IDF, concerns about the extent to which such abuse might be permissible within a halakhic framework extend beyond Israel's military. Jews serve in America's armed forces, currently at ranks from the lowest levels to that of four-star general, the highest rank in today's American military. They also serve in the armed forces of Britain, France and other western countries. For them, it might be assumed that they must follow orders under their military's code of conduct—in America it is the Uniform Code of

[1] Supreme Court of the United States, *Hamdan v. Rumsfeld, Secretary of Defense et. al.,* http:www.supremecourtus.gov/opnions/05pdf/05-184.pdf, pp. 6-7.

[2] United Nations Office of the High Commissioner for Human Rights, *Geneva Convention relative to the Treatment of Prisoners of War: Adopted on 12 August 1949*, http:www.unhchr.ch/html/menu3/b/91.htm, pp. 1-2.

Military Justice,[3] instructions handed down by each of the armed services, as well as *dina de-malkhuta*, the law of the land.

Yet there are those who argue that "torture" can be defined narrowly, and that even the Supreme Court's decision may not rule out the types of treatment that some American (and British) forces have meted out to imprisoned terrorists.[4] In addition, some argue that that the Geneva Conventions do not really apply to terrorists. The Conventions presuppose the notion of "communality of combat," with prisoners of war being treated as "brothers-in arms…The Geneva Conventions codified practice as it had developed in the 18th century.

The principles of the Geneva Conventions were the product of the 'Western warrior ethos.'

The basic principles of the Geneva Conventions, which were only modified by later Conventions in the 1970s, were thus the product of the 'Western warrior ethos' as it had developed up to the point of the Conventions."[5] On the other hand, terrorists fight in very different ways from those that generated the ethic of the Geneva Conventions. Indeed, it is precisely because terrorists, who are far more willing to die than troops in Western armies, are viewed by troops in those armies as "an other that represents everything the West is not;"[6] they are "simply not legitimate actors….[they are] outside the standards of civilization."[7] As such, they should not be subject to the protections that the Conventions afford. In this regard, it is noteworthy that the United States is perceived as being especially prone to treating enemies as moral inferiors, since "America's great wars have been all-out wars against adversaries, to be treated as criminals and pursued until their total destruction."[8] Indeed, some American experts would continue to take a narrow interpretation of Common Article 3 of the Geneva Conventions, which would, in their view, permit behaviors that others would consider abuse.

Of course, Jews played no real part in the development of the "Western warrior ethos." Nor are they necessarily bound by Western notions of what lies within, or outside, the bounds of "civilized" behavior. Indeed, the so-called "American" notion that an enemy is criminal and

[3] Section 934, Article 134 of the UCMJ states that "all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court martial…and shall be punished at the discretion of that court."

[4] See *Statement of Steven G. Bradbury, Acting Assistant Attorney General, Offcie of Legal Counsel, Department of Justice Before the House Armed Services Committee, U.S. House of Representatives Concerning The Supreme Court's Decision In Hamdan V. Rumsfeld* (July 12, 2006), pp. 7-10; Eric Posner, "Apply the Golden Rule to al Qaeda?," *The Wall Street Journal* (July 15-16, 2006), p. A9; Joseph Margulies, "Wiggle Room on Cruelty," *Washington Post* (July 17, 2006), p. 15. It should be noted that the definition of what is a "terrorist" is not universal, nor is it the subject of agreement by specialists. Moreover, experts do not agree as to whether a terrorist is a criminal or an enemy combatant. There is more agreement as to what constitutes a "terrorist act." For a brief discussion by a leading academic, see Adam Roberts, "The 'War on Terror' in Historical Perspective," *Survival* 47 (Summer 2005), pp. 101-103. Roberts is Montague Burton Professor of International Relations at Oxford. See also James P. Terry, "Legal Aspects of Terrorism," in Trevor N. Dupuy, et. al., eds. *International Military and Defense Encyclopedia* (Washington, DC and New York: Brassey's, 1993), pp. 2732-34. For an attempt to fit terrorism and terrorists within a halakhic framework, see David Rosen, "Does Ariel Sharon Consult His R.?: How Israeli Responses to Terrorism Are Justified Under Jewish Law," http://www,jlaw.com/Articles.html, pp. 5-6, 24-25. Rosen acknowledges that his approach at times involves "broad interpretation of the Halakha" arguing that "desperate times require desperate measures" (p. 53). It is not at all clear, however, whether his definitions or premises are objectively valid, so as to justify his halakhic approach.

[5] Mikket Vedby Rasmussen. "The Prisoner's Reflection: Identity and Detainees in the 'War on Terrorism,'" in Bertil Heurlin, Kristian Soby Kristensen, Mikkel Vedby Rasmussen & Sten Rynning, eds., *New Roles of Military Forces: Global and Local Implications of the Revolution in Military Affairs* (Copenhagen: Danish Institute for International Affairs, 2003), pp. 220-221.

[6] *Ibid.* p. 223.

[7] *Ibid.*, p. 225.

[8] Gilles Adreani, "The 'War on Terror': Good Cause, Wrong Concept," *Survival* 46 (Winter 2004-2005), p. 35.

must be defeated until total destroyed is central to the Torah's attitude towards Amalek or the Seven Nations. Moreover, virtually all[9] decisors who have addressed questions relating to the activities of terrorists against the State of Israel appear to agree that terrorists are of an organized force that seeks the destruction of the State and the murder of Jews because they are Jews—hardly the limited military aims of "civilized" forces.

How then, should Jewish soldiers, whether in the IDF or elsewhere, comport themselves? Does *halakhah* mandate that the individual soldier adopt a broader definition of torture, and seek to avoid involvement in activities that could be interpreted as such? Or given that the provenance of the Geneva Conventions is not central to Judaism, and in light of the beastly nature of terrorists, is there no halakhic imperative to adopt any but the most narrow definition that *dina de-malkhuta* mandates, thereby permitting severe corporal treatment of prisoners?

How should Jewish soldiers, in the IDF or elsewhere, comport themselves?

For Jews the issue actually extends beyond those who serve in their nation's military. Because Judaism offers guidance to all mankind, a concept encapsulated in the phrase *or la-goyim* ("a light to the nations"), it is important to understand not only the halakhic ramifications of prisoner abuse, but also the degree to which such abuse is countenanced within the realm of Jewish *hashqafah* (*weltanschauung*) and values. This question is especially salient in Great Britain and the United States. In Britain, reports of military abuses prompted the Law Lords to rule that evidence obtained through torture is inadmissible. In the United States, apart from the Supreme Court's ruling, the Abu Ghraib and related scandals led to the passage of new, restrictive legislation in the Senate that specifically addressed torture and to which the President, after months of opposition, finally assented (though again there are those who would take a narrow view of the law).

The treatment of prisoners, especially those caught in the war on terror, has received relatively light treatment in halakhic literature. It is a subset of a much larger corpus of responsa that address a host of aspects emerging from Israel's war against Palestinian terrorists. It has been Israel's misfortune to have been engaged in a war on terror for decades before the term was coined, particularly in the aftermath of the Six Day War. As the violence has persisted over the years, the responsa literature relating to terrorism has grown accordingly to include, as noted, some discussion of the treatment of prisoners.

The Biblical and Talmudic Legal Context

"With the exception of the Black Death," writes Vladimir Bukovsky, who spent about a dozen years in Soviet prisons, labor camps and psychiatric hospitals, "torture is the oldest scourge on our planet."[10] The Torah is emphatic about the humane treatment of both Jews and non-Jews who are subject to any form of corporal punishment. It places a firm limit upon the number of lashes to be meted out to Jewish criminal offenders, regardless of the violation that they have committed. No one can receive more than thirty-nine lashes, "lest being flogged further, to excess, your brother be degraded before your eyes."[11] Seforno was quite graphic about the meaning of degradation: excessive lashes would cause the prisoner to wet or soil himself on account of the pain to which he was being subjected.

The Torah's concern for human dignity extends beyond the Jew's lifetime. It expressly prohibits allowing the corpse of a convicted blasphemer or

[9] I have been unable to find a single decisor who views terrorists as merely criminals. Adreani considers terrorists to be criminals: see *id.*, pp. 40-43. The author is Head of Policy Planning at the French Defense Ministry.

[10] Vladimir Bukovsky, "Torture's Long Shadow," *The Washington Post* (December 18, 2005), p. B1.

[11] Deuteronomy 25:3.

[12] Thus Nahmanides on Deuteronomy 21:22.

idolater[12] to remain hanging for any length of time. As Rashi points out, because man is made in the image of his Creator, to humiliate his body is to demean the heavenly King.[13]

While the Torah had less to say about the treatment of non-Jews, it did so in one very specific case, that of the *yefat to'ar*, the non-Jewish female prisoner of war who had been raped in the heat of battle.[14] The Torah was emphatic about the subsequent treatment of this woman. It specifies that if the soldier who brought her home elected not to marry her, she could not be sold as a slave or mistreated in a demeaning manner.[15] For those commentators and decisors who consider the first sexual encounter to have taken place prior to her conversion, it is clear that the biblical injunction applies to the *yefat to'ar* in her status as a non-Jew (*be-goyutah*).

This sensitivity to human dignity, even in the case of a captive non-Jewish female, stood in marked contrast to the behavior and attitudes of the rest of the ancient world. For example, the firm biblical limit on the number of lashes applied to a prisoner was unique among all ancient Near Eastern peoples and their legal codes.[16] Far more common were the practices of the Romans, whether as pre-Republican kingdom, Republic or Empire. At a time when the kingdoms of Judah and Israel were still functioning entities, Tullus Hostilius, one of the seven Roman kings who preceded the creation of the Roman Republic, ordered that a traitor should be "suspended by a rope from a gallows, he shall be scourged whether inside or outside the *pomerium*."[17] Death invariably followed. During the Republic, torture was used to corroborate a slave's testimony. The assumption underlying this practice was that slaves could not be trusted to reveal the truth voluntarily, and in this case the slaves were not killed. Nevertheless, the contrast with the biblical emphasis on protecting the slave from permanent bodily harm is profound.

To humiliate man's body is to demean the heavenly King.

During the Empire, capital crimes were often dealt with by means of torture prior to death. For example, it was decreed that "persons who are privy to the art of magic shall be…thrown to wild beast or crucified. The magicians themselves are burned alive."[18] In contrast, biblical and talmudic law stressed the importance of administering the death penalty with a minimum of anguish for the convicted criminal.

Physical Abuse Of Prisoners In Bible And Talmud

The Bible provides some accounts of the physical abuse of non-Jewish as well as Jewish prisoners. Such abuse was geared to humiliation and retribution. For example, Judges 1:6-7 recounts the story of King Adoni Bezeq, who, following the

[13] *Ibid.* 21:23.

[14] It is the consensus of many *halakhic* decisors that the *yefat to'ar* can be subject to involuntary intercourse, though only once, after which she must undergo a specific regimen prescribed in the Torah, conversion and marriage, before her captor is permitted further sexual relations with her. There is a dispute among *rishonim*, pre-sixteenth century decisors, regarding the venue of the initial sexual relationship. Some argue it can take place on the battlefield; others state it must take place elsewhere; still others maintain that relations on the battlefield prior to conversion can only take place with the woman's consent. There are others who are of the view that even the first sexual contact can only take place after the regimen, conversion and marriage. For a complete discussion see R. Shlomo Yosef Zevin, et. al., eds., *Intsiqlopediyah talmudit: le-inyanei halakhah,* Vol. 25 (Jerusalem: Talmudic Encycolpedia, 2002), especially columns 30- 34

[15] Deuteronomy 21: 10-13.

[16] Jeffrey H. Tigay, *JPS Torah Commentary: Deuteronomy* (Philadelphia & Jerusalem: Jewish Publication Society, 1996), p. 230.

[17] Cited in Naphtali Lewis and Meyer Reinhold, eds. *Roman Civilization: Sourcebook I: The Republic* (New York: Harper & Row, 1966), p. 62.

[18] Paulus, Opinions, cited in *Ibid.: Sourcebook II: The Empire*, p. 549.

[19] Yehuda Elitzur, *Da'at Miqra: Sefer Shofetim* (Jerusalem: Mosad Harav Kook, 1993), p. 8. Elitzur notes that the original practice was to slice off the right thumbs of the vanquished to prevent them from ever using a sword.

usual Canaanite practice,[19] would cut off the thumbs and big toes of the kings whom he had defeated and captured. When the soldiers of Judah defeated and captured him, they sliced off his own thumbs and large toes. The king himself acknowledged that he had suffered retribution for the humiliation that he had inflicted on others: "I had seventy kings, with thumbs and big toes removed, gathering (scraps) under my table; as I did so the Lord has repaid me."[20]

Similarly, in retribution against King Zedekiah of Judah for breaking his vow not to rebel against Babylonia, King Nebuchadnezzar blinded Zedekiah after first forcing him to watch the execution of his sons.[21] The *midrash* notes that watching his sons being put to death was a worse form of torture than being blinded himself.[22] Interestingly, both Adoni Bezeq's victims and Zedekiah both survived their ordeals, though Adoni Bezeq may have died from his injuries.[23]

The pain of lashes is more terrifying than death.

The *Bavli* discusses a form of torture for prisoners which actually relates to capital punishment. A multiple offender who was liable each time for the punishment of *karet* (premature death) can be placed in a "cramped cell that has no room for him either to stretch or lie down."[24] He is then fed bread and water until his stomach shrinks, and then barley and water until it bursts and he dies.[25] However, such a case appears to have been unusual in that the guilty individual would already have received lashes twice, and was sufficiently recidivist to have been deserving of lashes a third time.[26]

The *Bavli* also reflects upon torture and physical abuse with respect to the miraculous escape of Hananiah, Mishael and Azariah and the death of R. Akiva. Hananiah, Mishael and Azariah did not actually face torture, but rather were threatened with the death penalty if they did not worship Nebuhadnezzar's golden idol. Precisely because they were prepared to face death, Rav argues that if Hananiah, Mishael and Azariah had been subject to lashes they indeed would have worshipped the golden image that had been placed before them.[27] Since they were righteous men and were prepared to meet their death rather than commit idolatry, the Talmud infers that the pain of lashes, i.e. torture, is more terrifying to a prisoner than death.

In a case that *Tosafot* notes leads to the opposite conclusion (i.e., that torture does not bring about desired behavior on the part of a prisoner), the Talmud recounts R. Akiva's willingness to endure being raked by iron combs for publicly teaching Torah in the face of the Roman edict to the contrary. Although, he was tortured until he died in line with Roman practice noted above, R. Akiva never lost his composure or his faith. Indeed, he viewed his torture as an opportunity to fulfill the commandment of loving God "with all his soul" that otherwise would have eluded him.[28]

All of the aforementioned instances involve torture inflicted *upon* Jews. They do not address the question of torture inflicted *by* Jews upon others,

[20] Judges 1:5-6

[21] 2Kings 25:6-7; Jeremiah 52: 9-11.

[22] Dictum of R. Shimon. See *Yalkut Shim`oni*, Vol I : Section 735 (Jerusalem, n.p. 5740 [1980]), section 735, p. 480.

[23] Regarding Adoni Bezeq, see Judges, id. R. Yohanan states that Nebudchadnezzar predeceased Zedekiah, see *Mo`ed Qatan*, 28b

[24] *Sanhedrin* 81b.

[25] Charles J. Harary, "Incarceration as a Modality of Punishment," (http://www.jlaw.com/Articles/ch_incarceration.html), pp. 4-5.

[26] *Id.*

[27] 33b.

[28] *Berakhot* 61b.

[29] To be sure, the case of Adoni Bezeq does recount torture inflicted by Jews, but, as noted, the torture was intended as punishment rather than to obtain information or a behavioral change.

as was the case with respect to Adoni Bezeq.[29] While the issue might have been dealt with on a theoretical basis, as were so many other matters over the centuries, this does not appear to have been the case. It was with the establishment of the State of Israel that the treatment of prisoners became a salient halakhic matter.

As noted above, there has been relatively little *halakhic* discussion about the treatment of imprisoned terrorists. The literature has focused instead on two particular sets of issues relating to terrorists. The first involves responses to hostage-taking, a long-standing bane of Jewish existence that has evolved into a major form of terrorist activity—Israel re-invaded both Gaza and Lebanon in June-August 2006 in response to the taking of hostages by the terrorist organizations Hamas and Hezbollah. The second relates to questions of risk with respect to potential terrorist activity. Both sets of issues provide the context, as well as indications of some of the parameters, within which issues relating to the treatment of imprisoned terrorists might be evaluated.

Trading For Lives; Risking Lives

Among the earliest developments that prompted rabbinic discourse with respect to Israel's response to terrorism was the rash of hostage-taking—affecting Jewish civilians of various nationalities as well as Israeli soldiers—that first broke out in the early 1970's. Hostage-taking is nothing new to the Jewish community. For centuries, indeed, as far back as talmudic times, Jews found themselves confronting demands both to hand over an individual Jew to forestall the extermination of an entire Jewish community or to pay exorbitant sums for the release of their imprisoned rabbi and leaders (*pidyon shevuyim*). The talmudic ruling was unequivocal, and set the pattern for future behavior on the part of Jewish communities everywhere: "We do not redeem captives for more than their value. This is an enactment for the protection of society."[30] The primary rationales given for this ruling were that excessive payment for any individual might impoverish the community and that redemption would encourage yet more hostage-taking. The majority of authorities adopted the latter reason: captives should not be redeemed for more than their value so as to discourage future abductions.[31] This rule was circumvented only in limited circumstances, such as the redemption of one's wife, or by particular communities in special circumstances.[32]

With the State of Israel, the treatment of prisoners became a salient halakhic matter

The taking of hostages by Palestinian terrorists differed from the classic question of freeing Jewish prisoners in a number of respects. First, the State of Israel possessed a powerful military that had the ability to free the hostage by force. The key issue in the context of such operations was that of collateral damage—whether the attempt to free hostages was worth the risk both to the hostages

[30] *Gittin* 45a.

[31] R. Avraham I. Halevi Kilav, "Releasing Terrorists," trans. R. Ezra Bick, in Ezra Rosenfeld, ed. *Crossroads: Halacha and the Modern World*, Vol. I (Alon Shvut: Zomet, 1987), pp. 207, 209. R. Kilav cites two views regarding the determination of value. According to Maharam Lublin, it remains the Mishnaic standard in *Gittin*, namely, the value that an individual is worth in a place where the slave trade exists. According to Radbaz, value is determined by the prevailing accepted cost to ransom non-Jewish captives. R. Kilav then asserts that "if the terrorists demand more people than is *common practice* [my italics], it will be forbidden according to all opinions. In fact, there is no "common practice." Demand is a function of a variety of factors, which, in the aggregate, represent the bargaining power of the terrorists' sponsors or commanders.

[32] See Maharshal's praise of the Jewish community of Turkey (*Yam shel Shelomoh*, on *Gittin* 45a, section 66). Maharshal noted, however, that Maharam of Rothenberg refused to be redeemed, because it would encourage the practice of taking scholars hostage. Indeed, Maharshal notes he heard that Maharam's captor, presumably Emperor Rudolph I, was planning the abduction of Maharshal's greatest student, the Rosh. As a result of this threat, Maharam concluded that not only would the community be totally impoverished but that "Torah would be forgotten in Israel." For a discussion of the various positions taken by decisors with respect to redemption of one's wife see Kilav, "Releasing Terrorists," pp. 202-206.

themselves and to the soldiers attempting to free them.

Second, terrorists did not necessarily take hostages for monetary gain. More frequently it was to force the release of their confreres from Israeli jails. At issue, therefore, was the risk that releasing terrorists, and particularly the large numbers that the hostage-takers demanded in exchange for a small number of hostages, would encourage their organizations to take even more hostages in the future. Moreover, there was the risk that the very terrorists who were released might strike again against Israeli military and civilian targets. Finally, if the hostages in question were members of the Israel Defense Forces, there was the question of whether the state had a special obligation to free them regardless of cost, because they were acting on the State's orders.

The issue of whether to risk the lives of hostages, and of the troops attempting to rescue them, gained special prominence in the context of the Entebbe Operation of July 4, 1976. R. Ovadiah Yosef addressed the question in a lengthy responsum that he had begun to write prior to the rescue but did not complete until after the military operation had taken place.[33] Citing the classic Talmudic ruling that it was permitted to violate the Sabbath in order to deter an attack planned by gentiles against Judaean cities,[34] R. Yosef considered hostage-taking to be a threat to the State itself. Moreover, R. Yosef contended that numerous scholars including Maimonides[35] and R. Joseph Karo[36] had argued that the talmudic ruling applied even if there were only a potential danger to life (*safeq nefashot*). As a consequence, R. Yosef asserted that in the case of the Ugandan hostage crisis, where life was no doubt at risk, the planned rescue was permitted "as long as the operation was sufficiently well-planned by military experts so that it was almost certain that God would grant them success."[37] R. Yosef did not rule out "surprises," i.e., he recognized that no planned operation could guarantee success, nor did he discount the likelihood of casualties. He acknowledged that there was danger attendant upon all military combat. Nevertheless, he ruled that such danger did not override the imperative to carry out a rescue operation.

The threat to the hostages was immediate, while the threat posed by the terrorists was less certain.

Although he argued that the rescue operation was permissible, R. Yosef had been prepared to support the release of the hostages in exchange for the four Palestinian prisoners demanded by the terrorists. In his view, the threat to the lives of the hostages was immediate, while the threat posed by the released terrorists was longer term and less certain.[38] Indeed, he felt that there was no certainty that "the released terrorists would return to their murderous activities in Israel after they had suffered for their evil intentions."[39]

However R. Yosef's ruling regarding the release of terrorists provoked both dissent and criticism. R. J. David Bleich argued that R. Yosef "ignores the fact that the release of terrorists in order to save the lives of hostages is not the act of a third party who is himself free of danger. The government officials and the citizens who must release the imprisoned guerrillas are themselves among the potential victims of possible terrorist activity."[40] In fact, R. Yosef clearly did recognize the danger to the community—of which the government is most certainly a part. Rather, in weighing the need to

[33] Ovadia Yosef, *Responsa Yabia Omer*, Vol. X (Jerusalem: Me'or Yisrael Institute, 5764/2004), p. 471-83.
[34] *Eruvin* 45a.
[35] *Mishneh Torah,Hilchot Shabbat*, 2:23.
[36] *Kesef Mishnah* ad loc, note 24, "*Ve-afilu*."
[37] R. Yosef, above, n. 33, p. 483.
[38] *Id.*, pp. 473, 479
[39] *Id.*, p. 474.
[40] J. David Bleich, *Contemporary Halachic Problems*, Vol. II (New York: Yeshiva University/Ktav, 1983), pp. 225.

eliminate the clear and present danger to the hostages against the uncertain likelihood of future terrorist attacks at some unspecified time, R. Yosef opted for the more urgent demand. [41]

In an argument akin to that of R. Bleich, R. Shlomo Goren made a powerful case against the May 20, 1985 release of 1150 imprisoned terrorists in exchange for three Israeli soldiers held by Ahmad Jibril's Popular Front for the Liberation of Palestine. Basing himself on rulings by Maimonides, Nahmanides, Rashba, Me'iri and the *Shulhan Arukh* among others, R. Goren argued that the "price" of the exchange was exorbitant even if the hostages' lives were in danger.[42] Moreover, he asserted that even *Tosefot,* who appeared to tolerate an excessive payment for a hostage, would not do so in the case where the price involved not money but rather the release of terrorists who could further endanger the community.[43] Nevertheless, in spite of the case he had made, R. Goren felt that the fact that the hostages were Israeli soldiers represented a special circumstance: the State had an obligation to free those who were captured in the course of carrying out its orders, regardless of cost.[44] It can be inferred, however, that in the case of the Entebbe hostage-taking, he, like R. Bleich, would not have supported yielding to the terrorists' demands.

Not all rabbis followed R. Goren in distinguishing between releasing terrorists to secure the freedom of military hostages and doing so to free civilians. For example, R. Avraham Kilav argued that the prohibition against releasing terrorists in exchange for hostages was all-encompassing. He asserted that "we are in a continual state of war with the terrorists, and it is a principle of war that we do not allow danger to soldiers to be an overwhelming factor in military decisions."[45] To support his view, he cited Nahmanides' commentary on Deuteronomy that discusses conditions in which those afraid of death are dismissed from the ranks of the fighting force.[46]

Yet that very discussion in Deuteronomy points to a very real concern about soldiers' morale, and the impact of an individual's skittishness upon the psychology of his military unit. As the Torah puts it: "Let him go back to his home lest the courage of his comrades flag like his" (literally, that he should not soften the hearts of his brothers as his heart [has softened]."[47] The Torah's dictum is one that has been widely accepted in all militaries for millennia.

Military leaders have seen high morale not only as a characteristic of successful fighting troops, but as a major cause of that success.

It was recognition of the compelling importance of troop morale, and its impact upon force effectiveness, that impelled R. Yuval Sherlow to permit the exchange of four hundred prisoners for three soldiers held hostage. R. Sherlow acknowledged that, in principle, *halakhah* forbids such exchanges even when life is endangered because of the future danger that the freeing of terrorists would engender. In that regard he appeared to reject R. Yosef's hypothesis that prison would alter the terrorists' behavior and instead seemed inclined to adopt R. Bleich's position. Nevertheless, in R. Sherlow's view what ultimately mattered was not only the unique status

[41] R. Yosef*, op. cit.*, p. 473.

[42] R. Shlomo Goren, *Sefer Torat ha-Medinah* (Jerusalem: Idra Rabba, 1996), pp. 426-27, 31-32.

[43] *Id.*, pp. 434-35. R. Goren argued that the only solution was to impose the death penalty on terrorists; his advice has not been heeded.

[44] *Id.,* pp. 435-36.

[45] Kilav, "Releasing Terrorists," p. 210.

[46] *Id.* R. Kilav does not cite chapter and verse. It appears he is referring to Nahmanides' statement that "in the natural course of things in all wars people die even among the victors" (on Deuteronomy 20: 5)

[47] *Id.* 20: 8.

of the armed forces as agents of the State, as R. Goren had postulated, but, equally important, the necessity "to protect the future morale of the military."[48]

R. Sherlow's rationale reflects modern military analysis in general and the nature of the IDF in particular, and it goes to the heart of what it takes to have an effective military. It is not merely that the State has an obligation to its troops, as R. Goren postulated. Rather, "military leaders have long seen high morale not only as a characteristic of successful fighting troops, but as a major cause of that success."[49] This recognition has grown markedly in recent years, especially since the World War II victories of British Field Marshals Montgomery, Slim and Wavell.[50] Morale is especially crucial to the performance of the IDF, which has a small standing army and is outnumbered by its potential enemies.[51] Thus, for the military to continue to function as an effective fighting force, it is critical that everything be done to preserve both individual and unit morale, including making exceptions to what *halakhah* appears to mandate under other circumstances.

Whether a released terrorist will resume his or her violent behavior comes into play when evaluating the permissibility of prisoner abuse

The rulings by Rabbis Goren and Sherlow clearly indicate that circumstances relating to terrorists may be unique, particularly when they involve the military. The obligation to provide for the military differs from the obligations affecting ordinary citizens, and the need to ensure that military morale remains high can trump considerations that might apply in other circumstances. These factors, as will be shown, also affect evaluation of the permissibility of torture when imprisoned terrorists are involved.

R. Eliashiv's Rulings and the Risks Posed by Terrorists

R. Ovadiah Yosef's view that priority should be given to dealing with an immediate threat over a potential future threat has drawn important support in a more recent case that was brought to the attention of R. Sholom Yosef Eliashiv. R. Eliashiv, currently recognized as the leading halakhic decisor for the *Haredi* community, was asked to comment on a case involving two guards, one of whom who had been seriously wounded by a terrorist. The terrorist then disappeared into an adjacent Jewish settlement. The soldier who had not been hit had to make a most difficult choice: should he remain in place and attend to his wounded comrade, or should he pursue the terrorist, who might wreak havoc in the Israeli township and leave his partner to die?

R. Eliashiv ruled that the unscathed soldier should remain behind to attend to the wounded guard. The latter's life was clearly in danger and it was imperative to save him. On the other hand, a number of factors rendered the danger to the community considerably less than certain and otherwise warranted tending first to the wounded soldier.

First, it was not at all clear that the soldier would apprehend the terrorist even if he gave chase. In the meantime his comrade would die. Moreover, even if he were to find and confront the terrorist, the terrorist might kill him first. In addition, there were other security forces that were pursuing the terrorist to apprehend him. On the other hand, no one but the healthy guard could save the wounded soldier. Finally, it was uncertain whether the

[48] Moreshet, "*She'eilot Uteshuvot* On Line," http://www.moreseht.co.il/web/shut2.asp?id=31319. It is noteworthy that R. Shlomo Zalman Auerbach permitted soldiers even to risk their lives to retrieve their dead comrades due to the negative impact on their morale should they conclude that they too would be abandoned if they perished on the battlefield. Cited in R. Yehuda Zoldan, "*Histaknut Le-Tzorech Hava'at Hallelei Milhamah Li-Qevurah*," *Tehumin* 25 (5765/2005), p. 424.

[49] Frederick J. Manning, "Morale," in Dupuy, et. al. eds., *International Military and Defense Encyclopedia*, p. 1858.

[50] For an extended discussion see Reuven Gal, "Unit Cohesion," in *id.*, pp. 2821-25.

[51] Dr. Gal was director of the Israeli Institute of Military Studies.

terrorist would actually kill anyone else—an assumption that underlay R. Bleich's critique of R. Yosef.[52] As will be outlined below, the critical question of whether it should be assumed that a released terrorist will resume his or her violent behavior comes into play when evaluating the permissibility of prisoner abuse.

On another occasion, R. Elyashiv was asked whether it was permissible to kill a suspicious-looking character who might be a suicide bomber. The case in question involved a bus driver whose route through the Jordan Valley had been subject to terrorist attacks. A man attempting to board the bus displayed behavior patterns attributable to a suicide bomber. Could the driver shoot to kill?

How do you make a prisoner talk if you do not torture him?

R. Elyashiv responded that unless the driver was certain beyond any shadow of doubt that the putative passenger was not Jewish, he was not permitted to kill him. The driver would be permitted to wound the would-be assailant, even if it appeared that he might be Jewish, if the suspect's behavior truly provided a basis for the driver to conclude that he might be a suicide bomber.[53] If, however, there was an insufficient basis for suspecting that the man boarding the bus was a suicide bomber, he could not be physically harmed.

R. Eliashiv's rulings clearly indicate that one must account for any elements of doubt (*safeq*) that might affect responses by the military or civilians to potential or actual terrorists and their activities. In particular, his ruling regarding terrorist recidivism raises important questions about the assumptions that might be made when interrogating imprisoned terrorists. While the *sfeiqot* themselves can be said to apply only to the particular cases he addressed, R. Eliashiv's evocation of the principle of accounting for doubt has important implications for evaluating the military utility of harsh treatment of prisoners. These will be addressed below.

Is Physical Abuse Permitted In Jewish Law?

The treatment of imprisoned terrorists poses a special challenge for *halakhah*. It views terrorists as a particularly noxious enemy; even R. Yosef, who appears to hold out hope for a terrorist's rehabilitation, nevertheless is prepared to circumvent a number of statutes to prevent terrorists from taking lives.[54] Moreover, the status of prison itself is ambiguous in Jewish law.[55] Finally, what *halakhah* might mandate with respect to killing terrorists may not be directly applicable to situations where they are imprisoned and subject to harsh interrogation. Nevertheless, a number of the foregoing considerations regarding both the nature and context of responses to terrorist activities and the framework for responding to potential acts of terror, whose certainty cannot be forecast, could affect the calculus of whether and under what circumstances the physical abuse of imprisoned terrorists might be permissible in Jewish law.

There is no doubt that, over the centuries, many have seriously asked, as a leading Iraqi notable told a member of the short-lived (2003-2004) Coalition Provisional Authority, "how do you make a prisoner talk if you do not torture him?"[56] Yet, as a first principle, it is clear that wanton abuse is not permitted by *halakhah* under any circumstances. R. Sherlow asserts that the blanket prohibition on such abuse, and indeed, the guiding principles for

[52] Yosef, *op. cit.*, p. 473.

[53] *Id.*

[54] See *Responsa Yehaveh Da`at* vol. 5, no. 55 (Jerusalem: 5743/1983), where R. Yosef permits female teachers to bear arms, and even dress like men, in order to forestall terrorist attacks.

[55] See R. Sholom D. Lipskar, "A Torah Perspective on Incarceration as a Modality of Punishment and Rehabilitation, "*Jewish Law Articles*, http://www.jlaw.com/Articles/PrisonerRights.html), and Harary, "Incarceration".

[56] Rory Stewart, *The Prince of the Marshes: And Other Occupational Hazards of a Year in Iraq* (New York: Harcourt, 2006).

the treatment of prisoners, derive from the biblical laws of *yefat to'ar*, the so-called "beautiful captive" discussed above and described in Deuteronomy chapter 21.[57]

Turning to the question of a prisoner who might possess valuable information related to the nation's security, R. Sherlow then adds that if such information might save lives, there is no doubt that the prisoner can be subjected to maximal pressure. Even so, R. Sherlow delimits just what is meant by such pressure: "Of course we are commanded to deal with every individual with due respect, and it is explicitly forbidden to degrade him, since it is written, "precious is the man who was created in God's image." [58]

At first blush, R. Sherlow's guidelines appear to be internally inconsistent. How can so-called "maximal pressure" be applied even as a man is "respected"? The answer, of course, is that degradation, whether through extreme physical abuse or even along the lines of the now-notorious photos associated with the treatment of prisoners at Iraq's Abu Ghraib prison is simply not permitted. Indeed, Vladimir Bukovsky's experience sheds light on the acceptable limits of "maximal pressure." Bukovsky, the former Soviet prisoner, notes that the practices lumped together in the more frequently used term, "cruel, inhumane or degrading (CID) treatment" (which some policy makers seem prepared to tolerate at least to some degree and which could be confused with "maximal pressure") is no different from torture pure and simple. "As someone who has been on the receiving end of the 'treatment' under discussion," he writes," let me tell you that trying to make a distinction between torture and CID techniques is ridiculous."[59] "Maximal pressure" must therefore be something less than CID, since it is difficult to argue with someone who been at the receiving end of CID that it somehow is not torture. Bukovsky and others have pointed out that CID seeks to destroy self-respect and human dignity.

The distinction between torture and CID is ridiculous.

Considerations of human dignity do not exhaust the bounds of what might be permissible during prisoner interrogations. To begin with, there is the question of dealing with uncertainty (as opposed to the "ticking bomb", which will be discussed below). It was uncertainty about the future behavior of imprisoned terrorist suspects that prompted both R. Yosef's ruling regarding prisoner exchanges and R. Eliashiv's ruling with respect to the wounded soldier and the escaping terrorist. Of course, those rulings address a different set of circumstances. Nevertheless, given the biblical injunctions against degrading even the idolater, the question of uncertainty must be addressed when contemplating the use of physical pressure against a putative terrorist.

It is arguable that in the case of a prisoner who might be the source of vital intelligence regarding future terrorist attacks, a number of uncertainties could militate against pressure of any kind, much less "maximal pressure." Such pressure could have the opposite of its intended effect, i.e., that the desired intelligence would *not* be obtained, or worse still, as will be discussed below, that it would serve as a rallying cry for new recruits to the terrorist cause. Thus, while the uncertainties in question are not identical to those cited by Rabbis Yosef and Eliashiv, the principle underlying them—maximal protection of Jewish lives—is identical.

Those in charge of extracting information from a prisoner who is a presumed terrorist first must demonstrate a real basis for assuming that he/she possesses information that can help foil a future

[57] Deuteronomy 21:18.

[58] Moreshet, "*She'eilot Uteshuvot* On Line," http://www.moreshet.co.il/web/shut2.asp?id=16652

[59] Bukovsky, "Torture's Long Shadow," p. B1. It is noteworthy that the NKVD was succeeded by the now better-known KGB and was preceded by the czar's *Okhrana*. Torture was a standard *modus operandi* for all three organizations.

terrorist attack. It has often been found that, in fact, some prisoners who are arrested as part of large sweeps prove to be only innocent victims of circumstance: They were merely in the wrong place at the wrong time

Moreover, even if those captured are known terrorists, they may simply be foot soldiers in organizations that have become increasingly highly compartmented. In other words, such prisoners may never have had access to plans or information of any kind other than for the particular attack they undertook and in the course of which they were captured. It is to these sorts of prisoners that R. Yosef most likely refers when he speaks of the reforming nature of prison.

Terrorists train themselves to provide false or misleading information

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Second, if the prisoner does possess information about future plans or attacks, it is not always clear that he or she will actually provide it, even when faced with the prospect of torture or undergoing torture. It is well known that terrorists train themselves (as do key individuals in the armed forces of the West) to provide false or misleading information when subjected to forcible means of interrogation.

As the above-noted case of R. Akiva and those of others of his fellow *asarah harugei malkhut* (the ten great rabbinic martyrs) indicate, torture is an ineffective means of breaking a prisoner's will. Moreover, with respect to the talmudic assertion that Hananiah, Mishael and Azariah preferred death to torture, and, if confronted with the latter, would have worshipped Nebuchadnezzar's idol, *Tosafot* argue that they would have contemplated doing so only because the statue was really meant to honor the king, rather than a deity. Had it been a true idol, *Tosafot* assert, they, like R. Akiva, would have been impervious to the suffering inflicted upon them.[60] Such behavior is analogous to that of prisoners who provide misleading information to avoid torture; after all, the Babylonians would have assumed the three righteous men were at last capitulating, when in fact their behavior (much like those of the *conversos* in Spain two millennia later) was an insincere artifice.

Third, even if there were some way to ensure that whatever information a prisoner volunteered under duress would prove to be true, that information might not embody what is termed "actionable intelligence." That is to say, the information might not be of any use in foiling a future attack. Indeed, former American prisoners of war, such as Tom Moe and Senator John McCain argue that, as Senator McCain has put it, "abuse of prisoners often produces bad intelligence because under torture a person will say anything he thinks his captors want to hear—whether it is true or false—if he believes it will relive his suffering."[61] Senator McCain recalls that when "physically coerced to provide my enemies with the names of the members of my flight squadron, *information that had little if any value to my enemies as actionable intelligence* [my emphasis]…I gave them the names of the Green Bay Packers' offensive line."[62]

Moreover, circumstances might have changed since the terrorist was caught and incarcerated and an attack might no longer be imminent. Indeed, circumstances might have changed *precisely because* that terrorist was caught. Such a development would be akin to R. Eliashiv's surmise that, for whatever reason, an escaped terrorist might not kill again.

Alternatively, the intelligence might not be actionable because it is not timely. This might be due to several factors. For example, the terrorist's parent organization may have revised its plans prior to, or during, the terrorist's capture, but also prior to his or her being aware of a change of plans. Whatever the reason, the information provided by the terrorist would prove to have been

[60] *Tosafot* acknowledges that the text in Daniel appears to refer to a real idol, but does not modify the basic argument.
[61] Senator John McCain, "Torture's Terrible Toll," *Newsweek* (November 21, 2005).
[62] *Id.*

made available too late to prevent another terrorist attack.

It is arguable that unless all of the foregoing uncertainties can be disposed of, R. Sherlow's legitimation of the use of maximal pressure may not be applicable. For that sort of pressure is meant to yield something useful, and it is not at all clear that anything useful will be forthcoming. On the contrary, it is the view of senior intelligence specialists that it is far more effective to engage a suspect rather than physically pressure him or her in order to obtain critical information necessary to forestall future attacks.[63] This is particularly the case with respect to hardened terrorists who have undergone rigorous training and therefore behave more like professional military people. As Charles Zuhoski, another former prisoner of war, who, like John McCain was a Navy pilot shot down over Vietnam, recalled: "people were always ready to sign confessions under torture, but nobody provided real information that could be used. We learned how to lie."[64] So do terrorists in their training camps.[65]

War is an area of modern social behavior that ethics as a discipline has failed to successfully regulate.

A second set of considerations arises from the possibility that physical abuse could lead to the death of a prisoner. This has allegedly been the case on a number of occasions during the Iraq insurgency, all of which are currently under investigation. R. Shlomo Goren, citing the biblical case of Simon and Levi's attack on the men of *Shekhem*, as well as the behavior of the kings of Israel, argues that there is a "moral imperative appropriate to questions of human life, even in the cases of non-Jews or idolaters."[66] The "teaching of the pious" is based on the divine attribute of mercy, which should be followed even during war, even if it contradicts the attribute of law."[67]

Similarly, R. Michael Broyde has written that "frequently Jewish law will conclude that certain activity is completely legal, but is not ethically correct." He adds that war is an area of modern social behavior that "ethics as a discipline has failed to successfully regulate" and that it is forbidden to "use more force than is minimally needed."[68] While R. Broyde's latter observation could apply in the case of almost all imprisoned terrorists, his view and that of R. Goren would appear to apply most directly to cases where a purported terrorist might actually be the victim of a larger "sweep," or might be a "foot soldier" who might well change his ways upon release from prison.

R. Yehuda H. Henkin argues that killing a bound or chained prisoner is a *hillul ha-Shem*—a desecration of God's name. He offers two distinct reasons for his ruling. First, the international community might not understand that a seemingly odious practice was permitted under Jewish law. As an example, he cites the case of Joshua's decision not to kill the Gibeonites after they tricked him into signing a treaty with them. R. Henkin observes that, strictly speaking, the Gibeonites, as one of the Seven Nations of Canaan, should have been subject to extermination. Nevertheless, he asserts,

[63] Interview with a former Director of the National Security Agency, September 2005

[64] Interview with author, August 2006

[65] In this regard, they differ from ordinary criminals who might crack under pressure from police interrogators.

[66] It would seem that there is a contrary biblical example, i.e., Samuel's execution of the Amalekite king, Agag. But it is arguable that the treatment of Agag cannot be a precedent for relations with other nations since Jews are commanded to exterminate all Amalekites. Samuel was therefore simply implementing a death penalty that should have been carried out on the battlefield.

[67] See R. Shlomo Goren, "Combat Morality and the *Halacha,*"in Rosenfeld, ed. *Crossroads*, Vol. I, pp. 223- 226 (the quotation is from p. 225), and p. 231.

[68] Michael J. Broyde, "Fighting the War and the Peace: Battlefield Ethics, Peace Talks, Treaties, and Pacifism in the Jewish Tradition," *Jewish Law Articles* (http://www.jlaw.com/Articles/war1.html), p. 2 and *id.*, (http://www.jlaw.com/Articles/war3.html), p.1.

Joshua was motivated by a concern for protecting God's good name. He therefore avoided taking extreme measures against the Gibeonites because "other idolaters would erroneously believe that Israel violated its treaty, even if it did not actually do so."[69]

R. Henkin then proceeds to describe a second category of desecration of God's name. In this case, the international community may understand that certain actions or practices are permitted to Jews. Nevertheless, if that community derides the practice in question, that too constitutes a *hillul ha-Shem*. R. Henkin cites Rabban Gamliel's ruling that it is prohibited to rob an idolater even under circumstances in which Jewish law might permit such behavior so as to prevent idolaters from besmirching the Torah by terming it "shoddy."[7]

While R. Henkin focuses on killing a bound or restrained prisoner, he notes more generally that there certainly is an issue of *hillul ha-Shem* with respect to any sort of practice that evokes universal condemnation by "the nations, their scholars and their governments."[71] As noted at the outset of this essay, torture has been banned by the Geneva Conventions. It also has been proscribed by numerous international human rights treaties, as well as the 1984 United Nations Convention Against Torture. Israel is a signatory to several of these agreements, including the 1984 Convention, whose first article defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[72]

It is therefore arguable that not only physical abuse that might lead to death, but *any* form of abuse that violates internationally recognized (and ratified) standards of behavior outlined in international conventions to which Israel is a signatory, could also be banned on the grounds of *hillul ha-Shem* and on the basis of *dina de-malkhuta dina*, since in signing the Convention Israel adopted it as part of its own laws to which its soldiers must conform.[73]

There is an issue of hillul ha-Shem *regarding any practice that evokes universal condemnation.*

R. Henkin is not the first to argue that injuring a Gentile amounts to *hillul ha-Shem*. As Chief Rabbi of Israel, R. Yitzchak Halevi Herzog stated bluntly that "in a case of *hillul ha-Shem* it is certainly forbidden to injure a gentile. This [*hillul ha-Shem*] is the most severe prohibition, punishable only by death."[74] R. Herzog extended this principle even to the case of financial harm, "in contemporary times

[69] Yehuda Herzl Henkin, *Responsa Bnei Banim* Vol. III (Jerusalem, 1997), p. 193.

[70] *Id., p. 194.*

[71] *Id.*

[72] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. When ratifying the Convention, Israel made declaration, under Article 28, that it did not recognize the competence of the Committee against Torture to investigate allegations of widespread torture within its boundaries.

[73] Although there was a serious halakhic dispute regarding the permissibility of disobeying orders to uproot Jewish families from Gaza, that was an entirely different issue that went to the heart of a soldiers' religious beliefs. It would be difficult to posit that even the most vociferous advocates of resisting orders with respect to the Gaza withdrawal would argue that a soldier could violate Israeli law against torture because of his religious beliefs.

[74] Itamar Warhaftig, "R. Herzog's Approach to Modernity," in Moshe Z. Sokol, ed., *Engaging Modernity: Rabbinic Leaders and the Challenge of the Twentieth Century* (Northvale, NJ: Jason Aronson, 1997), p. 287.

[75] *Id.*

when all financial interaction is public knowledge."[75] Moreover, following R. Herzog's logic, physical harm of a gentile, which violated Israel's solemn international undertakings, likewise could not be assumed to remain hidden from public view for long; it too would therefore qualify as a blatant *hillul ha-Shem*. Importantly, R. Herzog specified that his prohibition applied especially to Christians and Muslims, as the terrorists Israel and the West face are overwhelmingly Muslim and occasionally Christian.[76]

Prisoner abuse also runs afoul of another principle, that of *eivah*, or the incitement of hostility against Jews. As in the case of *hillul ha-Shem*, the need to avoid *eivah* can, according to some views, override biblical prohibitions such as those related to the Sabbath.[77] Moreover, like *hillul ha-Shem*, practices that outrage non-Jews can generate universal condemnation and hostility in today's era of instantaneous communications.[78] As Professor Rosemary Foot writes, "it has become a cliché that communication technologies now make it far harder to hide evidence of abuse; ease and speed of transportation and communication make it possible for a wide audience to know what is going on inside particular countries."[79] Reports of such abuse would be, indeed are, telecast and re–telecast not only on stations such as al-Jazeera and al-Arabiya, but on international cable networks throughout the world, further stoking hatred against its perpetrators. The threat of reprisals would not be limited to Israel alone, but could take place wherever Jews can be found.[80]

These *halakhic* observations, as well as the importance of taking account of any *sfeiqot* that would militate against the use of torture, are consistent with historical analysis of the uncertain utility of harsh measures against imprisoned terrorists. Such analysis indicates that the uncertainties inherent in mistreating prisoners who may not, in fact, be leading terrorists or useful sources of information create an additional major problem: They "tend to create martyrs and to give nourishment to the terrorist campaign."[81] This observation would, of course, apply even more strongly in the event of a prisoner's death as a result of abusive treatment. In other words, not only would the mistreatment of prisoners prove ineffective in pursuing operations against them; it actually would be counterproductive, creating new dangers to more lives.

Halakhic observations are consistent with historical analysis of the uncertain utility of harsh measures against imprisoned terrorists.

On the other hand, states that recognized the inherent risks that mistreatment of prisoners posed for their overall objectives against terrorism, and reversed course as a result, found more success in meeting those objectives. As Adam Roberts has argued, "those who suggest that humane treatment is a relatively unimportant issue—and those…who argue that torturing prisoners is a way to combat terrorism—do need to address the criticism that ill-treatment and torture have in the past provided purported justifications for the resort to terrorism,

[76] *Id.* See also Harav Yaakov H. Charlap, "*Hillul ha-Shem ke-gorem bi-Pesiqat Halahah*," *Tehumin* 25 (5765/2005), especially pp. 392-98.

[77] Rashba, cited in Yisrael Meir Lau, *Yahel Yisra'el* Vol. II, 3rd ed. (Jerusalem: 1994), p. 377, argues that it a Jewish doctor or midwife may violate the Sabbath to help a non-Jewess give birth because of the potential *eivah* resulting from a failure to do so. *Eivah* could engender life-threatening hostility, and even a possible threat to life is sufficient to justify a Sabbath violation.

[78] It may be argued that condemnation of Jewish practices such as *milah* or *shehitah* would not serve as a reason for their abandonment, and that condemnation of torture might likewise be ignored. The harsh treatment of non-Jewish prisoners differs in two major respects, however: First, it is not inherent to the Jewish religion. Second, it affects non-Jews directly in a way that *milah* and *shehitah* do not. A good summary discussion of *eivah* may be found in the *Intsiqlopediyah Talmudit*, vol. I, cols. 488ff.

[79] Rosemary Foot, "Human Rights in Conflict," *Survival* 48 (Autumn 2006), p. 115.

[80] *Id.,* p. 378. R. Lau notes that R. Shlomo Zalman Auerbach agreed with his view.

[81] Roberts, "The 'War on Terror,'" p. 111.

and also discredited the anti-terrorist cause."[82] Ultimately, he concludes, "the torture and ill-treatment of detainees…is, to quote Talleyrand, worse than a crime: it is a mistake."[83]

The "Ticking Bomb"

It is clear that there is a strong halakhic case against any form of abuse of prisoners in all but the most isolated of instances. In the first place, as the case of the suspicious character boarding the Jordan Valley bus demonstrates, *halakhah* proscribes killing anyone who is not actually caught committing an act of terror. Moreover, unless a prisoner is known to possess accurate, timely and actionable information, one must account for the mitigating impact of uncertainties surrounding the prisoner's value as an intelligence source. Third, the abuse, much less the death, of a prisoner would create a *hillul ha-shem* and generate *eivah*, with its concomitant threat to the Jewish community worldwide.

But what of the "ticking bomb?" Do the foregoing considerations apply to a prisoner who is known to have accurate, timely, and actionable information that, if revealed to his captors, could prevent an imminent terrorist attack? A number of secular experts argue that even in this case torture will prove of little use. The premise underlying the use of torture is that it is an effective means of eliciting information. Critics of torture would argue that even in the case of a "ticking bomb," terrorists undergoing torture will ensure that they do not reveal critical information to their captors.

As noted above, that is exactly what Senator McCain said he did. Similarly, former prisoner of war Tom Moe recalls that when severely beaten he tried to buy time: "I had to get out of the ropes, collect my thoughts and still do nothing, and perhaps muster a bit more strength to still do nothing or at least moderate what would happen."[84] By the time he was ready to confess, he had been beaten to near death and his captors decided he was no longer worth the trouble. In the meantime, however, he had wasted a lot of their time. If a bomb were ticking, the kind of resistance he and Senator McCain displayed would certainly have made it impossible for their captors to respond to the planned incident in a timely manner.

The dilemma posed by the "ticking bomb" is one that seemingly defies solution.

The recollections of Senator McCain and Mr. Moe would appear to underscore the assertion by Professor Mary Ellen O'Conner, a leading opponent of torture under any circumstances, that "there is no credible evidence of an actual ticking-bomb case leading to useful intelligence on an impending attack."[85] Yet former Israeli military officials have asserted, including to this writer, that torture has indeed been effective in such situations.

The dilemma posed by the "ticking bomb" is one that seemingly defies solution. As Harlan Ullman, a respected defense analyst and former Swift Boat commander during the Vietnam War (in the vicinity of My Lai, the scene of the notorious massacre) points out:

> In an age of mass destruction weapons, the dilemma of permitting or banning extreme interrogation measures in exigent circumstances cannot easily be resolved. Suppose, for example, a U.S. military unit captures an enemy combatant that intelligence believes has information on a pending attack that could kill hundreds, or even tens of thousands. What is the responsibility of the unit to pry that information loose by any means necessary in order to protect the greater good?[86]

[82] *Id.*, pp. 111-12.
[83] *Id.*, p. 126.
[84] Tom Moe, "Pure Torture," *Notre Dame Magazine Online* (Winter 1995-96), http://www.nd.edu/-ndmag/moew95.html.
[85] See Marc Perelman, "Experts Debate 'Ticking Bomb' Torture," *Forward* (December 23, 2005), p. 1.
[86] Harlan Ullman, "Needed: A Code of Conduct for the War on Terror," *U.S. Naval Institute.Proceedings* CXXXII (January

Ullman characterizes this dilemma as "a tough question, with no simple answer." However, it is arguable that in this circumstance *halakhah* takes a different view. As R. Michael Broyde claims, "there is no logical reason that *halakhah* would categorically prohibit duly authorized wartime torture as a method for acquiring information otherwise not available, in order to save lives in the future."[87] If indeed it is known that a given prisoner possesses information that will certainly lead to the prevention of an imminent terrorist incident, there is a strong case that the terrorist is no different from any other potential attacker, in which case two halakhic imperatives might apply.

It is the Jewish interrogator who is an accessory to whatever tragedy might result.

The first is the biblical injunction of "*lo ta`amod al dam rei`akha*" (neither shalt thou stand idly by the blood of thy neighbor).[88] As R. Goren, citing Maimonides' dictum in *Mishneh Torah*, *Hilkhot Rotseah*, notes, "morally one is obligated to take all feasible measures to prevent injury to others not only if one has been formally appointed to do so, but in any case where it is possible."[89] Moreover, in failing to act, one specifically responsible for the community's safety "shall bear responsibility for the results if he fails to discharge his obligation in a satisfactory manner."[90] In this sense, it is the Jewish interrogator who is an accessory to whatever tragedy might result from his/her inaction.[91]

A second consideration might be that of *ha-ba le-horgekhah hashkem le-horgo* (preempt a would-be killer by killing him first).[92] While generally applicable to an individual's right of self-defense, this principle also can be applied when the state acts in defense of both itself and its citizens. In effect, the government is "acting as an agent for individuals who will be attacked."[93]

Finally, it may also argued that a prisoner who is a "ticking bomb" has the status of a pursuer (*rodef*) since he or she has the ability, by electing to reveal or not reveal vital intelligence information, to forestall a terrorist attack or bring about the death of Jews. Indeed, in such circumstances, the imprisoned terrorist would have a greater direct impact on the life or death of individual Jews than would terrorist leaders, who, some assert, fall under the category of *rodef*.[94] Unlike the latter, the individual terrorist could be linked directly to a specific incident about to take place.

While there is certainly a risk that the prisoner will provide inaccurate or untimely information, the fact that he or she has been connected to such an incident connotes that the authorities will be in a position to discern whether the information they are being provided fits with that which they already possess. If there is indeed a fit, the authorities will have met the strict standard set forth by R. Moshe

2006), p. 10.

87 Michael J. Broyde, "Jewish Law and Torture," *The Jewish Week* (July 7, 2006), http://www.thejewishweek.com/top/editletcontent.php3?artid=5183.

88 Leviticus 19:16. See Maimonides, *Mishneh Torah*, *Hilkhot Rotseah* 1:14.

89 Goren, "Combat Morality," p. 226.

90 *Id.,* p. 230.

91 The interrogator would be subject to heavenly rather than judicial punishment, however.

92 *Sanhedrin* 72a*; Berakhot* 58a, 62a.

93 Rosen, "Does Ariel Sharon Consult His Rabbi?," p. 41. See also Harav Chaim David Halevi, *"Din 'ha-ba le-horgekha hashkem lehorgo' be-hayyenu ha-zibburiyim,"Tehumin* 1 (winter 1980), especially p. 346: "Because of the defense of the nation, it is permitted to launch a war against an aggressor like Midyan" employing the principle of *ha-ba le-horgekha.*

94 Rosen, above, n. 93. pp. 40-41. Rosen's argument suffers from the same flaws that undermine his reasoning from the case of one who places a dog or snake upon someone with the intent to kill; namely, it allows for no change of heart by the actual killer. Such a critique could also apply to the case of the imprisoned terrorist who provides information about an imminent plot, though as noted in the text, the very imminence of such a plot indicates a more direct relationship between the prisoner and the outcome of a specific attack than that between a terrorist leader, who provides general guidance, and any given terrorist operation.

Feinstein, i.e., that a *rodef* may only be killed (or in this case be placed in a situation where death might result), if the threat he or she poses "approaches certainty" (*qarov le-vadai*).[95] Thus, in addition to the danger being clear and present, there must exist a unique discriminator that would not normally apply in cases where torture is contemplated. The ambiguities that R. Yosef notes—in particular that the prisoner might never again attempt a terror attack—would certainly not apply in this case.

It is difficult to justify torture in any circumstance, even that of the "ticking bomb."

From a military and security perspective, the prisoner would qualify as an accomplice to an upcoming murder. *Halakhah* at times treats accomplices as a guilty of capital crimes, and in this regard does not appear to distinguish between Jews and non-Jews. Writing about battlefield circumstances in which the enemy is clearly not Jewish, R. Broyde notes that "it appears that one who assists in the murder, even if they are not actually participating in it directly is not 'innocent'; see comments of Maharal of Prague on Genesis 32. From this passage in Maharal one could derive that any who encourage this activity fall within the rubric of one who is a combatant."[96]

Might the principles of *lo ta`amod al dam rei`akha*, *ha-bah le-horgekhah*, and *rodef* justify measures so extreme as to cause a prisoner's probable death? One could argue that they might. After all, as R. Bleich points out, there exists a strong halakhic argument to support capital punishment even of terrorists who otherwise would remain in prison for life, who are unlikely ever to strike again and who have not been proven to be accomplices of future murderous activity. Nevertheless, because it is true that bringing a prisoner to death's door could take some time, it would seem difficult to justify extreme measures of torture in any circumstance, even that of the "ticking bomb," if it is as all likely that the prisoner, in spite of the harsh measures to which he or she is subjected, could delay a truthful confession beyond the point at which the resulting intelligence would be immediately actionable, particularly given the certain universal outcry that the death of a prisoner would engender (not to mention the fact that the intelligence would die with the prisoner).

Implications for Non-Jewish Military Forces

The foregoing discussion and the vastly larger halakhic literature that has been cited only indirectly, focuses on the practices of a Jewish army. It also would apply to Jews serving in the army of any state that is a signatory to the Geneva Conventions. Indeed, it is arguable that the same values that drive Jewish behavior in these circumstances would apply with equal force to

[95] R. Moshe Feinstein, *Iggerot Mosheh: Hoshen Mishpat* vol. 2, (Bnai Berak, 1985), No. 69b, p. 297. It is arguable that R. Feinstein set a very high standard for determining the status of a *rodef* because he was addressing the issue of abortion, specifically, the permissibility of an abortion when the mother's life was in danger. He determined that only if the child's head had not yet appeared, could one abort, on the grounds that the fetus was considered to be a *rodef* relative to the mother. He ruled, however, that abortion was only permitted if the doctors were virtually certain (*karov le-vadai*) that the mother would not survive the birth. On the other hand, if there was only a concern (*hashash*) that she would not survive, R. Feinstein would not sanction an abortion. See also his expanded discussion of this issue in *id.*, no. 71, pp. 302-303. R. Feinstein argues in the latter responsum that the ban on abortion applies to Jews and non-Jews ("sons of Noah") alike, although the penalty for the latter is death. He also compares the ban on abortion to other bans such as suicide and placing his fellow before a wild animal that is poised to assault him.

[96] Broyde, "Fighting the War," (http://www.jlaw.com/Articles/war3.html), pp. 1 and n. 32. R. Broyde adds that "It would appear difficult, however, to define 'combatant' as opposed to 'innocent' in all combat situations with a general rule; each military activity requires its own assessment of what is needed to wage this war and what is not. Basing himself on talmudic cases relating to the placing of a dog or snake on a victim, and of killing someone by throwing a stone in the air at a 45 degree angle, Rosen argues that those who 'brainwash' suicide bombers are themselves guilty of a capital crime. ("Does Ariel Sharon consult his Rabbi?, pp. 36-39). His reasoning is faulty, however, since a human's ability to reason certainly distinguishes him or her from a rock, or even a dog or a snake. Indeed, he acknowledges that "the Mishnah recounts that if any free will may be exercised on the part of another, even an iota, then liability will not be imposed" (p. 37). Since there have been cases of suicide bombers not completing their missions—whether from reasons of remorse or

states that embody democratic values, especially as it is in the context of military activity by such states that Senator McCain and other have argued against the employment of torture to elicit information from prisoners.

Torture is a counterproductive exercise that dehumanizes those who practice it. As Vladimir Bukovsky, points out, "every Russian czar after Peter the Great abolished torture upon being enthroned, and every time his successor had to abolish it all over again…Long experience in the use of these 'interrogation' practices in Russia had taught them that once condoned, torture will destroy their security apparatus. They understood that torture is the professional disease of any investigative machinery." His explanation for this phenomenon is straightforward: "when torture is condoned, the [investigative] service itself degenerates into a playground for sadists. Thus in its heyday, Joseph Stalin's notorious NKVD became nothing more than an army of butchers terrorizing the whole country but incapable of solving the simplest crimes."[97]

When torture is condoned, the service degenerates into a playground for sadists.

Violating international norms of decency toward prisoners undermines what Winston Churchill called "the Great Democracies." The United States in particular sees itself as a missionary democracy. In the words of Ronald Reagan, it is "the City on the Hill." As recent events have demonstrated, the abuses at Abu Ghraib and elsewhere have undermined America's claims both for its own moral leadership and for the superiority of the democratic way of life. They have also further exacerbated opposition to the American intervention in Iraq, and provided Israel's enemies another opportunity to link the intervention in Iraq with Israeli treatment of Palestinians.[98]

Thus, beyond inflicting damage to Western prestige and influence, torture could also lead to reprisals, both within the Middle East and outside it, against Americans and Britons in general, and against American and British Jews in particular, even if torture is perpetrated by non-Jews. It is therefore arguable that Jews in America, Britain and elsewhere are mandated to lend their voices to those who would ensure zero tolerance for the kinds of abuse that have made headlines in Iraq and Afghanistan, and Guantanamo Bay in the past two years.

In a memorandum dated June 28, 2006 reporting on his visit to the detention facility at Guantanamo, General Barry McCaffrey, US Army (ret.) described the Detention Center as "the most professional, firm, humane and carefully supervised confinement operation" that he had ever visited. Nevertheless the abuses that took place in the first 18 months of the war on terror not only led to widespread condemnation, but also "caused enormous damage to U.S. military operations and created significant and enduring damage to U.S. international standing…Most of these abuses…were a clear departure from our former commitment to the rule of law and the strong U.S. military belief that treatment of those under our control should mirror the expectations we would have for our U.S. personnel under similar conditions of vulnerability. Finally, we actually wanted to be better than those we opposed."[99]

It is noteworthy that General McCaffery is a retired four-star general who held the highest attainable military rank since the retirement of the five-star officers who served in World War II. As such, his memorandum belies what some may interpret as a blanket contention by R. Broyde that "torture is permissible and consistent within

fear—it is difficult to argue that they are automatons, even when they have strapped ammunition to their bodies.

[97] Bukovsky, "Torture's Long Shadow," p. B4.

[98] Dana H. Allin and Steven Simon, "America's Predicament," *Survival,* LXVI (Winter 2004-05), p. 24.

[99] Barry R. McCaffrey, General, USA (ret.), "Academic Report-Trip to JTF Gunatanamo, Sunday June 18-Monday June 19, 2006," (June 28, 2006).

halacha in *all* [my emphasis—D.S.Z.] situations where there is a proper and thoughtful military chain of command (the higher up one goes the more thought tends to get put in) and no other reasonable alternative is available."[100] Indeed, McCaffery is not alone among senior officers to hold this view.[101] The whole notion of a more "thoughtful" chain of command that might permit prisoner abuse flies in the face of American military reality, where significant and increasing command authority has devolved to field and even company-grade officers.

General McCaffery's views demonstrate that torture and abuses are as deadly, if not more so, for those who perpetrate them than for those who suffer from them. Such abuses are operationally and morally deleterious. As R. Arnold Resnikoff, a former Navy chaplain who currently serves as advisor to the Secretary of the Air Force wrote in the after-math of 9/11: "in the rivers of Vietnam, I learned to value *outrage*, because it reminded me I was still human, not yet numb to pain and horror. *Rage* was what I feared, for it could destroy the humanity I still cherished. Rage destroys our moral compass—and allows us to be manipulated by those who want us to lose our way."[102] Or, as I wrote in the same collection of essays, "What was common to both conventional and unconventional warfare in ancient Israel was the fact that the rules of engagement reflected higher values, not merely human emotion. That fact remains valid today, both in Israel and, as terrorism has spread to the United States, in this country as well."[103] Jews, who believe and proclaim that they provide the world with its moral compass must be especially forceful in ensuring that the military forces that confront evil do not sink to its level. In so doing, Jews everywhere can help to bring about the day, for which they yearn in their *Yomim Nora'im* prayers, that *kol ha-rish`ah kula ke-ashan tikhleh*—all evil will be truly eliminated, blown away as so much smoke.

[100] Broyde, "Jewish Law and Torture," *op. cit.*

[101] Other senior officers who protested the use of torture and opposed any relaxation or redefinition of Senator McCain's legislation included John W. Vessey, USA (ret.), former Chairman of the Joint Chiefs of Staff (letter to Senator McCain, September 12, 2006), General Colin L. Powell, former Secretary of State and like Vessey, a former Chairman of the Joint Chiefs (letter to McCain, September 13, 2006) as well as nearly three dozen other retired senior officers from all four branches of the military (letter from General Joseph Hoar, USMC (ret.) et. al. to The Honorable John Warner, Chairman and the Honorable Carl Levin, Ranking Member, Senate Armed Services Committee, September 12, 2006). See also William H. Taft IV, "A View from the Top: American Perspectives on International Law after the Cold War," *The Yale Journal of International Law* 31 (Summer 2006), especially pp. 506-508. Mr. Taft was General Counsel, and later Deputy Secretary of Defense and Acting Secretary of Defense, in the Reagan Administration, as well as Legal Advisor to the State Department, 2001-2005.

[102] Arnold E. Resnicoff, "Rules for Our Sake, Not Our Enemies," *Living Words IV: A Spiritual Source Book for an Age of Terror* (Sh'ma/JFL, 2002), p. 17.

[103] Dov S. Zakheim, "In Judaism There Are Always Rules," ibid., p. 14.

Meorot
A Forum of Modern Orthodox Discourse

CONVERSATION:
Halakhah and Morality in Modern Warfare

Warfare, Ethics and Jewish Law
Aryeh Klapper

"Purity of Arms" and Purity of Ethical Judgment
Benjamin Ish-Shalom

Only the Good Die Young?
Michael J. Broyde

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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 identified[1] 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`ah* (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 *Tehumin*.[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 *halakhah* and Jewish ethics. Just as we do not see the *halakhah* 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 uncompelling 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 uncompelling 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 *Tehumin* 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 *halakhah* 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 *halakhah*—in other words, *halakhah* 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 *halakhah* 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 Wurzburger, that routine *halakhah* is designed to perfect character in ordinary situations

[9] See in this regard the dispute between *Siftei Kohen*, *Hoshen Mishpat* 73:39 and *Hazon Ish*, *Liqqutim*, *Neziqin* 16 as to whether there are questions of *halakhah* 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 Kohen.* I owe this reference to my teacher R. J. David Bleich.

[10] Furthermore, as neither Israel nor the Western democracies accepts *halakhah* as binding, but Jews nonetheless serve willingly in their armies, it is necessary to distinguish between the *halakhah* as it must be practiced by a soldier whose country and superiors do not share his commitments, and the *halakhah* as it would be practiced by an army fully committed to *halakhah*. A soldier in a country committed to *halakhah* 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 *halakhah* but not their army's standards, and therefore likely need disobey only if orders meet the standard of *yeihareg ve-al ya`avor*, 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 situations[12].

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 anethical 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-mahteret*" (furtive trespasser). "*Rodef*" here refers to the classic case of defense against an immediate mortal threat, and "*ba ba-mahteret"* 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 *halakhah*, or that halakhic decisors should develop martial *halakhah* 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 anethical 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 anethical 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 anethical 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. Wurzburger'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-mahteret*. See *Mishneh Torah*, Laws of Theft, 9:7. These two areas of law may therefore respectively be models for the categories of "commanded war" (*milhemet mitsvah*) and "authorized war" (*milhemet reshut*) 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 ethics[18].

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

The *locus classicus* for rabbinic views of war is *Mishnah Sotah* 8:7, which divides legitimate wars into two categories[19] but has no term for illegitimate war. The example given of *milḥemet reshut* (authorized war) is the Davidic wars of territorial expansion; the example of *milḥemet mitsvah* (either commanded war or war to fulfill a commandment; see my discussion below) is Joshua's war of original conquest. This may be[20] 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 Talmud[22] concludes that a *milḥemet 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 argued[24] that even in the case of *milḥemet 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 Tsits Eliezer*,[27] argues that war can only be fought for religious purpose.

There accordingly is ample evidence that *halakhah* sees war as justified only by its cause[28] 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 irresoluble factual dispute.

[19] R. Yehudah and the sages disagree as to whether the proper division is between "*milḥemet hovah*" and "*milḥemet mitsvah*", or rather between "*milḥemet mitsvah*" and "*milḥemet 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 Naḥmanides, "List of Alternate Negative Commandments," toward the end. Note that *Mishnah Sanhedrin* 1:5 and all subsequent *halakhah* also require the permission of the Great Sanhedrin for a *milḥemet 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 *halakhah* 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 *milḥamot 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 *milḥemet _ 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 Aḥaronim* vol. 7 (Brookline MA: Maimonides High School, 2003).

[25] In this framework, the difference between a *milḥemet _ mitsvah* and a *milḥemet _ reshut* may be whether it is fought to fulfill a *mitsvah ḥiyyuvit* (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 *Tsits 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-mahteret*[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`ah* 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`ah*, and the notion that a *hora'at sha`ah* 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 *halakhah* 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, *halakhah* 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 *halakhah* generally is meaningless.

Furthermore, the concept of a "presumptive *hora'at sha`ah*" 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-mahteret,* 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`ah* 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`ah.

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 *Halakhah* 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 *halakhah* 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 *halakhah* 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 *halakhah* 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.

Halakhah 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-mahteret*.

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 Ettlinger[39] 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 Talmud[43] further notes that the 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

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.

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 *halakhah* 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 *milhamtah 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-ruaḥ – meḥqarim filosofiyim* [Nature and spirit – philosophical studies] (Jerusalem, 1953), pp. 148-154; Sinai Oko, *Al ha-ofi ve-ha-tov, filosofiyah shel ḥinukh* [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 – regashot be-ḥayyei 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 Livingston, 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 Broyde[3] 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" (*tohar ha-nesheq*)—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, *Etiqah 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 *Palmah* at the time, Yitzaq 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 hei asher nafelu be-harei hevron* [Thirty-five who fell in the hills of Hebron…], collected and recorded by E. Finkerfeld (Jerusalem, 1950), pp. 13-34.

[7] Id., p. 33.

[8] Avodah Zarah 35a.

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?

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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."

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 Zarah* 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 *halakhah* 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

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

[11] Aviezer Ravitzky, "*Ha-im pitehah ha-mahshavah ha-hilkhatit musag shel milḥamah asurah*" ["Prohibited Wars in Jewish Religious Law], in *Ḥeirut al ha-luḥot* [*Freedom Inscribed*] (Tel-Aviv: Am Oved, 2000), pp. 39-158. English translation in this edition of *Meorot*.

[12] Penal Law 34:12 (1977).

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 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:

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

> 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 *halakhah* 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

[13] Remarks of M.K. Zucker regarding Amendment No. 39 to the Penal Law. *Divrei ha-kenesset* [Proceedings of the Knesset], vol. 124, p. 2297, #39 (25 July 1994).
[14] See Lev. 19:16; *Sanhedrin* 73a; Maimonides, *Mishneh Torah*, *Hilkhot Rotseiah u-shemirath ha-nefesh* 1:14; *Shulhan Arukh*, *Hoshen Mishpat*, sec. 426.
[15] In addition to the foregoing, see *Yerushalmi*, *Terumot* 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).
[19] *Responsa Tsits Eli`ezer*, part 12, sec. 57.

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 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. Waldernberg'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 Milḥamah*," 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 rules[23]), 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 ḥasidim*), for "it, too, is Torah, and in capital cases it partakes of the nature of meta-*halakhah*."[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

[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 Milḥamah, She'eilot u-teshuvot be-inyanei tsava, milḥamah u-vittaḥon* [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.

[25] *Shabbat* 54b.

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 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 uninvolvement.

But we must distinguish between various levels of "uninvolvement." 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 "involvement"? 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

[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.

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

rodef acting under compulsion, lacking intention and, accordingly, not culpable. A civilian population that endangers the lives of our military 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]

[29] *Mishnah, Sanhedrin* 4:5.

[30] See A. Shochetman, *Sikkun ḥayyalei tsahal le-shem meni`at pegi`ah be-ezraḥei 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 ezraḥit oyenet be-halakhah bat zemaneinu*" [Operations against hostile civilians in contemporary *halakhah*], *Medinah, mimshal, ve-yahasim beinle'umiyyim* 41-42 (1997), p. 155; N. Gotel, "*Leḥimah be-shetaḥ revui ukhlusiyah ezraḥit*" [Warfare amidst a civilian population], *Teḥumin* 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 *halakhic* 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. Sha'ul Yisraeli, which is that *halakhah* has no unique rules of war, and it accepts secular law norms as valid. Like many areas of *halakhah*, this, too, is governed by *dina de-malkhuta dina* writ large.[2]

The third is the view of R. Shlomo Goren, that *halakhah* 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. Ovadiah Yosef, who acknowledges that there are indigenous rules of war within *halakhah*, 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 Rebbe, 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 *halakhic* authority who assumes that the *halakhot* 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. Sha'ul 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. Sha'ul Israeli, "*Pe`ulot Tsevayot 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, *Yehavveh 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. Ovadiah 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*, *Hilkhot 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 *halakhah*[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. Sha'ul 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 *halakhah le-ma`'aseh*. Why? Because the Israeli army obeys international law, and that is all *halakhah* 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 *halakhah* 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 *kohein* 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 *Yehavveh 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. *Halakhah a*nd 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 *halakhah*.[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-mahteret* 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 *halakhah*, 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 *halakhah* does not govern conduct in war time, but merely that the content of the applicable *halakhah* is quite different from the typical *halakhah* regarding the sanctity of life. Thus, I agree with R. Lichtenstein's formulation of the hierarchy of *halakhah* in war time. Yet I disagree with R. Klapper about the content of that *halakhah*. In the same vein, I did not understand R. Klapper's criticism of my use of the phrase '*hora'at sha`ah'*. 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`ah*, 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 ha-beriyot* 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 article[14], 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

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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 jurisdiction[15] 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 *halakhah* 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 *halakhah* that if one has to chose 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 *halakhah* 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 *halakhah*, 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

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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 *halakhah*. Too 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 *halakhah* specifically formulates a moral floor, and the righteous, or ethical, are encouraged to go beyond the bare minimum. Sometimes *halakhah* 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 *halakhah* speaks for itself. Even deriving an ethical framework from within the *halakhah* 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 *Halakhah* 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 *Halakhah* 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 according to 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, *halakhah* 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 *halakhah*.

* * *

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 Yitzaq 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.

Meorot
A Forum of Modern Orthodox Discourse

ON DIVINE COMMAND MORALITY

Divine Commands, Morality and Jewish Tradition: A Response to Eugene Korn

Michael J. Harris

Abstract: This essay takes issue with elements in Eugene Korn's article "Moralization in Jewish Law: Genocide, Divine Commands and Rabbinic Reasoning" in the *Sivan* 5766 edition of *The Edah Journal*. The essay argues that the presence of Divine Command Morality (DCM) in Jewish tradition is more complex than Korn and other scholars concede. Neither attempted moral justifications of the biblical commandment to destroy Amalek nor halakhic limitations on the application of the commandment presuppose denying DCM. The essay also argues that the halakhic restrictions on the Amalek commandment are sporadic and controversial, and that Korn is over-optimistic regarding the extent to which traditional sources resolve the moral difficulties of the commandment.

Biography: Dr. Michael Harris is Rabbi of The Hampstead Synagogue, London, Research Fellow in Philosophy at The London School of Jewish Studies and an Adjunct Faculty member at *Yeshivat Ma'ale Gilboa*, Israel. He is the author of *Divine Command Ethics: Jewish and Christian Perspectives*

Reply to Michael J. Harris

Eugene Korn

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Divine Commands, Morality and Jewish Tradition: A Response to Eugene Korn

Michael J. Harris

Eugene Korn's stimulating essay "Moralization in Jewish Law: Genocide, Divine Commands and Rabbinic Reasoning" in the *Sivan 5*766 issue of *The Edah Journal* provides a philosophical analysis of the assumptions underlying rabbinic treatment of the Torah's commandments to exterminate the Amalekite and Canaanite nations.[1] Korn argues that traditional sources "moralized" these commandments, i.e. interpreted and applied them in such a way as to bring them into line with accepted moral requirements, and that this moralization involved certain theoretical presuppositions. Through moralization, Jewish tradition succeeded in solving what Korn terms "the practical problem"—that Jews might kill innocent people out of obedience to the biblical commandments. Korn goes on to argue that the deeper, "theological/conceptual problem" of how God could issue such egregiously immoral commands was essentially solved by Maimonides's radical halakhic redefinition of the Amalekites and Canaanites.

While much of Korn's argument seems to me convincing and this essay is not intended as a point-for-point rebuttal of his presentation, there are several key elements in Korn's analysis with which I disagree.[2] Taken together, the alternative perspectives on these elements that I will try to articulate here amount to a view very different from Korn's concerning the important cluster of issues raised in his article.

In the course of the first part of his article, Korn analyzes the conceptual underpinnings of rabbinic treatment of the commandments to destroy the Amalekites and Canaanites.[3] *Inter alia*, Korn discusses the issue of Divine Command Morality (DCM). Following the views of Avi Sagi and Daniel Statman,[4] he emphasizes that what Sagi and Statman term "strong" DCM—the idea that God's commands determine morality, that "the very existence of moral obligations and moral values depends on God"[5]—is absent from rabbinic tradition not only in the context of the Amalek commandment but from traditional Jewish sources *tout court* (3).

Let us first address this broader claim concerning the absence of strong DCM[6] in Jewish sources. It seems to me that such a generalization seriously underestimates the complexity of the issue. A curious feature of contemporary Jewish scholarly debate concerning the attitude of Jewish tradition to

[1] Korn focuses mostly on the commandment to destroy Amalek and the sources which deal with that commandment. I shall follow his example here.

[2] References to page numbers in Korn's article are in parentheses in the text.

[3] Korn uses the term 'rabbinic' in a broad sense, to refer not only to *Hazal* but to later scholars as well. I shall follow this usage here.

[4] See Avi Sagi and Daniel Statman, "Divine Command Morality and Jewish Tradition", *Journal of Religious Ethics* 23 (1995), 39-67; Avi Sagi, *Judaism: Between Religion and Morality* (Hebrew) (Israel: Hakibbutz Hameuchad, 1998); idem., "The Punishment of Amalek in Jewish Tradition: Coping with the Moral Problem", *Harvard Theological Review* 87:3 (1994), 323-346.

[5] This formulation is borrowed from Avi Sagi and Daniel Statman, *Religion and Morality* (Amsterdam-Atlanta: Rodopi, 1995), 11. It is only intended as approximate, as a great deal more can be said about formulations and variants of DCM. For an excellent discussion, see ibid., ch.1.

DCM is that many writers apparently consider the position of the tradition on this issue to be clear, uncontroversial and capable of brief description—but construe that position in opposite ways.[7] While some thinkers, e.g. Sagi, Statman, R. Aharon Lichtenstein,[8] Shubert Spero[9] and Louis Jacobs[10] think it clear that the sources deny DCM, others—for example, R. Immanuel Jakobovits,[11] Isadore Twersky[12] and Marvin Fox[13]—believe that it is plain that Jewish tradition supports DCM. What this suggests, of course, is that there is in fact no simple answer to the question whether Jewish sources support or oppose DCM. If significant Jewish scholars take diametrically opposing answers to be obviously correct, there is reason to suspect that the truth lies somewhere between and is far from straightforward. I have tried to show elsewhere that if a sufficiently sensitive analytical framework within which to examine the classic texts of Jewish tradition is developed, the picture that emerges from those texts indeed yields a significantly more complex and nuanced stance concerning DCM ethics than most of the contemporary literature is prepared to concede.[14] Very briefly, this is because types of DCM and its denial (usually termed "autonomy") must be carefully distinguished, both in terms of the kind of relationship (ontic, epistemic, etc.) that is claimed to exist (or not to exist) between God's command and morality, and in terms of precisely what (God's unrevealed will or His Torah command) morality is asserted to depend (or not to depend) upon. When traditional Jewish sources are analyzed from this perspective, it clearly emerges that different traditional texts say different things, and therefore that the monochromatic picture usually presented in the literature is inappropriate. It also turns out that some

The monochromatic picture usually presented in the literature is inappropriate.

[6] For the sake of brevity, I shall henceforth usually refer to strong DCM simply as 'DCM'.

[7] Jakobovits's brevity, for example, in his articulations of support for the idea that DCM is the view of Jewish tradition is striking when compared with Lichtenstein's equally concise remarks averring that the denial of DCM is the position supported in the tradition. For references see ns. 8 and 11 below.

[8] See Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in Marvin Fox, ed., *Modern Jewish Ethics: Theory and Practice* (Columbus: Ohio State University Press, 1975), 62-88; reprinted in Menachem Marc Kellner, ed., *Contemporary Jewish Ethics* (New York: Hebrew Publishing Company, 1978), 102-123. See especially 102-103.

[9] Shubert Spero, *Morality, Halakha and the Jewish Tradition* (New York: Ktav/Yeshiva University Press, 1983), 69-70.

[10] Louis Jacobs, "The Relationship between Religion and Ethics in Jewish Thought" in Gene Outka and John P. Reeder, eds., *Religion and Morality* (Garden City, N.Y: Doubleday, 1973), 155-172; reprinted in Kellner, (above, n. 8) 41-57. Cf. Jacobs's restatement of Socrates' response to the *Euthyphro* dilemma in Jewish terms: "… a thing is not good because it is in the Torah. It is in the Torah because it is good" (*A Jewish Theology* [London: Darton, Longman and Todd, 1973], 241).

[11] Immanuel Jakobovits, "Jewish Views on Abortion" in Fred Rosner and J. David Bleich, eds., *Jewish Bioethics* (New York: Sanhedrin Press, 1979), 118-133.

[12] Twersky writes: "Autonomous morality according to Kant's ethical theory is morality that is created by man himself; the independence of morality finds expression in the fact that it is not indissolubly linked to divine command. This conception has no counterpart in Judaism: it [Judaism] recognizes only a heteronomous-theonomous conception, which sees in the Creator of the world the source of morality." (Isadore Twersky, *Introduction to the Mishneh Torah of Maimonides* [Hebrew][Jerusalem: Magnes Press, 1991], 338, n. 237. This passage is part of a supplement added to the Hebrew edition; it does not appear in the English edition of the work. The translation is my own.)

[13] Marvin Fox, "Maimonides and Aquinas on Natural Law," *Dinei Yisra'el* 3 (1972), 5-27; idem, *Interpreting Maimonides: Studies in Methodology, Metaphysics and Moral Philosophy* (Chicago: Univ. of Chicago Press, 1990), 202-203, 208. For further discussion of the views on DCM of the thinkers listed here and others including Abraham Joshua Heschel, Yeshayahu Leibowitz and David Hartman, see Michael J. Harris, *Divine Command Ethics: Jewish and Christian Perspectives* [London and New York: RoutledgeCurzon, 2003], 36-49.

[14] See Harris (above, n. 13).

sources which are commonly taken to support, or which appear to support, a particular view on DCM/autonomy cannot truly be understood as endorsing *any* position. At the same time, a number of sources do appear to support even a strong version of DCM.[15] It does appear, though, that the situation changes somewhat over time, with advocacy of strong versions of DCM achieving increasing emphasis the later one finds oneself in the history of classical Jewish texts. Thus support for strong types of DCM is extremely difficult to find in the Bible; it is to be found, though very seldom, in classic rabbinic sources; and it is most pronounced—though it still has many opponents—in post-talmudic rabbinic sources.

What about Korn's more specific claim that DCM is absent from rabbinic discussion concerning the commandment to eradicate the Amalekites? It is clear that the rabbinic treatment contains neither explicit assertion nor open denial of DCM, so we need to probe beneath the surface in order to uncover the tacit assumptions at work. Korn's argument for his claim that the denial of DCM is implicit in traditional sources dealing with the Amalek commandment is that "in attempting to supply justifications for the killing of the Amalekite nation, Jewish tradition presupposed that… 'God commands an action because that action is right' (to paraphrase Plato's *Euthyphro*) and that rabbinic tradition is committed to moral reasoning" (5). In other words, the very attempt to provide moral justifications for the commandment to destroy Amalek involves the denial of DCM, since according to DCM there is no need to offer any moral justification. "Because God said so" constitutes sufficient warrant.

Yet attempts to justify morally the severity of the treatment meted out to Amalek might quite plausibly rest not on an autonomous morality but rather on a revealed morality that opposes genocide. Traditional sources may offer moral justifications of the Amalek commandment only because they understand the revealed Torah itself as rejecting genocide, in the light of the Ten Commandments' prohibition on murder and other laws and statements in the Torah which reflect a deep regard for human life. The authors of these sources might well resist the notion that the Amalek commandment requires moral justification because of some revelation-independent moral standard.

Attempts to justify morally the severity of the treatment to Amalek might plausibly rest on a revealed morality that opposes genocide.

It is worth expanding briefly on this important point. Korn assumes that if traditional sources advocated DCM, they would not bother to attempt any moral justification of the Amalek commandment; the mere fact of the commandment's divine source would already constitute sufficient justification. But why should this be so? The rabbis might very well wish to make sense of the Amalek commandment in the context of their understanding of the revealed Torah as a whole. And since they understand the Torah as a whole to oppose the taking of innocent life (and maintain, as advocates of DCM, that it is only because of this opposition that taking innocent life is wrong), they might endeavor to explain the Amalek commandment in a way that is consonant with that understanding. In other words, what lies behind the rabbis' attempted moral justification of the Amalek commandment might very plausibly be not the denial of DCM, but merely the desire to achieve—and to present to the reader with—an understanding of the Torah as an internally coherent document that consistently opposes killing the innocent.

[15] These include *Berakhot* 33b, R. Ovadiah of Bertinoro on *Avot* 1:1 and R. Zvi Hirsch Levin, *Pirqei Avot im Perush Lehem Shamayim* (Berlin: D. Friedlander, 1834), 1, n.2. For further discussion see Harris (above, n. 13), ch. 5.

Korn holds that not only must attempted moral justification of the Amalek commandment rest on the denial of DCM, but more generally that a morally acceptable religious tradition must be based on this denial:

> The DCM argument holds little cogency today. After the Holocaust, the genocide in Rwanda, the terrorist attack on the World Trade Center and repeated suicide bombings in Israel, it is inconceivable that a clear thinking moral person would accept another's claim that a religious command justifies his intentionally killing women or children (4).

It is true that a proponent of DCM is committed to the view that if God commands me to carry out a terrorist attack, then my carrying out such an attack is morally acceptable. But a clear thinking moral person could quite consistently advocate DCM and hold simultaneously that God in fact does not and never would issue such commands (though He could if He wished).

Let us now turn to a later stage in Korn's argument. Korn shows how some halakhic sources placed severe limitations on the applicability of the Amalek commandment, thus rendering it inoperative. He argues that these qualifications were motivated by the dissatisfaction of rabbinic authorities themselves with the utilitarian justifications sometimes offered for the Amalek commandment in traditional sources (6), and that "it is plausible to assume" that rabbinic authorities restricted the applicability of the commandment "precisely because they sensed the overwhelming moral problems with a literal implementation of the commandment" (7).[16]

In the absence of ethical motivation being explicitly articulated, it is difficult to ascribe such motivation to the restrictions.

Korn's claim that there is a causal connection between rabbinic dissatisfaction with utilitarian or "consequentialist" justifications of the Amalek commandment and halakhic limitations on it is an intriguing one, though it seems to me that Korn overstates the extent of traditional opposition to consequentialism.[17] I would like to focus, however, on his apparently less controversial claim that halakhic qualifications of the Amalek commandment are generated by moral unease. (This is a claim which Korn emphasizes particularly in his discussion of Maimonides' interpretation of the Amalek commandment, arguing that Maimonides' reading, generated by moral discomfort, not only rendered the commandment inoperative but solved the theological problem of how God could have commanded it at all). To be sure, the various halakhic approaches that curtail the scope of the Amalek commandment have the *effect* of substantially moralising it. Yet in the absence of any ethical motivation being explicitly articulated, it is difficult confidently to ascribe such *motivation* to the restrictions. Perhaps we should take the restrictive approaches at face value, understanding, for example, sources that confine the applicability of the Amalek commandment to the messianic future as

[16] In the sentence quoted, Korn is referring to the injunction to destroy the Canaanites, but it is clear that he would apply the same judgment to the Amalek commandment. Elsewhere in his essay, he does argue explicitly that restrictions on the Amalek commandment are morally motivated, e.g. on p.11, where he writes that this is "undoubtedly" the case.

[17] For example, in the famous dispute between Rabbi Simeon ben Gamaliel and Rabbis Akiva and Tarfon regarding capital punishment (*Makkot* 7a), the fundamental issue at stake appears to be consequentialism vs. deontology. Moreover, the *halakhot* governing war, particularly *milhemet reshut*, seem to be grounded in a consequentialist approach. See Moshe Sokol, "Some Tensions in the Jewish Attitude toward the Taking of Human Life", *The Jewish Law Annual* 7 (1988), 97-113.

doing so simply for the stated reason that the biblical text alludes to the law being operative only at a future time when Israel is otherwise at peace.[18] And if it is unsafe to ascribe moral motivation to the limitations on the Amalek commandment absent their explicit formulation, it is worth pointing out that it is much more problematic to suggest that involved in the limitations is any denial of DCM. Parallel to the argument presented above in the context of attempted justifications of the Amalek commandment, it can be urged that even if the explicit motivation for the restrictions on the commandment were moral, the morality in question might be revealed morality. The moral basis for restrictions on the scope of the Amalek commandment would presumably be uncomfortable with the idea of killing innocent people. Yet, as mentioned earlier, precisely that is forbidden in the sixth of the Ten Commandments. Even if the motivation for halakhic limitations on the Amalek commandment is moral, perhaps the moral reservations that generate the limitations are grounded in revelation.[19]

Perhaps the moral reservations are grounded in revelation.

It is instructive to compare one aspect of the halakhic treatment of the rebellious son, the *ben sorer u-moreh*,[20] to the restrictions on scope and applicability that are a feature of the halakhic attitude towards the Amalek commandment. The Torah directs that the *ben sorer umoreh* be put to death, even though he has not committed any offense that would usually be considered deserving of the death penalty. Talmudic discussion of the *ben sorer u-moreh* commandment often attempts to limit its effect in practice. To cite a well-known example:

> Rabbi Simeon said: "Because he [the *ben sorer u-moreh*] eats a half *mannah* of meat and drinks half a *log* of wine, can his parents take him and have him stoned?! [Obviously not!] Therefore [we are forced to conclude that an actual *ben sorer u-moreh*] has never existed and will never exist. Why, then, is the law written? That you may study it and receive reward [for doing so].[21]

In this passage, the applicability of the *ben sorer u-moreh* commandment is curtailed in the most radical way possible: the law is confined entirely to the realm of theory. But this passage does not differ from halakhic approaches to the Amalek commandment merely in respect of the extent of the

[18] *Hagahot Maimoniyot* to Maimonides, *Mishneh Torah*, *Hilkhot Melakhim* 5:5; R. David ben Zimra (Radbaz) ad.loc. rejects this restriction.

[19] Similar considerations apply to Sagi's analysis of the significance of Maimonides' conditional reading of the Amalek commandment in *Hilkhot Melakhim (*see below in the text for further discussion of Maimonides' interpretation). Sagi writes that "Maimonides… restricts textual instructions so as to reconcile them with basic moral assumptions… This attempt at accommodation shows that morality operates as an autonomous factor and, furthermore, points to an inverted relation of dependence, whereby religion depends on morality rather than morality on religion. God's command, as well as the norms flowing from it, are now reinterpreted in this light." ("The Punishment of Amalek", 344-345). Even if Sagi is correct that Maimonides' limitation on the Amalek commandment in *Hilkhot Melakhim* is based on unstated moral premises, it is quite plausible that these premises are grounded in revelation. Interestingly, Sagi at times lapses into formulations which appear to concede this, for example: "Maimonides' moral interpretation is in accordance with the spirit of the Torah and its fundamental premises regarding human justice" (344); and "advocates of the moral approach rely not only on their moral intuitions but also on textual sources… the claim that "every man shall die for his own sin," a prime justification of Maimonides' rulings, is a biblical verse" (345). Unless Sagi can show that the Torah's statements about justice merely inform us about some of the contents of an independent morality, there is no reason why such statements cannot be understood in accordance with DCM.

[20] Deut. 21:18-21.

[21] B.T. *Sanhedrin* 71a and parallels. A similar statement is made about the law of the *ir ha-nidahat* (idolatrous city) (Deut. 13:13-19).

restriction that it places upon the applicability of a morally troubling biblical law. It differs also in that the moral motivation for the radical restriction on the law is explicitly articulated. The *Sanhedrin* 71a passage is thus very significant, because it demonstrates that rabbinic literature is perfectly able and willing explicitly to formulate the moral grounds of halakhic limitations on Torah laws. This makes it more difficult, in instances such as the Amalek commandment where the restrictions are *not* provided with an explicitly moral basis, to argue convincingly that such restrictions are nevertheless rooted in ethical considerations.

Sagi and Statman write concerning the *Sanhedrin* 71a passage:

> [t]his radical interpretation of the Torah is obviously hard to reconcile with DCM. In DCM terms, if God commands the stoning of the stubborn and rebellious son, then this act is morally correct and attempts to mitigate it have no place. The explanations adduced by the Sages reflect their perception of a conflict between justice and the Torah, which they attempt to resolve by resorting to exegesis.[22]

But again, even in a passage such as *Sanhedrin* 71a, the explicit moral motivation for the limitation on an ethically difficult Torah law need not necessarily presuppose the denial of DCM. Rabbi Simeon's objection might just as well be grounded in the ethics revealed in the Torah as in an independent morality. Interpretations such as those of R. Simeon might reflect his perception of a conflict between *the concern for justice that he understands to be characteristic of the Torah* and the validity of which is grounded in the Torah, and the law of *ben sorer u-moreh*, in which the Torah appears radically to depart from this concern. And if the denial of DCM cannot safely be said to underpin the moral motivation for restrictions on the applicability of a morally difficult commandment when that motivation is explicit, *a fortiori* it cannot confidently be claimed to inform the limitations on the Amalek commandment, where no express ethical reasoning is articulated.

It is also important to note that even though some halakhic sources, as Korn notes, undoubtedly place limitations on the Amalek commandment, in general the restrictions placed by *halakhah* on the commandment are really relatively few. Sagi concedes that talmudic limitations on the obligation to exterminate Amalek are rare.[23] In fact, not a single clear restriction on the applicability of the Amalek commandment can be found in the entire Talmud.[24] Moreover, even some of the halakhic qualifications on the Amalek commandment that do exist are resisted by other halakhists, as noted above.[25] The situation is not even totally unambiguous regarding Maimonides's treatment of the Amalek commandment in *Hilkhot Melakhim*, of which Korn makes so much. Maimonides, admittedly, moralizes the commandment by

[22] "Divine Command Morality and Jewish Tradition" (above, n. 4), 58.

[23] Sagi, "The Punishment of Amalek" (above, n. 4), 338.

[24] This claim is intended to cover the Mishnah and the Babylonian and Palestinian Talmuds. The word "Amalek" appears twice in the Mishnah, in *Megillah* 3:6 and *Qiddushin* 4:14. In the Babylonian Talmud, it appears in the following places (excluding references to the Mishnah): *Berakhot* 58a; *Shabbat* 56b; *Shabbat* 118b; *Yoma* 22b; *Megillah* 31a; *Bava Batra* 21b; *Bava Batra* 46b (as a mnemonic); *Sanhedrin* 20b (four occurrences); *Sanhedrin* 99b; and *Zevahim* 116a (two occurrences). In the Palestinian Talmud, "Amalek" occurs (excluding references to the Mishnah) in *Rosh ha-Shanah* 3:8; *Ta`anit* 4:3; *Megillah* 1:11; *Megillah* 4:2; and *Qiddushin* 4:11. In none of these places is any limitation on the Amalek commandment suggested. In one source not included in the above list, the Talmud states that "the descendants of Haman studied Torah in Benei Beraq" (B.T. *Sanhedrin* 96b; the same teaching is quoted in B.T. *Gittin* 57b). This does appear to curtail the applicability of the Amalek commandment, since it suggests that descendants of Amalek were accepted as converts to Judaism (Haman is traditionally regarded as descended from the Amalekite king Agag) – something that would of course be impossible if the directive to destroy them had been followed. As

making its application conditional on Amalek refusing to make peace. But the moralization is only partial, because, as Korn himself concedes (9 n. 37), the terms of peace are very demanding, involving various forms of subjugation to the Jewish people. (For the sake of argument, let us assume, with Korn, that although he does not explicitly state this in *Hilkhot Melakhim*, Maimonides does not hold that if the terms of peace are rejected, innocent Amalekites, including children, are killed). Furthermore, as Gerald Blidstein points out, Maimonides himself apparently does not consistently adopt this conditional interpretation of the Amalek commandment.[26] In his discussion of war against the Amalekites and the seven Canaanite nations in *Sefer ha-Mitsvot*, Maimonides makes no mention of offering terms of peace to these peoples.[27] In his analysis of optional war (*milhemet reshut*) in the same work, however, Maimonides deals in detail with offering the terms of peace.[28] It thus seems that, in *Sefer ha-Mitsvot*, Maimonides understands the Amalek commandment as unconditional.[29]

If *halakhah* includes only sporadic and disputed restrictions on the Amalek commandment, and if even the restrictions that do exist are not undoubtedly morally motivated, it appears that Korn is over-optimistic about the prospects of fully assuaging the moral discomfort that we are likely to feel concerning this *mitsvah* and its treatment in traditional sources. Even though *halakhah*, as Korn notes, has by now neutralized the Amalek commandment in practice, these factors justify our experiencing considerable residual disquiet.

Korn is over-optimistic about assuaging the moral discomfort that we are likely to feel.

A brief glance at traditional biblical exegesis of the Amalek commandment compounds the sense of unease. To be sure, some classical commentators such as Nahmanides and Abravanel attempt moral justifications, as Korn notes. Equally, however, the lack of emphasis by traditional exegetes on the moral difficulties surrounding the Amalek commandment is often striking. A good example is the approach of Rashi, widely considered, of course, to be the traditional Jewish biblical exegete *par excellence*. Let us examine briefly Rashi's commentary on the two main sections in the Torah that refer to Amalek's conflict with the Jewish people. In his commentary to the passage concerning Amalek in Exodus 17:8-16, Rashi mentions several considerations of a broadly ethical nature. These include the Israelites' lack of gratitude towards God (commentary to verse

Sagi ("The Punishment of Amalek", 338) himself concedes, though, "this passage, which is basically an *aggadah* (a non-halakhic text), can hardly be viewed as a matching counterpart" to the Talmudic passages which place no restriction on the Amalek commandment and indeed often support its literal interpretation.

[25] See n.18.

[26] Gerald J. Blidstein, *Political Concepts in Maimonidean Halakha* (Hebrew), (Ramat Gan: Bar Ilan University Press, 1983), 220.

[27] Maimonides, *The Commandments*, trans. Charles B. Chavel, vol.1 (London: Soncino, 1967), 200-203 (Positive Commandments 187 and 188).

[28] Ibid., 204 (Positive Commandment 190).

[29] R. Hayyim Heller, in his edition of Maimonides's *Sefer ha-Mitsvot* (New York, 5706), 82, n. 11, interestingly suggests that Maimonides does not interpret the Amalek commandment conditionally even in ch.6 of *Hilkhot Melakhim*. The phrase in *Hilkhot Melakhim* 6:4 usually translated "who do not make peace" is *she-lo hishlimu*, which can also be rendered "who *did* not make peace." Heller argues that, rather than ruling that the Amalekites are to be offered the terms of peace before any military attack upon them, Maimonides is merely attempting to explain why the Torah is so severe on Amalek and mandates its extermination–i.e., because they did not accept the terms of peace. On Heller's view, Maimonides does not necessarily commit himself to any future restrictions on the Amalek commandment. As Sagi points out, however (*Judaism* [above, n. 4], 223), the plausibility of Heller's novel reading of Maimonides is undermined by the fact that the Torah makes no reference to a historical peace offer to Amalek by the Israelites.

8); the necessity of showing respect even to one's disciples (commentary to verse 9);[30] Moses' improper lack of enthusiasm in following the divine command, as evidenced by his appointing Joshua to lead the Israelites into battle against the Amalekites instead of leading them himself (commentary to verse 12);[31] and Moses' empathy with the distress suffered by the warring Israelites (loc. cit).[32] Given the fact that Rashi, despite the characteristic brevity with which he expounds this passage, does not ignore ethical themes and indeed highlights them, one might have expected some reference to the apparently acute moral dilemmas attendant upon the Bible's instructions regarding the treatment of Amalek. Yet no such reference is forthcoming, even implicitly.

A similar analysis can be offered regarding Rashi's commentary on the passage dealing with Amalek in Deuteronomy 25:17-19. Here, once more, Rashi alludes to broadly ethical concerns: the need for honest weights and measures (commentary to verse 17); Amalek's sexual immorality (commentary to verse 18);[33] Amalek's blasphemy (loc. cit.);[34] and Amalek's lack of fear of God (loc. cit).[35] And here, not only does Rashi make no mention of the moral problems attendant upon the direct command to wipe out Amalek in verse 19; on the contrary, his only comment to verse 19 emphasizes the lengths to which the extermination of Amalek is to go:

> Man and woman, infant and suckling, ox and lamb, so that Amalek's name is not remembered even through an animal, by [someone] saying: "This animal belonged to the Amalekites."[36]

Thus, though I entirely sympathize with Korn's attempt to wed traditional Jewish treatment of the injunction to wipe out Amalek as closely as possible to the highest moral standards, it seems to me that this project faces more obstacles than Korn acknowledges, and that further discussion and analysis are required.

I would like to conclude with some broader and more speculative remarks. Korn's over-optimism regarding the extent to which traditional sources resolve the moral difficulties surrounding the Amalek commandment is, it seems to me, part of a wider trend among some contemporary Jewish scholars to emphasize the moral character of Jewish tradition in general.[37] It is this strong (and laudable) desire to portray Judaism as an unimpeachably ethical faith that also, I believe, informs the enthusiasm of Korn, Sagi and others for autonomy and their (so I have argued) over-simplistic view of Jewish tradition as almost totally lacking in support for DCM. For, though I have suggested above that DCM is logically reconcilable with a moral Jewish tradition, Korn and Sagi believe that a moral tradition can be underpinned only by autonomy. The determination of thinkers such as Sagi and Korn to portray Jewish tradition as morally sensitive and pro-autonomy is, in my view,

[30] S.v. *behar lanu.*
[31] S.v. *vi-yedei mosheh keveidim.*
[32] S.v. *even vayasimu tahtav.*
[33] S.v. *asher qarekha ba-derekh.*
[34] S.v. *vayezaneiv bekha.*
[35] S.v. *ve-lo yarei.*
[36] For fuller discussion of traditional Jewish exegesis of the Amalek commandment, see Sagi, "The Punishment of Amalek in Jewish Tradition" (above, n. 4), 325-336; Harris (above, n. 13), 136-143.
[37] Leon Roth, in the article which Korn cites at the beginning of his essay, is a precursor of this trend. For traditional Jewish interpreters, he writes, "the Torah is a law of life and kindness and love and decency and pity. This being the guiding principle, whatever appears contrary to it must be explained away. And it *was* explained away… [this] supreme principle is followed consistently throughout" (*Is there a Jewish Philosophy?* (London and Portland, Ore.: Littman Library of Jewish Civilization, 1999), 138, 141; emphasis in original). This seems too sweeping and too sanguine.

motivated to a significant degree by the political, social and cultural milieu in which modern Orthodox thinkers currently work, and constitutes a response to the regrettable but significant downplaying of broader ethical and humanitarian motifs within some sectors of the Orthodox world.[38] Like all philosophical reflection, theirs is not divorced from the social, cultural and political context in which it occurs.[39]

Needless to say, the existence of these underlying motives (if indeed the preceding speculations are justified) does not of itself invalidate the views of Korn and Sagi. Nevertheless, I have tried to argue here on other grounds for a perspective different from Korn's on some of the important issues that he raises.[40]

[38] Sagi's work *Judaism: Between Religion and Morality*, which strongly insists on the moral nature of Jewish tradition and the absence of DCM from Jewish sources, was published in 1998. It is difficult not to read this work against the background of the ideological struggle within the religious Zionist community in the years prior to its publication (particularly given some of Sagi's disputes in the book with figures on the political right of the religious Zionist community) and against the background of the assassination of Prime Minister Yitzhak Rabin z'l in November 1995 by a person who identified with religious Zionism. Near the end of the work, Sagi remarks briefly but revealingly that "this book is an attempt to direct autonomous moral consciousness anew in the face of a reality in which, sometimes, it is precisely religious commitment that causes the dimming or the eradication of moral sensibility" (352 - my translation).

[39] I am grateful to Dr. Tamra Wright for helpful discussion of some of the points in this paragraph.

[40] My thanks to Professor David-Hillel Ruben and Dr. Daniel Rynhold for their helpful comments on this essay.

Reply to Michael J. Harris

Eugene Korn

I thank Michael Harris for his thoughtful responses to my essay, and for ensuring that it will not be lost in the dust bins of history. I wrote it hoping to stimulate serious discussion about the relationship between ethical reasoning and halakhic imperatives, and how rabbinic thinkers wrestled with the issues surrounding that relationship. R. Harris's response indicates that the essay has partially achieved that objective. R. Harris's fine book, *Divine Command Ethics, Jewish and Christian Perspectives*, should be required reading for anyone wishing to understand the debate fully.

As Harris notes, by rejecting strong or analytic DCM (the theory that divine commands *define* moral concepts and standards, and therefore by definition there is no coherent concept of an immoral commandment), I am in the good company of Sagi, Statman, Rabbis Aharon Lichtenstein, Shubert Spero and Louis Jacobs—and I would add Sa`adyah Gaon, Maimonides, Nahmanides, all Jewish rationalists, R. Me'ir Abulafia (Ramah), R. Simhah ha-Kohen of Dvinsk (*Meshekh Hokhmah*), Netsiv, R. Abraham Isaac ha-Kohen Kook and R. Joseph Soloveitchik to that exalted list.

Harris presents three major theses that challenge the claims of my essay.[1]

(1) The non-literal rabbinic interpretations of the commands to destroy the Amalekite and Canaanite nations probably do not rest upon autonomous moral considerations, but upon a revealed morality, i.e. other legal principles in *halakhah*.

(2) No explicit ethical justification is present in Jewish sources regarding interpretations of the Amalek commandment, while such ethical justification is present in other cases, specifically *ben sorer u-moreh*. Hence it is unwarranted to assume that ethical considerations were a factor in traditional reinterpretations of the Amalek commandment.

(3) I (together with Professors Avi Sagi and Daniel Statman) suffer from a desire to portray Judaism as an "unimpeachable ethical faith," a view which is somehow derived from our political, social and cultural milieus. Harris's charge also carries the implication that this influence is not authentic to *halakhah*.

1. DCM and *Mehiyyat Amalek*

The important disagreement between Harris and me is whether the halakhic history of the specific commandments calling for warfare against Amalek and the Canaanite nations reflects the weak or epistemological DCM thesis. I argue that it does not. *Halakhah* rejected the literal interpretation of those commandments because the Talmud rendered the *mitsvot* inoperative and later halakhic tradition reconceptualized the obligation to conform to the demand of retributive justice not to kill innocents. Had rabbinic tradition subscribed to the weak DCM theory regarding those commands, it would have left the literal imperatives

operative, despite the moral disquiet they caused.

Harris offers an alternative explanation: the halakhic tradition's non-literal turn should be understood as a result of its resolution of incompatible divine commands (i.e. the prohibition of murder and the imperative to destroy Amalek), without any interference from moral considerations.

Had rabbinic tradition subscribed to the weak DCM theory regarding those commands, it would have left the literal imperatives operative.

Yet there is simply no textual evidence for Harris's thesis—and there should be if it were correct. Halakhic discussions are replete with explicit resolutions of conflicting commandments, such as *Pesahim* 120a regarding the conflict between Ex. 12:15 and Deut 16:5 on the number of days one is obligated to eat *matsah*; and *Berakhot* 7a regarding the conflict between Ex. 20:5 and Deut. 24:16 on whether punishment for sin may be applied to the sinner's offspring. Were the commands in question a case of conflict with other commands, the sources should have cited, "Thou shalt not murder" in the Amalek case. Yet nowhere in talmudic and rabbinic discussion do authorities cite that commandment or other revealed halakhic principles in discussing *mitsvat mehiyyat* Amalek or the wars against the Canaanite civilians. The cited *Midrash Tanhuma* 96:3 that quotes Moses' moral argument to God ("Should I now go and attack both those who sinned and those who did not sin?") is more typical of the halakhic discussions around those *mitsvot*. Only the consideration of moral justice is cited, not any countervailing halakhic principle. Were it an issue of a tension with Harris' "revealed morality," Moses could have easily and effectively cited the legal prohibition against murder. Even R. Abraham Bornstein (*Avnei Nezer*), who cites 2 Chronicles 25:4 "The children shall not die for their fathers," understands that this generic principle has little potency against the repeated and specific imperatives to destroy Amalekite and Canaanite innocents that appear in the *Humash*. His nineteenth-century contribution is late in the discussion, and I suspect that he could make this argument only because halakhic tradition had already rejected the implementation of killing the innocents of those tribes.

Moreover, there is a good reason why the "Thou shalt not murder" is not cited as a proof text against exterminating Amalekite and Canaanite innocents: As Benjamin Ish Shalom and Michael Broyde emphasize in their essays in this edition of *Meorot*, it is unclear whether this peacetime imperative applies in the conduct of war—and if it does it surely has different parameters. I note that the halakhic precedent I cited in my article for prohibiting the sacrifice of an innocent life for higher goals (*Yerushalmi*, *Terumot* 8:10) is in fact a precedent in the context of war.

I stated in the essay that "without moral considerations it is hard to explain why halakhic tradition opted for the justice principle over the literal reading of the Amalek commandment." This is because the most logical—and the favored halakhic—approach in the instance of contradictory commandments is to accept the generic imperative (e.g. do not murder) and make an exception to the general rule only in the particular circumstances delineated by the more specific conflicting commandment (e.g. destroy all Amalekites). This is illustrated in *halakhah* by the generic prohibition against marrying two sisters (Lev. 18:18), which is superseded only in the specific case of the imperative of *yibbum* (Deut. 25:5) for a husband to marry his sister-in-law whose husband has died childless. The general prohibition stands in all cases other than the one defined by the specific imperative. Yet *halakhah* did not adopt this method or conclude accordingly regarding the

Canaanites or Amalek. On the contrary, it concluded that the generic rule against killing innocents overrode the specific commandment to kill civilian Amalekites and Canaanites. Clearly, something more than legal or methodological considerations are at work in this prioritization of commandments.

Religious Jews should strive to see God in all truth.

I sympathize with Harris' religious impulse to root our moral principles in God and *halakhah*. Surely religious Jews should strive to see God in all truth, and wish to emulate Abraham's belief in a close connection between the Creator of heaven and earth and the moral axioms we hold dear. Yet it is quite another matter to force moral considerations into a Procrustean bed of exclusively legal analysis when there is no textual or experiential support for it. More nuance is required. We all understand that killing innocent women and children is wrong even before we read Ex. 20:13.

There is a bridge between Harris' position and the independence of moral truths from revealed law. It is provided by R. Simhah ha-Kohen of Dvinsk (*Meshekh Hokhmah*). He posited that God endowed each person with the capacity to understand moral authority and the fundamental moral principles that became known in halakhic parlance as the seven Noahide commandments (*sheva mitsvot benei Noah*).[2] Hence God implanted in Jews and gentiles alike a general moral capacity to understand that it is wrong to murder, rob, commit sexual immorality etc. as well as the positive understanding that we should live under a system of just laws—even though we sometimes disobey those standards. Although these are *mitsvot,* it is hard to understand them as formally legislated and explicitly revealed divine commands. There is no indication in the Torah that there was a formal command to Adam or Noah of any Noahide prohibition other than eating the limb of a living animal and possibly homicide. Even the talmudic discussion in *Sanhedrin* 56b that identifies these principles with Gen. 2:16-17 points to a supportive connection (*asmakhta)*, not to explicit divine commands from which these prohibitions are derived *ab initio.*

R. Simhah thus locates our moral axioms in a "revealed morality" that is also "natural" because it emanates epistemologically from our moral reason or intuition. Our moral sense is indirectly sourced in God, but not via formally legislated commands.

We see a similar assumption elsewhere in authoritative rabbinic thought. For Nahmanides, the generic imperative "You shall do what is right and good" (Deut 6:18) demands going "beyond the law" (*lifnim mi-shurat ha-din*). This means that it is up to our moral sense or practical reason to understand what is right and good beyond what is revealed by a specific commandment.

2. Moral Justifications—Explicit and Implicit

Harris argues that we should not ascribe moral motivation to the rabbinic limitations on the Amalek and Canaanite commandments since moral justifications do not appear explicitly in the literature regarding those *mitsvot.* Moreover, he claims that R. Simeon's argument in *Sanhedrin* 71a regarding the stubborn and rebellious son (*ben sorer u-moreh*) "demonstrates that rabbinic literature is perfectly willing and able to formulate the moral grounds of halakhic limitations on Torah laws. This makes it more difficult…to argue convincingly that such restrictions are rooted in ethical considerations."

[1] Harris also argues that DCM is found in post-talmudic sources. This is a minor point regarding my essay, as I argued only against the general presence of strong or "analytic" DCM I agree with A. Sagi that the strong or analytic DCM

Harris is correct that neither the Talmud nor Maimonides explicitly mentions ethical considerations regarding Amalek or the Canaanite nations. Yet rabbinic literature does consider the moral problematics of these *mitsvot* and of killing innocents to be factors in limiting or interpreting those commandments. Moses' objection in *Midrash Tanḥuma* and his subsequent refusal to kill innocents is precisely an articulation of moral concern regarding the injustice that would result from literally interpreting the divine command. Similarly, as stated in note 35 of my essay, R. Me'ir Abolafia argued on explicit moral grounds ("Heaven forbid that God cause evil") against killing the women and children of an idolatrous city—the very same ethical problem as killing civilian Amalekites or Canaanites. Hence there is ample precedent in rabbinic literature for moral considerations informing halakhic interpretations of these divine commands.

A greater weakness is that Harris reads *Sanhedrin* 71a imprecisely. A careful examination of the text does not substantiate his contention that R. Simeon's statement cites moral grounds for halakhic interpretation. The *gemara* states, "Because he ate a *tartimar* of meat and drank a half *log* of wine, do his father and mother take him *("motsi'in oto*") and have him stoned?"—not "can [sic] his father and mother take him and have him stoned?" as Harris translates it. On a literal level, R. Simeon denies only the causal conjunction of the son's gluttonous behavior and his parent's actions to initiate execution. There is no moral "can" (or more correctly "may") in the statement. Literally, R. Simeon's words can be understood to mean, "Parents would never be moved to execute their son merely because he was a glutton. Therefore there never was, nor will there be, a *ben sorer u-moreh*." The absence of any explicit moral "ought" or "can" has led the noted Orthodox philosopher, David Shatz to recommend to me in private conversation that this psychological interpretation is the correct interpretation of the passage.

R. Simeon denies only the causal conjunction of the son's gluttonous behavior and his parent's actions to initiate execution.

Once again, I empathize with Harris' interpretation. He has done precisely what he accuses me of doing illegitimately: seeing a moral dimension in a halakhic source, because this is the most plausible way to understand the text. Given the immediate context of the discussion in *Sanhedrin*, it is logical that the issue at hand is the justification—moral and legal—of capital punishment for the rebellious son, not whether such a case was ever an empirical reality. [3] Yet, like the talmudic text regarding exterminating the Canaanites or Maimonides' text regarding destroying Amalek and all Canaanites, the moral rationale in *Sanhedrin* remains implicit.

Since these texts do not explicitly state the rationales for their interpretations, we have no apodictic proofs demonstrating with certainty that ethical considerations were a material factor in forming the operative halakhic interpretations of how to behave toward the stubborn and rebellious son, Amalek and the Canaanite nations. Yet I submit that the moral rationale is both the simplest and most plausible hypothesis. It possesses the maximum explanatory power in light of the normative halakhic conclusions in these cases. It is improbable to ascribe to "mere coincidence" the fact that so many commandments that pose moral problems (e.g. killing all the inhabitants of an idolatrous city, the ordeal of a suspected wife (*sotah*), capital punishment, killing heretics

is absent in pre-modern rabbinic sources. None of the sources cited by Harris imply strong DCM. My major argument was that normative halakhic tradition rejected all DCM in interpreting the specific commands to go to war against the Amalekite and Canaanite peoples.

[2] *Meshekh Ḥokhmah*, Genesis 7:1. See also Maimonides, *Mishne Torah* Laws of Kings 9:1, where Maimonides states that the seven Noahite commandments are supported by human reason.

and idolaters, *lex talionis*, and genocide against Amalek and the Canaanites) are the very commands for which Hazal and *poseqim* rejected literal interpretations or practical implementation. And as R. Nahum Rabinovitch has demonstrated, there is no halakhic or spiritual reason to deny a higher ethical realization in the historical unfolding of the halakhic process. [4]

The moral rationale is the simplest and most plausible hypothesis.

Harris cites Rashi as ignoring any ethical considerations when discussing *mehiyyat Amalek*, and R. Hayyim Heller, who denied Maimonides' requirement to offer peace before going to war in a *milhemet mitsvah*. But arguments from silence—be it Rashi's or others—are weak evidence indeed for DCM. Since Rashi quotes the *Sifri* on Deut. 20:10 as limiting peace terms to a *milhemet reshut*, he clearly disagreed with Maimonides on this point. This strengthens my argument, since Maimonides rejected the previously accepted halakhic opinions on offering peace, and, as R. Goren indicates, nearly all halakhic authorities after Maimonides, including Nahmanides, Ra'abad, Abravanel, Meir Abolafia, Netsiv and *Hazon Ish*, adopted Maimonides' interpretation and rejected Rashi and the *Sifri*. Maimonides' position has become normative *halakhah* today. Indeed, it is hardly conceivable that a responsible contemporary *poseq* would rule that Jews are permitted to attack women, children, civilians or any person innocent of aggression against Israel.[5] This is all to the moral good of the Jewish people and the glory of Torah.

3. A Moral *Halakhah*?

This brings me to Harris' final point about "unimpeachable ethical faith" and the legitimacy of finding moral impulses at work within the halakhic process. Rashi and Maimonides held diametrically opposed philosophic positions on Torah and *mitsvot*. As Harris indicates in his book (pp. 107, 183-184), Rashi's commentary on the *mishnah* in *Berakhot* 33b implies that he believed *mitzvot* to be arbitrary edicts (*gezeirot*) without useful purpose that should be obeyed without ascribing philosophic or pragmatic rationales.

Maimonides strongly disagreed and insisted that *mitsvot* had purposes—including ethical purposes: "Every commandment …exists with a view to communicate a correct opinion or to put an end to an unhealthy opinion, to communicate a rule of justice or to warding off an injustice, to endowing men with a noble moral quality or to warn them against an evil moral quality."[6] For Maimonides, the quest for moral purity in divine commands is not a result of outside political events or a naïve faith in the ethics of Torah. It is intrinsic to Torah and the proper observance of *mitsvot*. It is this profound impulse that realizes the purposes of *mitsvot* and ennobles our religious

observance. In modern times, R. Abraham Isaac ha-Kohen Kook was one among most Torah authorities who also saw moral purity as a necessary quality of our service to God, announcing that "It is forbidden for religious behavior to compromise a person's natural moral sensibility. If it does, our fear of heaven (*yirat shamayyim*) is no longer pure." This type of supposed 'fear of heaven' is

[3] I agree with Harris that R. Simeon objected to the implementation of the law on grounds of justice. I interpret R. Simeon as saying, "There can never be an actual case of *ben sorer u-moreh* because an act of gluttony can never be the difference between guilt and innocence in a capital case. It would contradict retributive justice." This logical impossibility is what allows R. Simeon to predict with certainty about all future cases. Nevertheless, justice is only in the background and not explicit, as Harris claims.

[4] "The Way of Torah," *The Edah Journal,* 3:1 (*Tevet* 5763), found at www.edah.org.

[5] See Aviezer Ravitsky, "Prohibited Wars in Jewish Religious Law" in this edition of *Meorot* (*Shevat* 5767).

[6] *The Guide of the Perplexed*, III:31, trans. Shlomo Pines (Chicago: U. of Chicago 1963). Maimonides states in this chapter that people who reject the intellectual and moral reasons for divine commandments (i.e. consider them to be arbitrary decrees) are so compelled by a "sickness of their souls," and that they are persons of "weak intellects."

incorrect (*pesulah*)."[7] R. Joseph B. Soloveitchik also maintained that *halakhah* cannot violate the moral law.[8]

There is no doubt that Maimonides, R. Kook and R. Soloveitchik believed it was a timeless truth for God's commandments to possess ethical integrity. Yet R. Harris is correct that ethics holds critical importance for Jews today. Religion is not a self-justifying affair, and we have seen it become coarse in peace and evil in war.[9] We live in an age when religious zeal has produced murder around the world, and when even some Jews have fallen prey to violence in the name of God.[10] Moreover, sovereignty has bestowed upon the Jewish people the privilege of national responsibility as well as the burden of military power. No longer can war or retaliation remain abstract theological categories; today they are Jewish existential options.

It is the quest for moral purity in the *mitsvot* of peace and war that can redeem the Jewish people from coarseness and unjustified religious violence. Without it, *halakhah* runs the risk of being reduced to a spiritually neutral technical discipline and a morally dangerous commitment.

Thus the "considerable residual moral disquiet" to which R. Harris refers is an essential redemptive experience for all Jews making their way through contemporary challenges.

Maimonides, *Avnei Nezer*, Netsiv and R. Goren all understood that it would be a desecration of the Torah for Jews to intentionally kill women, children and innocent parties in the name of God. As Abraham's protest regarding Sodom indicates, the quest for ever-evolving moral purity in religious life, a life that reflects the highest ethical standards as we humans understand them, is not born of contemporary values and culture.[11]

We need not to be defensive about the moral impulse in the halakhic process. On the contrary, we should stand in awe of its power and rededicate ourselves to continue that sacred tradition.

[7] *Orot ha-Qodesh* 3:11.

[8] *Lonely Man of Faith*, *Tradition* 7,2 (1965): 61-62n.

[9] R. Joseph B. Soloveitchik understood that religious life requires redemption and purging of its immoral tendencies. See "Catharsis," *Tradition* 17,2 (1978): 2-53. For R. Soloveitchik's view that halakhah cannot violate the moral law, see above, n. 48.

[10] See Eugene Korn, "*Tselem Elokim* and the Dialectic of Jewish Morality," *Tradition* 31,2 (1997): 5-30.

[11] Rabinovitch claims this evolution is part of God's plan for us to understand Torah anew in every age of history.

Meorot
A Forum of Modern Orthodox Discourse

Aggadic Man: The Poetry and Rabbinic Thought of Abraham Joshua Heschel

Alan Brill

Abstract: This essay analyses two recently translated works of R. Abraham Joshua Heschel, illustrating how he reads classic texts through modern eyes. It focuses on Heschel's view of Rabbinic Judaism as *aggadah,* and his theology of revelation that includes a Heavenly Torah and Torah from Sinai as elements of Torah study. Using the tools of poetry and comparative religion, Heschel presents an experiential Torah of the heart that offers an understanding of rabbinic thought through the generations.

Biography: R. Dr. Alan Brill is the founder and director of Kavvanah: Center for Jewish Thought. He is the author of *Thinking God: The Mysticism of R. Zadok of Lublin* and is presently writing a book on Judaism and other religions. His previous contributions to *The Edah Journal* include "Worlds Destroyed, Worlds Rebuilt: The Religious Thought of Rabbi Yehudah Amital" (*Sivan* 5766), "An Ideal Rosh Yeshiva: By His Light: Character and Values in the Service of God and Leaves of Faith by Rav Aharon Lichtenstein" (*Tammuz* 5765) and "Judaism in Culture: Beyond Bifurcation of Torah and Madda" (*Nisan* 5764).

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Aggadic Man: The Poetry and Rabbinic Thought of Abraham Joshua Heschel

Alan Brill

R. Abraham Joshua Heschel (1907-1972), one of the significant Jewish theologians of the twentieth century, taught modern American Jews to speak about God. He capped off his full theological career with activism for civil rights and protest against the Vietnam War. Most readers of Heschel know his later works in English, especially their calls for awe, wonder and a sense of the ineffable in our lives.

The recent translation of Heschel's early Yiddish poetry collection *The Ineffable Name of God: Man*[1] provides a fresh understanding of his idioms of direct relationship with God—views not previously available in his later theological works. More importantly, the newly translated volume of Heschel's *Heavenly Torah*[2], which Heschel considered his major work, now allows the reader to consider the standard presentation of Heschel's theological positions. This essay explores how Heschel sought to present the pre-modern texts on revelation as a means of reawakening the religious sense of revelation, as mediated through various modern idioms.

Poetry—*The Ineffable Name of God: Man*

In 1933 Heschel already invited his readers to experience a tangible sense of divine presence in his poetry. Heschel's early poems thus serve as a wonderful introduction to his thought: we can see in them Heschel's core goals before his exposure to formal academic training and his distraction by phenomenology, aesthetics, and comparative religion.[3]

In these poems Heschel asks how we are to overcome the indifference of the world around us to God. "It is only God who still believes in God," he argues (181). Rather than relying on existentialism, Heschel's method produces an answer to God through the *in zikh* (thing itself) school of Yiddish poetry. Following its method, Heschel seeks to capture an expressionistic mood of the moment in itself—in this case an expressionistic sense of the divine as an identity with God and an empathy with divine pain.[4]

> Am I not—you? Are you not—I?
> When a need pains You, alarm me!
> When You miss a human being
> Tear open my door!
> You live in Yourself! You live in me. (31)

This concern for God and the expressionistic portrayal of closeness to God, quickly reminds one of Rainier Maria Rilke's *Book of Hours*. Rilke writes about his relationship to God, "I want to mirror Your image to its fullest perfection." Heschel demurs, however, stating "I didn't need to study in Rilke's *heder* to know there is a God in the world" (13).

[1] *The Ineffable Name of God--Man: Poems*, translated from the Yiddish by Morton M. Leifman; introduction by Edward K. Kaplan, (New York : Continuum, 2004).

[2] *Heavenly Torah As Refracted Through the Generations*, edited and translated from the Hebrew with commentary by Gordon Tucker with Leonard Levin, (New York:: Continuum, 2005).

[3] For an overview of Heschel's early career, see Edward Kaplan and Samuel Dresner, *Abraham Joshua Heschel, Prophetic Witness* (New Haven and London: Yale University Press, 1998).

[4] For another *in zikh* religious poet, see *Selected Poems of Jacob Glatstein* (October House: June 1973). In contrast to Heschel's piety, the cosmopolitanism of his contemporaries is presented in Ruth Wisse, "1935-6, a Year in the life of Yiddish Literature" *Studies in Jewish Culture in Honour of Chone Shmeruk* (edited by Israel Bartal, Ezra Mendelsohn, Chava Turniansky, Jerusalem, 1993) 83-103.

Like the prophets of yore, Heschel felt called by God; he pleaded with God, directly beseeching Him to deliver "a message from You. I cannot curse as justly as did Jeremiah… You are meant to help here, Oh God… I will fulfill your duty, pay your debts" (33). As a twentieth-century prophet whose actions bespeak God's presence and message on earth, Heschel felt God's direct word since "God follows me everywhere" (57).

Charles Taylor describes how modern man, having lost the fixed order of traditional society, uses his individualistic works to redirect attention from this loss to a recovery by maintaining traditional sensibility:

> Rilke speaks of angels. But his angels are not to be understood by their place in the traditional defined order. Rather we have to triangulate to the meaning of the term through the whole range of images with which Rilke articulates his sense of things… We cannot get at them through a medieval treatise on the ranks of cherubim and seraphim, but we have to pass through this articulation of Rilke's sensibility. [5]

The traditional public orders of meaning are no longer viable, Taylor suggests. We have only the articulation of a modern author trying to recapture the traditional meaning. In Rilke's case, angels will never be known again through philosophy, science, or theology independent of the articulated human sensibility. For example, modern science no longer uses the great chain of being. Angels, therefore, are not part of human sensibility. But almost as if mirroring Rilke's gap from the divine, Heschel's sensibility offers the direct presence of God in a world indifferent to God, one no longer part of medieval metaphysics, kabbalistic hierarchies, or a larger order. Rather than relying on traditional hierarchy, Heschel provides a kabbalistic and Hasidic sensibility that is mediated through his poetic imagination.

Heschel eventually discovered the distractions and joys of academic theology, and wrote his dissertation on the experiential nature of prophecy. He laid important groundwork for his later work on revelation by using the phenomenological method of comparative religion of Geradeus Van de Leeuw, as taught by his advisor Alfred Bertholet. In his dissertation (see below for citations), Heschel argued that **biblical prophecy**, distinct from the experience of other seers and mystics, is non-ecstatic and gives an intuition of an ethical doctrine.

Religion derives from God's call to man.

Heschel's defense of religion also made generous use of the early neo-orthodox theology of Karl Barth, which openly rejects the liberal understanding of religion as serving man. Heschel reasoned instead that religion derives from God's call to man. Religion reaches beyond the autonomous, rational, Kantian world of science to acknowledge a revelatory truth. One can find variants in Heschel's writings of Barth's early neo-orthodox statement that the Bible is God's anthropology, and not man's theology.[6]

Yet for a poet to combine Barth's submission to the divine with the human realm of intuitive experiences of phenomenology and poetry creates an implicit tension—one that runs throughout Heschel's writing. Heschel remains in oscillation between neo-orthodoxy and comparative religion, between the other-worldly elements of the Torah and the human poetic and experiential elements, between heaven and earth. Heschel seeks to capture that tension, which lies at the core of religion and his own soul.

[5] Charles Taylor, *The Ethics of Authenticity* (Cambridge: Harvard, 1991), p. 84.

[6] "It is not the right human thoughts about God which form the content of the Bible, but the right divine thoughts about men." Karl Barth, *The Word of God and the Word of Man* (*Das Wort Gottes und die Theologie*), trans. D. Horton, (New York: Harper & Row, 1957 [orig. pu. 1928]), p. 43. On the Barthian element in Heschel's theory of revelation, see David Novak, "Divine Revelation," in *Modern Judaism; an Oxford Guide* (2005), pp. 278-289; id., "Briefly Noted- Heavenly Torah as Refracted through the Generations," *First Things* (November: 2005), p. 59.

The Torah of the Heart

The second newly translated work is *Heavenly Torah,* a translation of *Torah min ha-shamayim be-aspaqlaria shel ha-dorot*. Here we see Heschel's most serious engagement with rabbinic texts as he opens up new vistas in rabbinic theology. While most of his English writings have a universal quality and present a philosophy of religion applicable to all faiths, *Heavenly Torah* is Heschel's explanation of the heart of Judaism.[7]

This essay can only scratch the surface of the book's content. It covers the following five topics: Judaism as *aggadah*; the bi-polar nature of rabbinic thought; the differences between revelation and heavenly Torah; Heschel's own deflection of biblical criticism by downplaying the role of the text; and the role of prophecy in the ongoing community. I consider the importance of the book for engaging in further theological work, but I cannot analyze here Heschel's views on God, *mitsvot*, prayer, ethics, and symbolism, or consider the intersection of his life and thought.

Tucked away at the end of *Heavenly Torah* is a passage in which Heschel offers a direct answer to all questions of revelation, prophecy, and biblical criticism. He suggests that:

> You cannot grasp the matter of the "Torah from Heaven" unless you feel the heaven in the Torah. All temporal questions are in the context of eternity…But whoever denies the wondrous has no share in this world; how much more so can such a person have no dealing with heavenly matters. If this event is like an everyday occurrence, given to accurate apprehension and description, then it is no prophecy. And if the prophetic encounter is sublime and awesome, without parallel in the world, then it is clear that no description will do it justice, and silence becomes it." (668)

One needs to experience a feeling of the Torah from heaven.

Heschel argues that one needs to experience a feeling of the Torah from heaven: if one does not, one should not be teaching or studying these matters. He declares passionately that Judaism is not the rational non-experiential approach of historians and talmudists. He remains the poetic Heschel—self-identified with God, striving to open his reader to the awe and wonder of the ineffable in an age of indifference. He writes of the Torah that "no description will do it justice" since it is a mystical entity beyond all proposition, an ineffable experience.

Heschel fits nicely with those early twentieth century thinkers who fostered the great age of modern theological mysticism: William James, Dean W. R. Inge, Evelyn Underhill, and Friedrich Heiler. For them, all religion is experience and the depth of the heart.[8] These thinkers dismiss philology, history, or metaphysical schemes to reach the non-doctrinal core of religion. Heschel similarly seeks "depth theology": "The theme of theology," he wrote, "is the content of believing. The theme of depth theology is the act of believing." "Theology," he elaborated, "is in books; depth theology is in hearts. The former is doctrine, the latter is events."[9]

[7] It is unfortunate that Heschel's book lacks an index of cited rabbinic passages to allow for cross-references. Also for a book that openly reads rabbinic thought through the eyes of later generations, there is no index of the myriad passages of Maimonides, Zohar, Maharal, and Hasidism from which Heschel drew his interpretations. Both are serious omissions. In addition, the footnotes are not consistent in citation of editions, or quotes.

[8] For example, "Moreover, when he introduces concepts drawn from medieval Christianity or from Eastern religions, he does not situate them in their communal, interpretative setting. Similarly, he does not present the basic concerns of the neo-scholastic authors whose views he tries to assess." Rowan Williams, "The Prophetic and the Mystical: Heiler Revisited," *New Blackfriars* 64 (1983): 330-347, esp. 333-334. Similar comments are found in Dana Greene, *Evelyn Underhill: Artist of the Infinite Life* (New York: Crossroad, 1990).

[9] On the difficulty of working philosophically with Heschel, see Neil Gillman, "Epistemological Tensions in Heschel's Thought" *Conservative Judaism* 50,2-3 (1998): 67-76; Edward Kaplan, "Heschel as Philosopher: Phenomenology and the Rhetoric of Revelation", *Modern Judaism* 21, 1 (Feb. 2001): 1-14.

Given the experiential call of Heschel's reading of the Torah, one might be prompted to ask these questions: Can Heschel's expectation for everyone to share in revelatory experience actually create an experiential Judaism? Can one listen to the direct voice of God as a voice of pietistic or poetic individualism, religious anarchy, or artistic creativity? Heschel's theological position is certainly not for everyone, particularly those who are comfortable with rational, authoritarian, and legalistic approaches.[10] It is well suited to religious seekers who are on individual paths to directly experience God, yet it continues to pose the question of whether a romantic mystical sensibility can answer theological questions. We will return to these questions throughout this essay.

Aggadic Man: Wonder

Heschel's primary aim in *Heavenly Torah* is to present the centrality of *aggadah*, which he defines as seeking religious experience, within Judaism. For Heschel, *aggadah* shows our very humanity and individuality, unlike the constricting and binding *halakhah*, which is followed in submission. He proclaims that

> In *Halakhah* you find power and might, while in *aggadah* there is grace and love… *Halakhah* is the line of defense for the person whose wisdom exceeds his or her works; *Aggadah* lifts one up above all works….*Halakhah* deals with matters that are quantifiable; *aggadah* speaks of matters of conscience. (2)

Inspired by Rav Kook, H. N. Bialik wrote that we need both *halakhah* and *aggadah*; *halakhah* is the fruit, but *aggadah* is the flower. Heschel, however, goes further and considers the *aggadah* as the fruit with firmly planted roots (7). *Aggadah* is not just ornamentation; it is as substantial and serious as the *halakhah,* serving as a record of the past experiences that guide us to our own calling. There is no binding *halakhah* without *aggadah*, since the latter can change the performance of a *mitsvah.*

There is no binding halakhah *without* aggadah

Heschel credits Baruch Spinoza with the view "that Judaism is not a religion but a legal system" (5), and paradoxically considers pan-halakhic Orthodoxy to be Spinoza's heirs. For Heschel, accepting only the *halakhah* is a non-normative position, for the *aggadah* is the source for the fear of heaven, spirit of the law, moral imperatives, and piety. *Halakhah* includes the realms of saving a life, engendering community values, and accepting human dignity—all tenets that spring from logical and legal thinking. In contrast, *aggadah*'s piety offers poetry that is impressionistic, spiritual, and that flows from one's relationship with God. Heschel maintains that:

> The master of *Halakhah* …determines how Israel should behave, and it is he who determines their public and private lives. The master of *Aggadah*…is only the realm of thought and speculation-matters of the heart that are invisible. (11.)

In Heschel's view, *aggadah* is a major category including meta-*halakhah,* ethics, intention in prayer, performance of *mitsvot*, and human needs. Judaism, he argues, includes not only action but also the heart, beliefs, feelings, and thought. The contrast between the realms is bold: one is closed and the other is open. "Whoever says. 'This *halakhah* does not seem right,' forfeits his share in the world to come" (1). In contrast, Heschel suggests that "in *aggadah*, a person can easily reveal non-normative (*shelo ka-halakhah*) views"(2).

Heschel critiques those, such as Saul Lieberman, who proudly treated the rabbis of the Talmud as

[10] Heschel's work is also similar to the important Catholic systematic theologian Karl Rahner in his work modernizing mysticism. (Interestingly, Rahner's New York students often sought out personal relationships with Heschel.) In Heschel's belief that every committed Jew becomes a hearer of revelation, one sees a similarity to Karl Rahner's belief that every Christian is a mystic. Rahner wrote that our personalities have an innate capacity based on human freedom to reach the divine. Hearing the divine word in our freedom is our expression of the self. Karl Rahner, *Hearer of the Word* (New York: Continuum, 1994).

concerned only with legal details and minute philological textual traditions. For Heschel, someone taking this position is unfit to decide matters of Judaism, even *halakhah*. Heschel defends the direct experience of God over philological scholarship and legalism.[11] As his opponents were one-sided about the *halakhah*, Heschel was one-sided about the *aggadah*.

Gershom Scholem portrayed rabbinic Judaism and medieval philosophy as devoid of mysticism, crediting Kabbalah as the sole Jewish source. Heschel disagreed, arguing that mysticism is part of rabbinic Judaism, but that religious experience is its focus. (Rabbinic sages, in his view, are not simply halakhic figures, scribes or communal leaders.) Heschel assumes a continuous tradition of *aggadah* throughout all later generations: "From the time of Bahya ibn Paqudah until the time of Israel Baal Shem Tov," he suggests, all great figures were focused on the *aggadah* and complained about the deviant legal scholars who ignored the *aggadah*, the heart of religious life and the core of all *mitsvot*. Heschel's Judaism became the continuous tradition that includes *aggadah*, medieval Neo-Platonism, Ashkenazi esotericism, Maimonides, Kabbalah, Maharal, and Hasidism.

Maimonides supplies one of Heschel's proofs for the centrality of *aggadah* because Maimonides began his *Mishneh Torah,* with *Hilkhot Yesodei ha-Torah* (Laws of the Fundamental Principles of the Torah), an aggadic composition. In Heschel's understanding of Maimonides, *ma`aseh merkavah* (lit., "the account of the chariot," referring to Ezekiel's vision; Maimonides associated it with metaphysics) is equated with spirituality and not philosophy, for it deals with principles of religious faith. Furthermore, in the *Guide of the Perplexed* (III:51), Maimonides wrote explicitly that the only way to enter the king's inner courtyard (and approach God) is through knowledge of God, and *Heavenly Torah* 10, 17-20 is based on this passage in the *Guide*. Halakhic scholars do not know God and serve God in a lower form than those who have knowledge of God. This presentation of Maimonides derives from Heschel's teacher Julius Guttman, who cast Maimonides as a neo-Platonist, as did Guttman's contemporary Zevi Diesendruck. Additionally—and more than germane to our discussion—Heschel wrote his classic interpretive biography of Maimonides in the years immediately after he wrote his Yiddish poems. This influential work presents Maimonides as an engaged, caring, and contemplative religious figure—not a cold rationalist, as he was depicted by the neo-Kantianism of Hermann Cohen or the Aristotelianism of Harry Wolfson.[12]

Scholars did their utmost to present the Talmud as rational; Heschel restores the experiential and irrational.

Beyond laying the groundwork for exploring Maimonidean thought, Heschel argued that creating a new *aggadah* for our age is done by presenting what was stated in the past, evaluating the various positions, and finally asking how they resonate with today's aggadic needs. The first part of the volume illustrates the questions that Heschel considered important: Is Torah composed of ordinary words or esoteric secrets? What are the roles of miracles, Temple service and sacrifice? What was revealed in Torah? How is Torah a product of revelation? What are the reasons for the commandments, God's indwelling, and theodicy? I will limit my comments to revelation.

Heschel's unique and most important contribution to the study of *aggadah* was to reintroduce people to the rabbinic texts in their full strangeness, otherness, and wondrousness.[13] In the translator's

[11] There are converse statements from *R.* Soloveitchik stating that we only accept *aggadah* from those scholars who were masters of *halakhah* like *R.* Akiva.

[12] Abraham Heschel, *Maimonides: Eine Biographie* (Berlin: E. Reiss, 1935). For his proximal influence, see Z.Diesendruck, *Maimonides' Lehre von der Prophetie*, *Jewish Studies in Memory of Israel Abrahams* (1927). For his own theories, "Did Maimonides Believe He Had Merited Prophecy?" (Hebrew) *Louis Ginzberg Jubilee Volume* (New York: American Academy of Jewish Research,1945) 159-88.

[13] For a similar approach in the academic study of history, see Caroline Walker Bynum, "Wonder," *American Historical Review*,

introduction to *Heavenly Torah,* Gordon Tucker points out that although the book was not assigned to him during his own education, it was eye opening because it captured the sense of familiar, but unarticulated, "far flung exegesis" that is the basis of rabbinic Judaism (xxi). Heschel retrieves the wondrousness of the rabbinic text. Whereas most scholars of rabbinic literature did their utmost to present the Talmud as rational, ethical, and devoid of mysticism, Heschel restores the experiential, theosophic, and irrational.[14] Most modern Jews first learned of the wondrous and magical Torah vision of black fire on white fire described in *Midrash Konan*, Nahmanides, Hizquni, and Cordovero from the Hebrew edition of the book. Heschel does not demythologize, nor avoid the wondrous by way of abstraction or didacticism. [15] The strangeness does not bother him. On the contrary, he finds that these texts hold the secrets of rabbinic thought. Though acknowledging the critiques of the *aggadah* that point to the strangeness of some *aggadot*, Heschel does not try to defend the *aggadot* by showing that they are not strange or reinterpret them in modern terms. Rather, he points out comparable fantastic moments in *halakhot,* such as the strange *halakhot* of elephants eating and excreting children, and he notes that these moments are accepted as part of the rational halakhic world (21ff).

Heschel was not historical in his presentation and therefore he is hard to read as an introduction to *midrash* given much of the recent scholarship.[16] He does not grapple with the textuality of the rabbinic passages to discover their worldview, myth, hermeneutics, intertextuality or actual positions. Nor does he use Greco-Roman history to determine the cultural world of the texts. Instead, he gives us a phenomenological sensibility: the experiential approach of rabbinic Judaism is *sui-generis* and wondrous.

R. Ishmael possesses delicacy, lucidity, and rationality; R. Akiva is a man of action who possesses inner profundity

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Two Opinions: Heaven and Earth

Heschel reworked R. David Zvi Hoffman's distinction between R. Akiva and R. Ishmael into a typology of two broad, intuitive, axiological, and personality-based approaches that typify Judaism throughout the ages.[17] He portrays R. Ishmael as possessing delicacy, intellectual reserve, clear thinking, sobriety, lucidity, and rationality. R. Akiva is described as being wondrous, a man of action intent upon reaching the people, as well as possessing inner depths, profundity, and a desire to ascend to the upper realms. This dichotomy reflects the thoughts of these two figures in the realms of spirituality, theodicy, daily life, and religious experience.

R. Ishmael offers interpretations based on tradition and the hermeneutic principles and has a rational ethics. He seeks to fulfill the middle path of "the right and the good." In contrast, Rabbi Akiva has an expansive approach that encompasses infinites of meaning and kabbalistic theosophy. He finds the unmeasured extremes of both leniency and stringency in the law (56-61). R. Ishmael advocates plain sense, humanistic reduction, and metaphor; R. Akiva advocating the enjoyment of thematic, freely interpretive, mystical truth.

102, 1 (Feb., 1997): 1-17. She objects to the presentation of medieval history in a manner elevating contemporary concerns and modern rationality over the wondrous differences from today.

[14] E. R. Dodds, *The Greeks and the Irrational*, (Berkeley: University of California Press, 1951) accomplished this for the study of classical antiquity.

[15] Compare the books written under the direction of Isadore Twersky, for whom the virtue was to show that medieval scholars could allegorize or downplay the *aggadot* to provide a rational world.

[16] For examples (without any desire to slight by exclusion the many fine contemporary scholars of *midrash*), see Daniel Boyarin, Marc Bregman, Gerald Bruns, Michael Fishbane, Steven Fraade, Yonah Frankel, Moshe Halbertal, Joseph Heinemann, Marc Hirschman, Menachem Kahana, James Kugel, Joshua Levinson, David Stern, and Azzan Yadin.

[17] David Tzvi Hoffman, *The First Mishna and the Controversies of the Tannaim ; The Highest Court in the City of the Sanctuary* (New York: 1977). For the current state of the field, see Menachem Kahana, *Sifre Zuta on Deuteronomy: Citations from a New*

Consider their divergent conceptions of God. R. Akiva's conception turned towards the personal God, the Holy One, blessed be He who "participated in the pain of his creature"; in contrast, R. Ishmael surrendered before a God of judgment, mercy, and power (32-34). Regarding the relationship of heaven and earth (a relationship at the core of Heschel's values), Heschel presents two chapters on the typological attitudes toward the *shekhinah* (God's presence). For R. Akiva, the *shekhinah* is located spatially, in the west, in the Temple, as in Ezekiel's vision. This approach, in turn, generated later *kavod* theories and Kabbalah. R. Ishmael senses God everywhere in the temporal world, as in Maimonidean cognition or Hasidism. One notices the similarity to Moshe Idel's categories of theosophic and ecstatic.

Heschel is at his best when he presents both other-worldly asceticism and this-worldly pragmatism.

How do we explain Heschel's claims of rabbinic ecstasy and theosophy in modern terms? Throughout the book, Heschel casts R. Akiva as his mystical starting point, probably based on his own Hasidic background. He thus makes much of the book his own *bildungsroman*, in which he grapples with R. Ishmael as a defender of poetic experience, rational cognition, and confronting the needs of the hour. Many think that Heschel always favors one side or the other; in fact, in each chapter he seems to seek an approach that works today. In one chapter, he favors R. Ishmael's defense of sacred time, but in the next chapter he leans toward R. Akiva, who identifies God and Israel as one.[18] Though the two men and two schools of thought seem at odds with each other, Heschel ultimately affirms both.

Heschel's view that we live between heaven and earth prompts us to ask whether normal life exists in Judaism. R. Akiva accepts mortification and living for the other world, suggesting a negative answer. For R. Ishmael, the answer is certainly yes, because "you shall live by them." Most modern rabbis would choose R. Ishmael and deny the relevance of R. Akiva; or, at the very least, would relegate this debate to the past. Here we see Heschel's book at its best when it presents both sides of the rabbinic position—both other-worldly asceticism and this-worldly pragmatism. For Heschel, to understand the intellectual movements of recent times, you must inquire into the chain of tradition that precedes them.

Heschel presents a rabbinic tension between transcendence and immanence (Chapter 14). The transcendental includes anything esoteric or mystical; it encompasses philosopher and kabbalist alike (who appear on oppose sides in Chapter 13) and anyone who speaks of higher realms, or hidden knowledge. Immanence includes the exoteric, this-worldly, terrestrial, or merely symbolic.[19] For Heschel, the transcendental approach treats Torah as an exact copy of a divine prototype. In the earthly approach, God gave the Torah to humans through Moses.

Another important category of rabbinic thought is "man in the image of God," which mediates between heaven and earth. According to R. Akiva, "The person is a reflection of the supernal realm…The human image below corresponds to the divine image above; terrestrial man resembles heavenly man." Meanwhile for R. Ishmael who stresses the importance of earthly life, each person is unique and individual.[20]

*Tannaiti*c Midrash. (Jerusalem: Magnes Press, 2002); Azzan Yadin, *Scripture as Logos: Rabbi Ishmael and the Origins of Midrash,* (Philadelphia: University of Pennsylvania Press, 2004). When Heschel's book was first printed it received reviews that criticized the specifics of his dichotomy of Rabbis Akiva and Ishmael in given texts. For example, see David Shapiro, "New View on the Opinions of *R.* Ishmael and *R.* Akiva" (Hebrew) *Oraḥim* (Jerusalem: Mosad ha-Rav Kook, 1977), pp. 241-260 who in his review called Heschel a "faithful architect of a grand building," but that some of the rooms still needed fixing.

[18] To use Idel's terms, Heschel offers a cross between "theurgy and ecstasy," in that Heschel accepts the ecstatic and the theurgic while rejecting the theosophic and the magical.

[19] *Heavenly Torah* 261, n. 5; the translators use the terms "immanence" and "transcendence" to correspond to Heschel's two approaches, not in their original philosophic meaning.

[20] Although the mythic nature of the image of God in rabbinic thought has only recently been emphasized in the work of

Heschel's portrayal of R. Ishmael mixes Maimonidean naturalism, Hasidic panentheism, the poetry of Rilke, the anarchism of Tolstoy, with the need to respond to call of the moment. It does not include the rational immanence of the scientific, the pragmatic, and the functional. R. Akiva'a portrait mixes Zohar, Nahmanides, Maharal, Karl Barth, and the comparative study of religion, but not halakhic process, synagogue life, or homiletics (*derash).* Heschel's categories do not all line up; his two poles are floating.

Prophecy or Apocalypse

Heschel's most important poles of revelation are prophecy and apocalypticism—two unequal, if not opposite, concepts. Medieval Jewish thinkers define prophecy as a natural or preternatural ability to experience God. Revelation, on the other hand, is a modern question about the possibility of receiving God's word even though modern philosophy and science preclude the possibility. Medieval prophecy explains techniques of gaining divine knowledge, while the modern problem of revelation needs to justify how one can still speak of a non-empirical reality. Since modern thought has generally rejected revelation, Heschel answers the modern problem of revelation by triangulating medieval prophecy through his sensibility of directly experiencing a divine-human encounter.

For Heschel, prophecy describes a fundamental phenomenological orientation to the divine as a form of sympathy with God. In his view, the prophetic sensibility equals revelation, and revelation therefore has three options in the modern world: a return to a medieval sensibility, a comparative religion category of paranormal consciousness, or a direct experience of a God-infused mystical and poetic life. (For a fourth option of reading Heschel as a modern existential presence, see the discussion of Neil Gillman below.) It is important to note that, in Heschel, the subtleties of the relations between the three options are not fully worked out. Heschel oscillates between R. Ishmael's rejection of metaphysics and R. Akiva's acceptance of a mystical heavenly Torah before returning to the experiential approach. Yet Heschel's wavering theological reflections on revelation and prophecy have not been superseded by any new theological reflection—despite many who take issue with his views. This suggests that contemporary Jews have avoided theological reflection for the attraction and safety of historicism.

Heschel's wavering reflections on revelation and prophecy have not been superseded.

Heschel's doctoral advisor Alfred Bertholet (1868-1951) and his student Johannes Lindblom distinguished between three experiences: ecstasy, ethical prophecy of concentration, and the apocalyptic. The first was the common ancient Eastern type of *unio mystica,* quite alien to Israel. Here the mystic is absorbed into a union with the deity. For this school of the history of religions, the ecstatic element in classical prophecy, if it exists at all, is confined to the prophets' profound concentration. By contrast, in ethical prophesy one encounters God through ethical petition and demands.[21]

Heschel writes that there are two realms: the prophetic and the apocalyptic. He notes that "the theology of *R.* Akiva has two basic apocalyptic concepts: the ascent of Moses to heaven and the existence of the Torah in heaven in the form of a book" (286). Apocalypticism is needed because "the cessation of prophecy was not easily accepted

Moshe Idel, Yehudah Liebes, and Yair Lorberbaum, Heschel took these dichotomies as a given decades ago. Yehudah Liebes, "Myth and Orthodoxy: a reply to Shalom Rosenberg" *Jewish Studies* 38 (1998) 181-185 Yair Lorberbaum, *Imago Dei in Classical Judaism – Law and Philosophy* (forthcoming 2007), Lorberbaum gives full citations to Idel.

[21] See the acknowledgements in the preface to Abraham Heschel, *Die Prophetie* (Krakow, Nakładem Polskiej Akademji Umiejętności, 1936); Alfred Bertholet *, A History of Hebrew Civilization* 1926, reprinted Eugene OR: Wipf and Stock Publishers, 1994). While this review treats Heschel's categories as those of phenomenology of religion, Jon Levenson criticizes Heschel's influence from the categories of Protestant theology. Jon D. Levenson, "The Contradictions of A.J. Heschel" *Commentary* 106,1 (Jan. 1998): 34-38.

by the people of Israel" (id.). Although apocalyptic books were not found explicitly in rabbinic literature (the books were to be hidden), their influence affected many sages throughout Jewish history.

At points Heschel blurs the categories of the ecstatic and the apocalyptic and considers R. Akiva thirsting to become one with God. Heschel presents R. Akiva as the apocalyptic who believed Moses ascended like Enoch and that others have also experienced ascents of the soul (Chapter 18). Heschel contrasts this with R. Ishmael's idea that Moses received a message:

> The prophets dwell not upon what goes on in heaven, but what happens on earth (287)…. The prophets hear words from the Almighty and learn what is on the mind of the Holy and Blessed One at that moment. The visionaries of the Apocalypse see words in heaven; they read what is written and engraved, since earliest times, in the books and on the tablets that are in heaven. The prophets speak of what they heard; the apocalyptic visionaries tell us what they read. (293)

Heschel's distinction between apocalyptic and prophecy corresponds to the debate concerning the event on Mount Sinai: Kabbalists think that Moses physically ascended, while Maimonideans think "ascent" means to ascend intellectually (352).

Heschel used R. Akiva to show infinities of Torah, freeing the reader from literalism

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Heschel applies these two models also to God descending on earth—an apocalyptic vision of the *kavod* or an experiential intellectual grasping. We must choose either the apocalypticism of the *Zohar* or the prophetic approach of Maimonides. (The approaches of Judah Halevi, Albo, and Maharal disappear.[22]) Heschel used R. Akiva to show infinities of Torah, thereby freeing the reader from literalism, whereupon he can return to R. Ishmael and cognition. Heschel's framing of R. Akiva as *Zohar* seems to be close to the position of the *Zohar* itself, especially in its unwavering acceptance of the existence of a heavenly Torah, sublime and above the world.[23] Heschel presents R. Ishmael as a Neo-Platonist Maimonidean, with a cognitive approach toward the grasping of hidden truths[24] through angels, *sefirot*, or intellectual apprehension. Prophecy does not directly come from God. It occurs, rather, through cosmic hierarchies both ancient and neo-Platonic or kabbalistic, mediated by natural and human elements (Chapter 28).[25] Yet many claim that Heschel equates prophecy with an American humanistic existentialism of encounter and response.[26]

[22] They are not midpoints but different starting points. Judah Halevi started with reliable tradition and peoplehood, Albo started with the text, and Maharal had a need for revelation that transcends the natural order and natural ethics.

[23] As the *Zohar* explains, "All the words of Torah are sublime words…all those words and all those stories-they are the garments." Heschel even accepts the apocalyptic visions of light and heavenly books delineated in the *Zohar* and how, as it narrates, "all of Israel saw the letters flying through space in every direction, engraving themselves on the tablets of stone." (However, it is important to note that Heschel is generally non-erotic in his approach to Kabbalah.): Daniel Chanan Matt, *Zohar, the Book of Enlightenment* (Paulist Press: New York, 1983), pp. 43-45, 120.

[24] Modern Orthodoxy and Centrism generally do use the Neo-Platonic elements of Maimonides and assume that Maimonides sought secular studies and not preparatory studies leading to prophecy.

[25] In his focus on cognition, Heschel does not have the important Farabi political elements of Maimonidean prophecy: Moses the lawgiver and the building of a virtuous society. His Maimonides is almost Abulafian; the medieval concept of intellect (*aql*) meets Hasidism.In his discussion of the concept of intuition (*lutf*) in Sa`adyah, Heschel was able to deflect those who wanted to make Sa`adyah a rationalist, yet he stumbled with modern concepts of experience unable to define the specifics of medieval Kalam intuition; Heschel, A. J. "The Quest for Certainty in Saadia's Philosophy," *JQR* 33 (1942-3): 213-64.

[26] Many have also mistakenly conflated Franz Rosenzweig with Heschel. It is important to note that Rosenzweig specifically describes revelation as a sense of transcending the human finitude of death by entering into a stance of a loving relationship with the transcendent. This moment of transcendence moves existence from isolation to externalized relationships with other beings. This personal transcendent moment allows meaning to be created from personal human history, unlike Georg W. F. Hegel's limiting of external life and history to the collective. God in his system is the existential commitment that transcends the entire Hegelian world of collective representation and the negations inherent in our

Torah from Heaven: Prototype and Will

The original second volume begins, "Two expressions are used in the Mishnah with respect to the Torah…Moses received *Torah from Sinai*… and *Torah from Heaven* (321). Heschel explains these two expressions as two separate models of revelation: "Torah from Sinai" and "Torah from Heaven," associating the former with *R.* Ishmael and the latter with *R.* Akiva. R. Akiva's "Torah from Heaven" means that the Torah did not begin at Sinai. Indeed it pre-existed Sinai as a primordial Torah. Hence an apocalyptic Kabbalah and an understanding of the divine will can yield a knowledge of this primordial pre-Sinai Torah, one perhaps more important than the Sinai Torah itself. The heavenly Torah antedates the world, yet it is ever expanding. Heschel situates the text's other-worldly importance when he observes "*R.* Akiva believed that before the Sinaitic revelation, the Torah existed in heaven as a unitary document… the original Torah is even now in heaven" (264). Sinai fades away in importance because the heavenly Torah takes precedence over the earthly Sinai Torah. As Heschel argues:

> The notion of a Torah literally existing in heaven may seem at first like a strange growth, the chaff and straw of our religious imagination. But on reflection it is simply a particular consequence of a whole systematic way of looking at the relationship of the supernal and terrestrial realms… The supernal realm contains the secret and origin of everything terrestrial. (265)

Even as he acknowledges that a heavenly Torah seems non-rational and a figment of the imagination, Heschel asserts the basis of Torah is the existence of a supernal archetypal Torah greater then any earthly Torah.

After a strong defense of this position, Heschel turns around and makes "Torah from Heaven" problematic by asking this question. "Does "Torah from Heaven" mean that the letters were in a supernal realm or heaven, or is it just a way of referring to the divine will?" If the latter, and Torah is not actually in heaven in a physical way, then the divine will is available to all who listen. He explains that the primordial Torah is not something theosophic or esoteric, and does it give a fixed moral order for the universe. Heschel reveals his own experiential position of granting access to the primordial Torah in our own hearts, and chooses this as the title for the entire book. The philosophy of R. Akiva has become a sensibility of the heart.

The philosophy of R. Akiva has become a sensibility of the heart.

In one of the most memorable and innovative parts of the book, Heschel presents rabbinic texts that depict the Torah having visual elements.[27] A visual Torah further destabilizes any notion of a fixed textual Torah. R. Akiva's visionary Torah is continued in the Middle Ages: Sa`adyah and Ibn Ezra accepted a pre-existing *logos*, and Maimonides considered the divine glory as an apprehension of the divine. Moreover, early esoteric traditions as preserved in *Midrash Konan*; Nahmanides and Hizquni, saw the primordial Torah as black fire on white fire (336-7).[28] By presenting the medieval positions (unavailable until the recent research of Idel), Heschel makes the modern questions fade away. If one conceives of the Torah as a heavenly fire and our earthly Torah as a pale reflection, then all questions—of authorship, history, canon, and content—vanish before the bright light of this supernal radiance.

Nahmanides was one of the prime sources for a Torah in heaven, completely unlike the current

individuality. Compare the entire second book of the *Star of Redemption* on revelation. For a basic presentation, see Stéphane Mosès, *System and Revelation: The Philosophy of Franz Rosenzweig*, trans. Catherine Tihanyi (1982; Wayne State UP, 1992).

[27] Cf. Daniel Boyarin, "The Eye in the Torah: Ocular Desire in Midrashic Hermeneutic," *Critical Inquiry* 16 (1990): 532-50; Marc Bregman, "Aqedah: Midrash as Visualization" *Journal of Textual Reasoning* 2,1 (2003).

[28] Albo mentions but finds this approach of black fire on white fire lacking, based on the inability to have clear directives for reward and punishment.

earthly Torah, composed of a single Name of God. Another source is the writing of R. Judah Loewe of Prague ("Maharal"; 1525-1609), for whose thought Heschel had a special affinity. Maharal developed the midrashic theme of the Torah as a blueprint for creation, and in his first comments on tractate *Avot*, he pointed out how Torah from heaven is above earthly definitions. When the Torah exists in this world, it is known in its limited meaning as part of the imperfect and human realm, where it no longer can reflect the primordial Torah because it is in an imperfect world. Maharal explained that the nature of the primordial heavenly Torah beyond the human ken contains contradictory opinions as a coincidence of opposites. When the heavenly Torah descends to the human realm, the Torah must adapt a single opinion and is no longer the bearer of the coincidence of opposites. [29] One can notice the basic similarities between Maharal's and Heschel's approaches, particularly considering the earthly text as pale before a heavenly Torah of divine will.

Torah is from heaven, but its nature is open.

One might be impelled to ask whether Heschel actually believes in a pre-existing heavenly Torah of black fire on white fire. It appears that he does, but he also seems to be winking at the reader.[30] In doing so, Heschel offers a Kabbalistic image sufficient for a neo-orthodox Barthian but, rather than saying we need to submit in humility before revelation, he claims that a poetic spirit moves us. Torah is from heaven, but its nature is open. [31]

Torah from Sinai: Doctrine or Revelation in *Ordinaire*

Heschel defines *R.* Ishmael's "Torah from Sinai" as the giving of a specific earthly doctrine at a specific time and as a fixed text. Heschel is clearly less satisfied with the option of a fixed text, and he demonstrates its problematic nature through a series of questions: Does the "Torah from Sinai" include all of the Torah, even the parts given in the Tabernacle and the Steppes of Moab? If so, was the Oral Law also included? Heschel answers by suggesting that if the details of the Torah were given at the Tabernacle and if the Oral Law were not included, one would need only a minimal acceptance of the Sinai position. Heschel manages to whittle Sinai down to a specific revelation, one among many. R. Ishmael's argument becomes simply ascertaining God's will. Since Heschel formulates Torah as far from any fixed book or canon, he can ask, "What is Torah's substance?" (322). He acknowledges, "Our sages who were involved in it day and night found it difficult to grasp its essence."

Continuing this inquiry, Heschel limits revelation to the acceptance of divine will because all details cannot be pinned down:

> Perhaps "the Torah" means the book we have today, while "Torah" in general refers to prophecy, or the revelation at Sinai, and

[29] On continuous revelation, Maharal has much to say relevant to contextualizing Heschel's thought. On the question of why it says Torah from heaven and not from God, Maharal writes, "because the God of all flows wisdom to all everyday… If the Torah was not received by Moses on Sinai then it would have been received by another." (*Derekh Hayyim* on *Avot* 1:1; see also *Ti'feret Yisra'el,* chs. 60, 69.)

[30] At points, he seems to have been influenced by Henry Corbin, the great scholar of Islamic mysticism and the translator of Heschel's German work on prophecy into French. Corbin was attracted by their shared interest in using Max Scheler's concept of sympathy as a modern appropriation of prophecy. When Heschel mentioned in the aforementioned quote that the "supernal realm contains the secret and origin of everything terrestrial," it could be expressed in Corbin's entrance into a realm of eternal essences. Corbin postulates an objective realm of the heart and imagination where such visions take place.

[31] Heschel is orthodox and supernatural in the way of Bishop Joseph Butler (1692-1752) who, by affirming revelation, rejected the Deism of David Hume and Thomas Hobbes. Heschel's affirmation is also similar to that of R. Samuel David Luzzatto (1800-1865), who propounded a self-defined non-traditionalist orthodoxy that rejected liberal critiques of revelation. But whereas these latter thinkers, with a patent apologetic and rationalist thrust, decided clearly which medieval positions were still tenable in the modern era, Heschel deflected the issue by presenting his medieval positions through a personal poetic sensibility or as a phenomenology of experience.

> it is a denial of the latter for which one forfeits eternity. However, one cannot establish fixed rules about the use of the definitive article by the Rabbis in relation to the word Torah (373).

In other words, Heschel asks whether revelation is a book, a prophecy, or Sinai. Curiously, since we cannot pin down the definite article, there is no delimitative meaning.

The tradition is a continuous plurality of positions—ever open, ever individualized.

In this absence of definitive statement, the reader is left to conclude only that Heschel would accept wide latitude in the interpretations of revelation, as long as it is affirmed that the Bible is God's will or a product of a divine human encounter. Heschel does not use his aforementioned detailed presentations of Maimonides, Nahmanides, *Zohar*, and Maharal to pin down his definition or to create parameters. He suggests, for example, that due to the multiplicity of ways to explain rabbinic texts, all interpretations are valid. Moreover, at certain places Heschel seems to affirm creative openness and at other places wants a sense of the wondrous transcending our finite categories. Heschel quotes R. Akiva on a heavenly text of Torah, then oscillates to R. Ishmael's rationalism of a complete earthly text, and finally uses R. Akiva's position to reject R. Ishmael's doctrinal concern with textuality. He finds problems with both positions. Hence, we are left free to have a more open approach to canon. The tradition is a continuous plurality of positions—ever open, ever individualized.

As part of his analysis of R. Ishmael, Heschel cites *Sanhedrin* 99a, the talmudic discussion that defines as heretics those who deny Torah is from Heaven. By now the reader should know that any fixed list or doctrine would bother Heschel. Heschel notes that the Talmud on that page contains three *beraitot*. The first defines Torah as instruction and limits the status of heretic to one who denies instruction from heaven, allowing a broad concept of revelation. The second *beraita*, from R. Akiva, requires accepting the text "with all distinctions, deductions, or analogy." The third *beraita*, of R. Ishmael, calls the denial of revelation a form of idolatry, teaching that the revelation of Torah is intrinsically connected to the correct belief in God. Heschel obviously prefers the opinions of the first and third *beraitot*. He adds that there are many other statements in the *Sifre* and *Sifre Zuta* on the topic, but does not work out their implications.

Addressing the troublesome second opinion, Heschel points out that Maimonides' formulation of the Torah from heaven as including every word in fact originates with Hillel. But Heschel surprises his reader, claiming that because this position is perfectionism the people cannot accept it. Heschel feels compelled to give them other options and cites Abbaye's belief that not everyone is righteous and it is better to sin out of ignorance than malice. Heschel gives a "go and see" (*puq ḥazi*) of belief. This thinking is neither halakhic nor theological; he recognizes it is not an intellectual critique or response and in effect is saying, "let us not present texts that contradict the views people are led to by their doubts." The "go and see" works because he accepts the false dichotomy between the extremes of plenary verbal inspiration and heavenly divine will. Heschel's own interpretation of Maimonides' position of the *Guide* is absent from his presentation.

Heschel seems reluctant to present theological points that the generation cannot handle, and he later justifies this by claiming that "whoever takes principles of the faith at face value distorts their true meaning… The entire history of Jewish thought contains a process of fusing together two extremes" (712). Unlike those writers who argue that theological thinking has only one meaning, Heschel advocates an open-ended experience.

In the next chapter, Heschel suggests that some of the sages of the Talmud and Maimonides gave a plenary and verbal presentation of Torah as a polemic against sectarians. Heschel points out that,

in the former case, the ancient Greeks thought that Moses made up the Torah, and, in the latter case, Maimonides stood against Moslems who denied the text of our Torah. These were not their actual beliefs, Heschel argues; these diverse writers, he claims, only stated them for polemical reasons (Chapter 21).

Heschel offers the reader four models of approaching the divine and human status of revelation. In each case he defines the nature of revelation by blurring the lines. Heschel treats revelation as if biblical prophecy were still alive and as if personal directives had the status of prophecy. (Heschel is unlike Eliezer Berkovits, who claimed that Torah is not in heaven in order to stress the human element.) Heschel argues that inner revelations have the same divine status as the revelations at Sinai.

Whoever takes principles of the faith at face value distorts their true meaning.

In the first case Heschel conflates personal initiative and divine revelation (440). He explains that Moses ascended the mountain on his own authority and consequently there is a human element in Sinaitic revelation. For most theologians, a person's action in response to God is just that, a response, but Heschel takes response to God as revelation. Revelation thus becomes any action in response to God.

Heschel's second approach blurs the lines by showing that there were levels of revelation, some fallible. He argues that since prophecy was still alive in the time of the medieval sages and since the beit din possessed prophetic powers, it must still be found among ordinary people. Prophecy is not infallible since no one considers medieval prophecy to be infallible.

Heschel's third approach quotes R. Zadok Ha-Kohen of Lublin to prove that there were three levels of revelation even in the time of Moses: (1) the Torah at Sinai, corresponding to Torah; (2) the repetition in the Tent of Meeting, similar to the prophets found in most of the rest of the first four books; (3) the steppes of Moab, where the Oral Law was given. These three levels correspond to Moses receiving through God's own mouth, the holy spirit (*ruah ha-qodesh)*, and the start of the Oral Law at the steppes of Moab.[32]

Heschel's fourth approach conflates the issues of Sinai and today by equating Oral Law with revelation. Since the Oral Law is a continuation of Sinai, revelation is not a one-time event, Heschel reasons. In a chapter called "The Problems of the Maximalist Position," Heschel points to examples of defining Torah as including anything said in the future as part of revelation, and if the possibility of new insights in Torah is accepted, then not all is from God. Heschel thus treats interpretive creativity the same as revelation. Maimonides states that if there is debate (*mahloqet*), then there is no tradition from Sinai. Heschel does not have any understanding of innovations within tradition; for him, if there are Torah innovations that we know human made, then Torah is a human creation.

Eastern Europe produced a variety of approaches of progressive revelation, infinite Torah, and Torah through mystic understanding. Heschel uses Hasidic homilies about hearing the voice of Sinai in daily life as if they are literal, and he uses Hasidic homilies claiming the ahistoric nature of Judaism to show that Sinai continues today. "Just as there is an Oral Torah, so is there a Torah seated in the soul… everyone adds to it, according to what heaven displays to them." (587) Heschel does not explain his relationship to Hasidic individuality. His later works on Hasidism, such as *Passion for Truth,* completed his thoughts on Hasidic individuality.[33]

No Text

Heschel avoids addressing Bible criticism by making the biblical text pale in importance. The heart and prophecy are what count. In accepting

[32] *Heavenly Torah* 475-6; R. Zadok Hakohen, *Pri Zaddik behar* 93-4.

[33] Aryeh Cohen, in his review of *Heavenly Torah* in *Conservative Judaism* 58:1, (Fall 2005) speculates that Heschel's work on the typology of the Ba`al Shem Tov and Menahem Mendel of Kotzk might have been the follow up third volume, as would his articles on Maimonides and prophecy. This seems highly likely.

divine will as any form of communication with man, Heschel allows the question of Biblical criticism to fall away. Either the divine will antedates the biblical text or it is created in response to the moment. He follows this chain of reasoning:

> The essence of our faith in the sanctity of the Bible is that its words contain that which God wants us to know and to fulfill. How these words were written down is not the fundamental problem. This is why the theme of Biblical criticism is not the theme of faith, just as the question of whether the lightning and thunder at Sinai were a natural phenomenon or not is irrelevant to our faith in revelation (258).

In many ways, Heschel has framed his argument so he cannot be pinned down. The Torah from heaven is not now in heaven. To the extent that the Torah was from heaven then, now we have a fallen human version. And if Torah was given at Sinai, we are still called by God now in the contemporary world.

When Bible critics treat the text as human, they rob it of the prophetic message.

I disagree with Heschel's consciously ambiguous treatment of any statement about revelation, yet the sources and issues he presents raises are important. Heschel sees no relevance in the philological literal meaning (*peshat*), nor does he think that the meaning of the text through the generations is only human homiletics (*derash*).[34] He reawakens the divine call in the modern era; but when Bible critics treat the text as human, they rob it of the prophetic message. In the end, people who do not experience God in the heart cannot understand the message.

Though not a historian, Heschel was correct to note that the Bible's own statement leads to a doctrine that it was composed of earlier works. Even the Pentateuch cites earlier works, *Sefer ha-Yashar* and *Sefer Milhamot A-donai*, and implies Moses may have written the Pentateuch slowly over many years.[35] Moreover, Heschel shows that prior commentators accepted lower criticism. For example, Heschel cites the sources stating that Joshua added the last eight verses of the Torah. Yet he also cites Don Isaac Abravanel for the premise that because God told Moses to write these verses about the future, it is as if God Himself wrote it. And yet, in addition to citing textual concerns Heschel gives a mystical explanation. He cites Hayyim Vital, arguing that "It is actually not so farfetched that Moses wrote [the last eight verses] in tears, for he saw that his aura was departing, so that he was like someone who was not there" (615). Despite Heschel's previously textual position, he is not winking at this point. Hayyim Vital's mysticism resonates with him.

We should thank Heschel for collecting much of this material and demonstrating *midrash*, medieval thinkers, and Hasidic texts trembled before the awesomeness of revelation while they had fluid concepts of the text. Beginning with "Introduction to Bible" classes offered by S. D. Luzzatto in the nineteenth century, there has been an approach to understanding the Torah that mines these classical commentaries for statements that would allow one to accept revelation and still use lower criticism. The statements of Rashbam[36],

[34]On Heschel's use of historical materials without any historicism or philological concern, see Jon D. Levenson, "Religious Affirmation and Historical Criticism in Heschel's Biblical Interpretation" *AJS Review* 25,1 (2000-2001): 25-44.

[35] On these topics, good starting points for developing a rabbinic perspective on the editing of the Bible are the following: Menahem Mendel Kasher, *Torah Shelemah* (Jerusalem: Machon Torah Shelemah) vol. 8 addenda ch. 17; Vol. 19, addenda 33; comments on Num 33:2; Sid Z. Leiman, "The Inverted Nuns at Numbers 10:35-36 and the Books of Eldad and Medad" *JBL* 93 (1974): p. 348-355; Baruch A. Levine, "Critical Note: More on the Inverted Nuns of Num 10:35" *JBL* 95 (1976):.122-124; Yehudah Kil, *Bereshit*, in *Daat Mikra* series (Jerusalem: 2003) ; M. Breuer, *Pirqei Bereishit* (Alon Shevut, 1999).

[36] On Rashbam, see Elazar Touitou, "Concerning the Methodology of R. Samuel b. Me'ir in His Commentary on the Pentateuch," *Tarbiz* 48 (1979): 254-64 (Hebrew). According to Touitou, Rashbam distinguishes between the legal and narrative portions of the Torah: the legal portions are the word of God himself while the narrative portions (and all of

Ibn Ezra, Ibn Caspi, Judah Ha-Hasid[37], and Abravanel become the needles through which the huge camels of the philological and historical enterprises of the last two centuries are threaded in the quest for a historical reading (*peshat*). In contrast to this *peshat* tradition, Heschel does not use these sources for confinement to earthly text. He uses them instead to ask important theological questions about prophecy and God's word: How does the prophet use his own personality in the process of hearing God's word? Can the word transcend the text? How does the circle of prophets create something greater than the individual? Heschel collects enough material to start a discussion on the theologies of revelation.[38]

His question was how to awaken modern Jews to transcend the limited definitions of revelation.

In sharp contrast to Heschel's mystical and transcendentalist understanding of revelation and Torah, Louis Jacobs saw the text as a predominately human product, with human authorship, based on a specific historical era, confined to a faulty process, and having the primitive morality of its era. Jacobs's theological question was, "Can moderns still accept revelation?" In contrast to Jacobs's watery reading of revelation, Heschel's goal was to show the incredible plurality of *aggadah*, in the broad sense; on revelation specifically, his question was how to awaken modern Jews to transcend the limited, dogmatic, and finite definitions of that revelation.[39]

It is important to note that Heschel's quest to seek the experience behind the text was not original to him, since he would have been familiar with the formulations and definitions of revelation in the field of history of religions, especially those used between 1890 and 1933, when he received his doctorate after writing his dissertation on prophecy. Heschel would have known Matthew Arnold's statement, seminal for the study of comparative religion, that "all literature is tentative and Biblical literature is no exception." [40] For Arnold, "to understand that the language of the Bible is fluid, passing, and literary, not rigid, fixed, and scientific, is the first step towards a right understanding of the Bible." In T.S. Eliot's explanation, Arnold sought to dodge the question of having to mediate between the naturalism of T.H. Huxley and the doctrinal position of John Henry Newman. Primarily a poet and literary critic himself, Arnold argued for a more poetic understanding of religious dogmas, scriptures, and the existence of God.[41]

Hans Kippenberg explained that in the first decades of the twentieth century, the study of religion was motivated by the quest to overcome the materialistic bourgeois exclusion of God from modern life and seek a return to religious genius, by a sense of the numinous, an animistic *mana*, the sacred, the prophetic revelation, and the direct

Deuteronomy) were written by Moses. Heschel would allow for the start of the theological discussion of how God's will unfolds within the texts.

[37] Israel Ta-Shma "On Biblical Criticism in Medieval Ashkenaz," *Kenesset Mehkarim* I, pp. 273-282.

[38] Marc B. Shapiro, *The Limits of Orthodox Theology: Maimonides' Thirteen Principles Reappraised* (Oxford: Littman Library of Jewish Civilization, 2004) is a historical analysis of the doctrinal position. However, for an excellent example of a theological analysis of the doctrinal position, see William J. Abraham, *The Divine Inspiration of Holy Scripture* (New York: Oxford Univ. Press, 1981). The theological meanings of many basic concepts in rabbinic and medieval texts have not been analyzed, including prophets using their own personal style (*signon*), the medieval understanding that the language of the Torah is based on human accommodation (*dibrah torah bi-leshon benai adam*) or the difference between holy spirit (*ruah ha-qodesh*) and prophecy.

[39] For Louis Jacobs's views, see his *We Have Reason to Believe* (London, Vallentine, Mitchell & Co., 1957); *Principles of the Jewish Faith* (London, Vallentine, Mitchell & Co., 1964). The latter is his post controversy defense.

[40] Matthew Arnold, *Literature and Dogma* (1883) p. 31; preface. Heschel clearly followed this approach, especially in his extreme statement that the entire Bible is not biblical.

[41] Variants of this poetic approach are cited in works known by Heschel: Reville, E.B.Tylor, Soderblum, and van der Leeuw, see Hans G. Kippenberg, *Discovering Religious History in the Modern Age.* trans. Barbara Harshav (Princeton: Princeton Univ. Press. 2002) *passim.* Even R. S. R. Hirsch at many points avoids the text and states "Jews are the living parchment of the

encounter—i.e. anything beyond contemporary materialism. During this time, even the contemporary Church religion was considered more materialistic and self-serving than a means to connect with the divine. Scholars of the period sought in the comparative method access to the importance of revelation and prophecy that were part of every religion, but have been lost to the bourgeois. And these scholars used a vast variety of Romantic theories connecting prophecy and genius to explain the phenomena,[42] sometimes combined with more recent theories of vitalism by James or Bergson. Heschel romantically identifies all experiences as prophetic: Bible, *Heikhalot,* Maimonides, veridical dreams, Hasidism, Existentialism, art, and music. Associating twentieth-century creativity with prophecy, Heschel writes that "Prophecy is the product of the poetic imagination. The flash of prophetic or poetic inspiration is a part of God's perpetual revelation."[43]

Heschel seeks the highest religious experience centering on the ethical prophet.

By the 1920s and 1930s, after collecting data on oracles, meditation, and shamanism, these scholars considered the category of revelatory religion to be the exclusive domain of the Semites. The higher form of Semitic revelation was the ethical prophet of the Hebrews.[44] Heschel, therefore, does not seek just any religious experience, but the highest religious experience centering on the ethical prophet. He rejects descriptions of religious experience that lack an ethical component, such as Rudolph Otto's concept of the numinous or Eliade's symbolic approach. For comparative religions scholars like Van de Leeuw, "all experience is revelatory"; the very experience needs to oppose the materialism of modern life. Heschel critiques Otto, considering the numinous revelatory experience itself to be ethical. It necessarily transforms culture as it moves life from materialism to God-centeredness.

Halakhah

For Heschel, the halakhic process and the Oral Law from Moses become continuations of Sinai in a literal way, and are treated as a series of new revelations. Heschel considers anything not explicitly defined from Sinai as a change, not a process; therefore the various moments of the giving of the Torah—first the well of Marah, then Sinai, and finally the Tent of Meeting—are each separate revelations within the continuous revelations of the halakhic process. According to Heschel, there is only continuous cognition. In these rabbinical responses, there is no historical change or driving force to history, only God-intoxicated rabbis responding to their own times.

After the destruction of the Temple, prophecy was taken from prophets and given to the sages. Like many other twentieth-century Jewish thinkers, Heschel finds importance in the story of the oven of *Akhnai,* the talmudic debate that ends with a heavenly voice proclaiming that Torah is not in heaven. For Heschel, this text teaches the role of human initiative in performing of God's will. Heschel concludes that this text "crystallized the idea that the Torah flows from two sources: the wellsprings of prophecy and the wellsprings of human wisdom."

Heschel actually defends the idea that the human initiative of the sage should be seen as God's guiding hand. As a result, he suggests that their personal opinions can transcend the text. While Heschel presents the sources for "*da`at Torah"* because he sees rabbinic authority as individual and expressionistic, he does not draw the political implications of this idea (Chapter 27). He entirely ignores the hierarchic, political, and coercive

Torah- not the text studied by scholars."

[42] Albert Reville *Prolegomenes de l'histoire des religions* (1881, 4th ed., 1886; Eng. trans., 1884) and cited by Evelyn Underhill and others

[43] Abraham J. Heschel, *The Prophets* (New York: Harper and Row, 1962), Vol. II, 148; 146.

[44] Kippenberg, *Discovering Religious History*, pp 183-4. This list of those who defined the prophets as ethical included Nathan Soderblom and Van de Leeuw, both read by Heschel for his doctorate.

structures in his discussion of talmudic law or of *halakhah* as duty, as Gordon Tucker notes with respect to Heschel's selective use of David Zvi Hoffman.[45] Heschel's position functions as hyperbole against presentations of the Sages as rational and juridical, but at times he sounds like he is advocating the acceptance of the Haredi position of *da'at Torah*, which he is not.

As I stated earlier, Maharal exerted an important influence on Heschel, e.g., Heschel accepted Maharal's idea that rabbinic Torah is greater than the written Torah. Heschel further accepts that Torah intellect is greater than logic and sense data and that the sage is greater than the prophet (*hakham adif mi-navi*). Consequently, Torah is not located in texts but in rabbis (666). Yet because everyone is a rabbi-mystic, Heschel's understanding lacks the elements of political authority, obedience and divine command. Heschel identifies looking "at what the people do" (*puk hazi)* as the basic first instinct of the halakhic process. He quotes R. Hai Gaon, claiming that consensus (*ijma*) is greater than logic of the text (*kiyas*)(662).[46]

Heschel surprisingly turns "see what people do" into a form of revelation by trusting the collective's connection to God.[47] There are few halakhic figures that share this premise: One has to go back to the *Ge'onim* to find it. In many ways, Heschel should have said that the first premise of aggadic man is to decide a practical matter after he sees the situation. Heschel correctly notes rational Maimonidean influence on *Hatam Sofer*'s rejection of apocalyptic Kabbalah when the latter claimed that Moses and Elijah never ascended, only their souls did (335).[48] Heschel, however, misses the 1840s cultural polemics against Reform by treating *Hatam Sofer* as a model of rationalism. As a graduate of Berlin's *Hochschule* Reform seminary, Heschel certainly did not accept *Hatam Sofer*'s banishment of the Reform movement, nor his ban on secular studies, western dress, and middle-class practices. *Hatam Sofer* was socially conservative, but Heschel has made him the liberal exemplar for a dynamic vision of Torah based on personal inspiration and attaining a heavenly Torah above the text. In contrast, in Heschel's hands R. Samson Rafael Hirsch's cultural integration becomes a reactionary fixing of the Torah into text, doctrine, and static revelation. The spontaneous, intuitional, *ex-cathedra* pronouncements of *Hatam Sofer* and Hasidism take precedent over the rational textuality of both neo-orthodoxy and positive historical Judaism.

Heschel lacks the elements of political authority, obedience and divine command.

On the principle of halakhic fluidity and multiple opinions (*elu ve elu*), Heschel returns once again to *Hatam Sofer*, who taught that there is no certainty in *halakhah*, for "even a halakhic ruling that appears to us to be firm and correct may not be so according to ultimate truth" (706). For *Hatam Sofer*,

[45] David Tzvi Hoffmann, *The Highest Court* (New York: 1977).

[46] On this responsum and its implications, see Tsvi Groner, *The Legal Methodology of Hai Gaon*, Brown Judaic Studies (Decatur, GA, 1985). Moses Zucker, "The Problem of Isma—Prophetic Immunity to Sin and Error in Islamic and Jewish Literatures" (Hebrew), *Tarbiz* 35 (1966): 149–73. It is interesting to note that Tucker adds a telling footnote stating that ge'onim could have been in agreement with Mordecai Kaplan in locating Judaism in practice, but then he reminds us the ge'onim were favoring the community not because of the historical process but because they believed that the divine will rested on the community, p. 662. For a opposing model in which there is a need to rely on logic (*kiyas*) based on Maimonides, and not the Geonic *ijma,* see Jose Faur, '*Iyunim be-mishneh torah le-ha-Rambam* (Jerusalem: Mosad ha-Rav Kook, 1978).

[47] Heschel's "go and see" should be compared to Robert Gordis's formulations; see Robert Gordis, *Judaism for the Modern Age* (New York: Farrar, Straus, and Cudahy, 1955). And see the questioning of this ignoring of precedent in order to "see what the people are doing" by his grandson Daniel H. Gordis. "Precedent, Rules and Ethics in Halakhic Jurisprudence," *Conservative Judaism* 46,1 (1993): 80-94.

[48] *Responsa Hatam Sofer* VI:98 Jacob Katz, "Towards a Biography of the Hatam Sofer" *From East and West* (1990) 223-266 paints a picture of R. Moshe Sofer as a stringent charismatic, while Moshe Samet in his recently published work points out a number of the lenient rulings of the *Hatam Sofer* and claims that his halakhic methodology is more complex than many have thought. *Hadash Asur Min Ha-Torah: Perqaim be-toledot ha-Orotodoqsiyah* (Jerusalem, Merkaz Dinur 2005), pp. 306-309, 317-318.

the Torah is above any text; aggadic statements such as "no innovations in the Torah" (*hadash asur min ha-torah*) are valued over halakhic reasoning. Heschel uses this fluidity to prove the need to look toward the ultimately inaccessible divine Torah rather than knowing Torah only by means of juridical decisions.

The approach of a heavenly, supernatural non-textual Torah comes naturally to him.

Heschel claims that the approach of a heavenly, supernatural non-textual Torah comes naturally to him; R. Akiva was his "mother's milk" (xxv). He understands the *halakhah* through Moshe Cordovero, Maharal, Rama of Fano, Hasidism, and *Hatam Sofer*.[49] He is a Galician *hasid* gone "bad," with a tension between his personal past and his current modernist experience. In this juxtaposition of histories and beliefs, *Hatam Sofer* meets the modernists Rainer Maria Rilke, Max Scheler, and William James. Heschel's pluralism is more experiential than liberal, more poetic than intellectual.

Heschel does write that that today's *halakhah* needs to be more like the ideas of *R.* Ishmael in accepting *ad hoc* leniencies. He argues that "All paths should be presumed to carry danger" (718) and "one cannot be safe and observant, but one needs to light lamps for the multitude." Heschel cites R. Simhah Bunim on the need for intentional sin; he also cites cases of personal illumination and messianic intentions, and accepts the idea that there will be new messianic readings of the Torah in which the pig will be kosher. The very texts a halakhic thinker tells you to ignore, Heschel makes pillars of his thought (Chapter 35). His readings are not those of New York, but rather more like those of the Polish schools of Kotzk, Izbica, and R. Zadok Ha-Kohen.

In presenting the rabbinic perspective, Heschel accepts the doctrines of R. Zadok ha-Kohen of Lublin (1823-1900) by name. R. Zadok accepts a fluid Torah of the heart over the Torah of the texts. Throughout *Heavenly Torah*, Heschel follows the thought of R. Zadok, where there is an identity of experience and prophecy that create different levels, as well as a blurred line between the human mind with God's revelation. R. Zadok wrote, "The Sefer Torah written in ink on parchment is only for this world that hides and conceals the true light of the future age. As it is written, 'on the tablet of their hearts I will write it.'"[50] Yet Heschel lives by this Torah of the heart, while the Hasidic mystic R. Zadok strongly cautions that the infinite Torah of the heart is not for this world. For R. Zadok, R. Meir typifies this Torah of the heart, which cannot exist in the world: "R. Meir…comprehended the inner light…No one could reach the limit of R. Meir's infinite knowledge." In contrast, *R.* Akiva is the teacher for this world who uses the halakhic process. "All things in the physical world are limited; therefore the physical *halakhah* is forced to decide against R. Meir's infinite approach. [The infinite Torah] can only lead to quarreling because it is not subject to the give and take of the halakhic process.[51]

Unlike R. Zadok, Heschel describes a direct reading of rabbinic texts, including *halakhah*, based on the immense openness of the *aggadah* as a system of polarities, tension, and oscillation. He never asks how to resolve indeterminacy or reach a legal decision. Heschel believes rabbinic texts are forever open and individualistic, and that the Talmud cited contradictory statements without seeking a resolution, as if *Tosafot*, Maimonides, and the *Shulhan Arukh* had not already decided to accept only one of the statements.[52]

[49] From a similar canon R. Zvi Yehudah Kook creates a particularistic quest for prophecy in the Jewish soul, for the national collective of Israel, and in the land of Land, and choosing the collective over the individual. These would be anathema to Heschel.

[50] Alan Brill, *Thinking God: The Mysticism of R. Zadok of Lublin* (Hoboken: Yeshiva Univ. Press, 2002).

[51] A. Brill, *Thinking God*, p. 348-9.

[52] The translator and editor Gordon Tucker, compares Heschel's approach to *halakhah* to David Hartman. The latter bases his thinking on a this-worldly approach to *halakhah* as a democratic and creative process, derived from *Lonely Man of Faith* and

Heschel considers the approach of most halakhic sages who treat the *halakhah* as defining Judaism to be provincial. He claims that:

> Most Sages have made the *Halakhah* primary and life secondary to it. As for one who says that a certain decree or another cannot be lived with, they coerce him until he says "I am willing." [They say] "The *halakhah* was not given to be marked up and evaluated. It is absolutely unique. All is contained in it, including its own foundations and boundaries. It is above critique…I object to the provinciality of thought, and to the construction of mind in all of this. (717-718.)

R. Soloveitchik and his followers would consider this concept to be simply wrongs—even sacrilege.[53] Yet to an aggadic person, Heschel offers as a worldview the open-ended aspects of rabbinic thought.[54]

The Talmud should remain a mixture of justice, piety, custom and ethics.

The Talmud should remain a mixture of justice, piety, custom, convention, ethics, and exemplarity. One should not rarify one part, even the *halakhah*, and make it unique. Spirituality, human sensitivity, *kavvanah*, and *aggadah* are not supererogatory, but always in balance with *halakhah*. Rabbinic texts are to be read as experiential and containing a spirit of the law; insights from *aggadah*. Maharal or Hasidism can carry prescriptive weight, and Heschel points out that Maharal and R. Yeshayah Horowitz (*Shelah)* even advocated studying the wisdom of rejected rabbinic opinions. Heschel defers to the past by keeping all past options open. *Heavenly Torah* has a refreshing discussion of leniencies and stringencies, one that acknowledges that stringencies have always had the upper hand in Jewish history (753). In contrast to his contemporary Eliezer Berkovits and others who see greater strictness now, Heschel argues that we are more lenient in the modern era in America. He expects everyone to reach his or her own opinions with the seriousness of a talmudic sage.

In Heschel's understanding of *halakhah*, the human elements for our age, particularly marriage and sexuality, become God-intoxicated ethical projects. Even while eating and drinking, we have to worry about gluttony that might fall outside of the Torah's permission and understanding of human dignity. Heschel advocates Safed pietistic customs as a source for dealing with these everyday problems.

We should follow the lead of the famed sociologist-theologian Ernest Troeltsch (1865-1923) who, in his valuable analysis of the role of social structure in religion, would categorize Heschel as having a mystical, individualistic approach to religion unencumbered by generating control over his followers. Heschel's approach is neither church nor sect, but what we loosely call today "spirituality"— an approach to God located outside church structures and therefore capable of generating a wide range of interpretations. For Troeltsch, Heschel is not a member of a denomination. He is a sociological a mystic. Heschel's own behavior based his own callings of the moment is idiosyncratic and personal at best.[55]

Halakhic Man. Hartman views Torah from the perspective of our autonomous, pluralistic, modern selves and the ways we act based on our limited human choices. In contrast to this contemporary and active point of view, Heschel advocates a heavenly Torah known in the heart; for Hartman, in contrast, a connection between heaven and heart is not relevant; see *A Living Covenant* (New York: Free Press, 1985).

[53] On Heschel's critiques of Soloveitchik in his classroom as panhalakhic, see Samuel H. Dresner, "Heschel and *Halakhah*: The Vital Center" *Conservative Judaism* 43,4 (1991): 18-31. For Soloveitchik's critiques of Heschel, see Lawrence Kaplan, *Halakhah and Religious Experience in the Thought of Rabbi Joseph B. Soloveitchik* (forthcoming book) ch. 1.

[54] For a similar open-ended approach to rabbinic texts that also relies on Hasidism, but combines the latter with Levinas and literary indeterminacy, see Marc-Alain Ouaknin. *The Burnt Book: Reading the Talmud,* trans. Llewellyn Brown. (Princeton: Princeton Univ. Press, 1995).

[55] For details of his observance, see Yair Sheleg, "The Universal Rabbi" *Ha'aretz* (June 27, 2003); for his lack of clear directives, see Yehudah Mirsky, "The Rhapsodist" *New Republic* (4/19/99).

Anthology, Poetry, and Theology

Heavenly Torah belongs on the shelf with the other great romantic readings of rabbinic Judaism, especially Bialik's and Yehoshua Ravnitsky's *Book of Legends*, Louis Ginzberg's *Legends of the Jews*, and Shai Agnon's *Present at Sinai.* Nevertheless, it is quite instructive to compare Agnon's content with Heschel's. Agnon's chapter titles reflect the revelation at Sinai, or the collective's lived experience of the Sinaitic experience: "In the third month" "we will do and we will hear" "thunder and lightening" "abstinence and bounds" and the "Ten Commandments."

Heschel's choice is to hear God; all the talk in the world won't help you understand the rabbis.

For Heschel, revelation is not just the event at Sinai: He does not even collect the rabbinic statements about Sinai. Instead, he provides analyses of divine-human encounters within rabbinical literature. Whereas Agnon presents the statements without embellishment, Heschel's rabbis, are too much like Rilke,[56] i.e., already self-conscious about the metaphorical nature of metaphysics.

Heschel presents *Zohar*, R. Zadok, Maharal, and *Shelah* as core texts of Judaism and wants to use them for modern theology. He teaches his readers about the depth and breath of Jewish thought and about acceptable positions not taught in the academic Jewish study of his time. While there is a wealth of new sources in his book, Heschel does not leave them as historic curiosities but recoups them as part of the rabbinic palette that should be taken seriously—especially by those who are mystical, intuitive, or romantic, or even artistic, and anarchistic. In many ways Heschel has provided an annotated *Norton's Anthology of Revelatory Thought in Judaism*. Now is the time for those of us inclined to theology, both systematic and historic, to evaluate the material.

Heschel's tension between the transcendental and earthly is palpable. Can these applications hold true for us moderns? Heschel's choice is to hear God; all the talk in the world won't help you understand the rabbis. As Heschel already wrote in his poems of 1933, "Let it be clear: enthusiasm or mockery!" (193). One needs to take up the prophetic banner of renewal, the poetic, the kabbalistic or the Maimonidean, or one must openly reject Heschel's approach. Heschel demands a reading of his text in his own commitment to openness. He asks, however, the reader to not limit him for the demands of those who do not hear the voice of God. The "aggadic man" hears loudly the divine will from heaven. In our humanness we understand revelation in contemporary poetry, theology, and study of religion to produce a response in deeds.

[56] In comparing Rilke's poetry to Heschel, my student Mordechai Shinefield notes that for both where language cannot be used, we find the divine "leaps around" and "changes." He notes also the use of Rilke's "pure Too-little" before it transforms into "that empty Too-much." Similarly in Heschel, R. Akiva is too much while R. Ishmael is too little. Mordechai Shinefield, "Heschel and Rilke: Dichotomous Language and Poetics" (Unpublished undergraduate paper, Yeshiva College, spring 2006).

Meorot
A Forum of Modern Orthodox Discourse

REVIEW ESSAY

Mi-Yosef ad Yosef Lo Kam ke-Yosef:

Hayyav, Mishnato u-Mahalkhav ha-Politiyim shel ha-Rav Ovadiah Yosef by Zvi Aloush and Yossi Elituv, (*Ben Porat Yosef:* Or Yehudah, 2004)

Maran Ovadiah Yosef: Ha-Biographyah by Nitzan Chen and Anshil Pepper (Jerusalem, 2004)

Mi-Maran ad Maran: Mishnato ha-Hilkhatit shel ha-Rav Ovadiah Yosef by Binyamin Lau, (Tel Aviv, 2005)

Marc B. Shapiro

Abstract: R. Ovadiah Yosef has brought about a revolution in the contemporary Torah world, one which has permanent implications. Marc B. Shapiro analyzes this phenomenon, in both its halakhic context as well as the more personal side of this great Torah leader.

Biography: Marc B. Shapiro holds the Weinberg Chair in Judaic Studies at the University of Scranton. His previous contributions to *The Edah Journal* include "Rabbi Jehiel Jacob Weinberg on the Limits of Halakhic Development" (*Sivan* 5762) and "Of Books and Bans" (*Elul* 5763). His most recent book, *The Limits of Orthodox Theology*, was published by The Littman Library of Jewish Civilization in 2004.

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REVIEW ESSAY

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Reviewed by Marc B. Shapiro

Outstanding rabbinic figures usually do not merit critical biographies in their lifetimes. Indeed, most have to wait a good while after their deaths before some student, looking for a topic for his doctoral dissertation, decides to focus on them. It is thus quite notable that three books appeared on R. Ovadiah Yosef in quick succession. It is a clear sign that R. Ovadiah is not like any other rabbi.

What is it about R. Ovadiah that makes him so significant? The answer is not simple, and comes down to a combination of the religious and the political. Without R. Ovadiah's entry into politics in 1983, the year he began his association with the newly founded Shas party, he certainly would have had a lower profile. While his influence in religious circles would have remained great—perhaps even greater, for, as we shall see, his image has been tarnished by his foray into politics—he would not have the wider significance currently attached to him, being undoubtedly the only rabbi whose name and picture are recognized by all Israelis.

While Binyamin Lau's book is focused narrowly on R. Ovadiah's scholarship and halakhic achievements, the other two books are complete biographies that show the complexity of the man and how he rose from

What is it about R. Ovadiah that makes him so significant?

the most humble beginnings to become not only the world's most important rabbi, but also one of the leading powerbrokers in Israeli politics. Neither of the biographies has footnotes, so it is hard to evaluate the accuracy of every detail, but in virtually all aspects they are in basic agreement. Both books are well written, but *Maran* is the livelier of the two—a real page-turner for those with even a general interest in the subject. As with many biographies of rabbinic figures, these books bring us back to a more innocent era, when, in the Sefardic

world particularly, respect for *halakhah* was still part of most people's lives and they lived in a traditional rather than an Orthodox society. Since we live today in an era when some rabbis have declared that one should not sit in or buy coffee at a store like Starbucks that has no *hashgahah,* it is refreshing to read that R. Ovadiah and his students spent time in the coffeehouses of Cairo, where R. Ovadiah may have first developed his love of Arab music.

Both biographies convey a sense that R. Ovadiah presents a paradox for anyone writing about his life. On the one hand, he is a man whose sheer knowledge is unmatched. None of the other great rabbinic authorities of our time comes close to him in this regard. As mentioned already, he comes from very humble beginnings and entirely lacks the *yihus* that is so much a part of the rabbinic world. Throughout his career he has shown great courage and compassion, be it during his time in Egypt when he battled against communal leaders who showed no concern for *halakhah*, or when he spent many sleepless nights painstakingly going over army files, until not one *agunah* remained from the Yom Kippur War. It is thus no surprise that he has earned the admiration of hundreds of thousands, observant and non-observant alike. Those who have been close to R. Ovadiah for many years know him to be a loyal and honorable man, who is prepared to suffer the slings and arrows of others in the name of truth as he sees it.

Yet the paradox is that the same man who spends most of his day devoted to the most advanced level of Torah study, has also consistently shown a side more reflective of the low culture of his youth. There is, to be sure, a positive side to this, as no other scholar in the Sefardic world has been able to form an attachment to the masses like R. Ovadiah. As anyone who has attended his Saturday night lectures—a privilege I enjoyed in 1985—can attest, his mix of Torah, stories, and humor has great appeal to the man of the street. This is a quality R. Ovadiah has had since his days as a yeshiva student, when it first became apparent that in addition to his incredible knowledge, he also had a gift for reaching the less educated.

No other scholar in the Sefardic world has been able to form an attachment to the masses like R. Ovadiah.

Together with this, R. Ovadiah has been known for numerous outrageous statements, as well as for cursing this or that politician and promising heavenly rewards for those who support his party. Not surprisingly, the secular newspapers carefully monitor his talks, most of which now appear on the internet, waiting for the next "juicy" quote. Perhaps the most embarrassing of these came following Hurricane Katrina, when he declared that it was retribution for the Bush administration's encouragement of the Gush Katif evacuation. Why was New Orleans leveled? Because blacks live there, and they don't study Torah.[1]

These latter comments were made after the biographies appeared, but the two books offer plenty of similar examples which show that we are not dealing with someone who occasionally misspeaks, as all are wont to do. Rather, we are confronted with a basic facet of R. Ovadiah's personality, or perhaps I should write "personalities," as he seems to have more than one. It is no longer surprising to those who have followed R. Ovadiah's career that the same man who soars to the heights of Torah scholarship can be counted on to come up with some of the most offensive rhetoric of any Israeli public figure. The same man who brought Shas into a Labor-Meretz government—an action

[1] The video of R. Ovadiah saying this can be seen at www.maran1.com (on both the homepage and in the section "*derashot shelishi*," 3 Elul 5765).

which brought down upon him the wrath of much of Orthodox world—was also the one who famously called Yossi Sarid "Haman" and "Satan," adding, "God will uproot him just as he uproots Amalek." The same man who declared that land can be given back in order to achieve peace, also publicly referred to the Arabs as "snakes."

The same man who soars to the heights of Torah scholarship can be counted on for offensive rhetoric

In addition to documenting this aspect of R. Ovadiah's career, the two biographies also discuss other things that would never make it into a typical *haredi* hagiography but that are well known. For example, they deal with the difficult relationships R. Ovadiah has had with other rabbis, and even with his own son, R. Ya`akov, from whom he has been largely estranged at times. Both volumes contain extracts from R. Ovadiah's unpublished diaries. In them one can find all sorts of negative comments about his early opponents, including his predecessor as chief rabbi, R. Isaac Nissim, and the famed kabbalist, R. Isaac Kaduri, who in his roles as amulet writer and object of veneration would later become an important part of the Shas machine. There is no explanation as to how passages from the diaries reached the authors' hands, and the logical assumption is that R. Ovadiah cooperated with his biographers.

In seeking to understand R. Ovadiah, one can view him in his totality or completely separate his halakhic achievement from his political persona. It is this latter approach that Lau takes, and while some will see this as distorting R. Ovadiah's legacy, there is much to be said in favor of Lau's method. After all, if we are seeking to understand R. Ovadiah's halakhic approach, why is it important for there to be discussion of his various ill-chosen comments or political decisions? R. Ovadiah's scholarship can certainly stand on its own, and it is unlike his curses of prime ministers, which thankfully will be forgotten by future generations. For one to achieve a complete understanding of the man, it is obviously necessary to study his political activities and polemical rhetoric, which on occasion do have a connection with his halakhic views, while at other times, as demonstrated by Zion Zohar, they do not.[2] Yet this does not mean that studies such as Lau's create a false picture by choosing a more narrow focus any more than a study of Maimonides' halakhic method suffers by not dealing with the latter's difficult relationship with R. Samuel ben Ali.

Since R. Ovadiah has taken positions that conflict with the leadership of the *haredi*[3] world, it is not surprising that he has been a focus of its anger. Much of this has to do with his political positions as well as Shas's emergence as the leading fervently Orthodox party, which succeeded in marginalizing the once important Ashkenazic *haredi* politicians.. When R. Ovadiah was allied with the Ashkenazic *haredim*, their newspapers referred to him with all the titles reserved for great sages. When he parted with them he became *persona non grata* and suddenly it became permissible to attack him in all sorts of ways.

But it was not only R. Ovadiah's political outlook that brought the wrath of the *haredim* down upon him. As mentioned above, after the Yom Kippur War he worked tirelessly to free all the *agunot*. This is described in both biographies and was an important element in cementing his reputation as an outstanding halakhist. The responsum he published setting forth his halakhic principles is required reading for any *poseq* who must deal with this weighty problem.[4]

[2] "Oriental Jewry Confronts Modernity—The Case of Rabbi Ovadiah Yosef," *Modern Judaism* 24 (May 2004):. 120-149.
[3] Throughout this paper when I refer to *haredim*, I have in mind the Ashkenazic *haredi* community.
[4] *Yabi`a Omer,* vol. 6, *Even ha-Ezer* no. 3.

Yet in a recent *haredi* work that discusses this episode, R. Yosef is referred to as "Ovadiah," without even putting a *resh* (for Rabbi) before his name. He is also derided as one who will "rely on a responsum, even if it from a book that is not accepted such as some author from Egypt or something similar."[5] I would merely add that for most *haredim*, no author from Egypt in the last few hundred years would qualify as "accepted," as their perspective is entirely Ashkenazic-centered. Standard works of the Sefardic halakhic tradition, such as *Erekh ha-Shulhan*, *Petah ha-Devir, Yafeh la-Lev,* and the numerous books of R. Chaim Palache, as well as many less important Sefardic halakhic writings, are not regarded with any significance by the typical *haredi poseq* and are hardly ever quoted.

Although the point mentioned at the beginning of the last paragraph is an example of the halakhic disagreements between R. Ovadiah and the *haredi* leaders, the fact remains that had he not taken a different political line from the *haredim*, he would never have been referred to in print in such a disrespectful way. Indeed, in the early years of Shas when R. Eleazar Shakh was the dominant influence and R. Ovadiah his political protégé, the titles that mean so much in *haredi* society were also attached to R. Ovadiah's name in the *haredi* press.

When I read *haredi* attacks on R. Ovadiah I confess that they remind me of a gnat attempting to take on an elephant. R. Ovadiah just marches on, seemingly oblivious to the carping. Although R. Ovadiah is aware that if he falls in line with the Ashkenazic *Da`as Torah* he will once again be welcomed in the *haredi* world as one of the *gedolei ha-dor,* he nevertheless holds fast to his views. The harshness of the attacks on both R. Ovadiah and Shas illustrate the political powerlessness of the *haredim* in the State of Israel. It is R. Ovadiah who has the power and influence. All the screaming about R. Ovadiah doing this and that, and about Shas rejecting the authority of the *gedolim,* are the desperate cries of people who no longer have any control over the party they helped create. Ever since Shas broke out on its own, it has been the dominant force in religious politics. It has held the purse strings and set the agenda (and with this has come the inevitable financial corruption that Shas figures have been involved in). In short, R. Ovadiah has become *the* religious powerbroker in the State of Israel.[6]

R. Ovadiah has become the religious powerbroker in the State of Israel.

This is quite a success story considering that in 1992 R. Shakh famously declared that *Sefardim* were not yet capable of leading. This comment, coming after decades of discrimination against *Sefardim* in the Ashkenazic school system and society, was the straw that broke the camel's back, causing Shas to break off on its own.[7] It led

[5] A. Halevi Horovitz, *Orhot Rabbenu Ba`al ha-Qehillot Ya`aqov* (Bnei Berak, 2005), vol. 5, pp. 66-67 (quoting R. Ya`aqov Yisra'el Kanevsky, the Steipler). See also *id.,* p. 173, to the effect that Kanevsky would use R. Ovadiah's responsa, *Yabi`a Omer,* but only because it is a good reference work. Along these lines, when R. Isaac Jacob Weiss, author of responsa *Minhat Yitzhaq,* was still in Manchester, he often quoted R. Ovadiah. This ceased following his move to Jerusalem, where he became head of the *Edah Haredit.* (According to the Bar Ilan Responsa Project data base, *Yabi`a Omer* is quoted twenty-six times in *Minhat Yitzhaq* vols.. 1-4, but not even once in vols. 5-10). Yet the "*hakham ehad*" with whom Weiss disputes in *Minhat Yitzhaq*, vol. 7, no. 27, is none other than R. Ovadiah. See *Yehaveh Da`at,* vol. 2, no. 62.

[6] Just before this article went to press, R. Ovadiah issued another ruling at one of his Saturday night *shi`urim* that is also sure to create controversy in the *haredi* world. He stated that if it is going to create problems, one need not insist on a *mehizah* at the wedding meal. See www.nrg.co.il/online/11/ART1/498/181.html. The video can be seen at www.maran1.com (*derashot motza'ei shabbat*, 7 Marheshvan 5767).

[7] The contempt with which the *haredim* have treated the Sephardim is so well known that there is no need to dwell on it here (and it is paralleled by the long history of racism in the non-Orthodox Ashkenazic community). Suffice it to

to a strong feeling of ethnic identification with Shas by *Sefardim* of all levels of religious commitment. R. Shakh's picture was ripped up in development towns as people declared that they would never again vote for *Ashkenazim*. Shas plastered R. Shakh's patronizing words on walls throughout Israel, while loudspeakers passed through the streets playing the tape over and over, skillfully stoking the fires of anti-Ashkenazic sentiment that would redound to Shas's advantage.[8]

In truth, the Shas-Ashkenazic break was inevitable. Sefardic society was ripe for an ethnic party that would encompass the wider community—a community that, though not Orthodox, has a strong attachment to tradition. As for those *Sefardim* who had been educated in *haredi* institutions and had begun to create a Sefardic *haredi* culture, how long were they supposed to submit to the rule of Ashkenazic sages who conducted their deliberations in Yiddish and had no place at their table for Sefardic *gedolim*?

Here we come to R. Ovadiah's real significance, which is stressed in both biographies: It is R. Ovadiah who single-handedly restored pride to Sefardic Jewry. The slogan of Shas*, "le-hahazir ateret le-yoshnah*," ("to return the crown to its glory"), says it all.[9] R. Ovadiah ushered in a new era, one in which *Sefardim* were no longer to be regarded—or regard themselves—as second-class citizens, either in society at large or in the Torah world. This was a great social achievement and is the reason why numerous non-Orthodox *Sefardim* voted for Shas. As is well known, Sefardic society has a range of levels of observance, but even those who are not Orthodox usually have great respect for tradition and religious leaders. Shas was able to tap into these feelings with great success, and through the many schools it established was able to ensure that its message was passed on to the youth, many of whom have continued on for further study at Shas-affiliated *yeshivot* and *kolellim*.

R. Ovadiah single-handedly restored pride to Sefardic Jewry.

From this perspective, there is nothing surprising about the wide-ranging Sefardic support for Shas. Yet what makes R. Ovadiah's political achievement even more significant is that until the Gaza withdrawal, he and Shas were identified with dovish political positions. In addition, for decades now R. Ovadiah has enjoyed a good relationship with Shimon Peres. It has never been a secret that R. Ovadiah is firmly convinced that it is halakhically permissible to give back land if it would lead to peace.[10] The views of the typical Sefardic voter are much more in line with the right-wing parties, yet many of them have been willing to overlook their differences in political outlook in order to support R. Ovadiah. This is a testament to his incredible drawing

say that, despite any recent court decisions, Israel has not yet had its *Brown v. Board of Education*, and the *haredi* school systems continue to discriminate and see nothing wrong with having quotas on Sefardic children. Yet I would also note that Shakh's comment was not as bad as it appeared, and contrary to Chen and Pepper, was not "racist." Shakh was always a patron of Sefardic Torah students and strongly opposed the anti-Sefardic quotas. See Moshe Horovitz, *Ha-Rav Shakh: She-ha-Mafteah be-Yado* (Jerusalem, 1989), pp. 133-134. What Shakh meant, and the complete passage is found in *Ben Porat Yosef,* was that the *Ashkenazim*, due to their historical experiences, knew how to deal with the anti-Torah forces. It is with reference to this battle that Shakh declared that the *Sefardim* were not yet prepared to lead. Many would argue that Shakh actually showed prophetic insight, since shortly following this statement Shas agreed to join a government in which Shulamit Aloni was Minster of Education.

[8] See *Maran,* p. 316.

[9] See Omar Kilani, "Rabbi Ovadia Yosef and His 'Culture War' in Israel," *Middle East Review of International Affairs* 4 (Dec. 2000), pp. 22-29; Eitan Schiffman, "Schools and Votes: The Rise of the Shas Party in Israel," (unpublished doctoral dissertation, University of Colorado, 2003; called to my attention by Menachem Butler).

[10] See his "*Mesirat Shetahim mei-Erez Yisra'el bi-Meqom Pikuah Nefesh*," *Tehumin* 10 (1989), pp. 34-47.

power, and also to his strength of character in that he was willing to stick to his dovish positions even though he knew that he would be able to pick up more Knesset seats if he adopted a more hawkish outlook. While in recent years his assessment of the possibility of peace has soured, the principle that land for (real) peace is halakhically appropriate remains firm in his mind.

R. Ovadiah disputes the yeshiva world's approach to Torah study, as it is focused on theoretical analysis rather than halakhah le-ma`aseh.

One should not think that it is only Shas which, for political reasons, speaks about the Ashkenazic-Sefardic divide. R. Ovadiah himself has made a number of statements critical of Ashkenazic society. They are not only intended for the ears of the masses, as some reflect more serious concerns. For example, in the introductions to volumes 1 and 3 of his *magnum opus*, *Yabi`a Omer*, R. Ovadiah disputes with the yeshiva world's approach to Torah study, as it is focused on theoretical analysis rather than *halakhah le-ma`aseh* and also discourages students from studying *Aharonim*.

All three books discuss one of R. Ovadiah's first acts as Chief Rabbi of Tel Aviv, in 1969, which was to permit *Sefardim* to marry between 17 *Tamuz* and 1 *Av,* contrary to Ashkenazic practice that forbids weddings during this period.[11] As R. Ovadiah explained, in previous years the great Sefardic rabbis in the State of Israel were not prepared to challenge the Ashkenazic hegemony in this area, but he had no such hesitation.[12] Along similar lines, R. Ovadiah rejected the *taqqanah* that was signed by the first Sefardic Chief Rabbi of Israel, R. Ben Zion Uziel, together with his Ashkenazic counterpart, R. Isaac Herzog, banning *yibbum* in favor of *halitsah*. While this *taqqanah* was instituted in order to establish one halakhic standard in Israel, R. Ovadiah saw it as a betrayal of the Sefardic halakhic tradition, which has preferred *yibbum* to *halitsah*.[13]

Although R. Ovadiah's responsa always show respect for Ashkenazic scholars, even when he is rejecting their opinions, this has not always been the case when he is speaking to his followers. Both of the biographies mention the storm that arose after R. Ovadiah downplayed the significance of the Hazon Ish,[14] who is regarded as the most important twentieth-century *haredi* figure, the one who was responsible for crafting the *haredi* response to the State of Israel. Yet R. Ovadiah has none of the feeling of awe when it comes to dealing with what is, for him, just another prominent Ashkenazic scholar. In this case he went so far as to declare that the Hazon Ish was not to be regarded as a *moreh hora'ah,* as he was only a private citizen without communal responsibilities. He furthermore "loved to be stringent, adding *humrot* on top of *humrot*"![15] As for the Vilna Ga'on, whose stature is unquestioned among the *Ashkenazim*, here too R. Ovadiah has a different perspective. To give one example, after quoting the Ga'on R. Ovadiah writes: ובמחכ"ת זה אינו ("and with all due respect to his honor, this is not so").[16] This type of language will never be found among Ashkenazic authorities, who tremble at the mention of the Vilna Ga'on.

[11] It is worth noting that in some Sefardic communities as well as in Yemen the *minhag* was identical to what the *Ashkenazim* observed.

[12] See *Yabi`a Omer,* vol. 6, *Orah Hayyim* no. 43.

[13] See *Yabi`a Omer,* vol. 6, *Even ha-Ezer* no. 14.

[14] See my "Of Books and Bans," *The Edah Journal* 3:2 (2003), p. 4 n. 18, for R. Zvi Yehudah Kook's similar effort.

[15] *Maran,* p. 318, *Ben Porat Yosef,* p. 260.

[16] *Yabi`a Omer* vol. 9, p. 416. See the surprised reaction of R. Sha'ul Yisraeli, *Havot Binyamin* (Kefar Darom, 1992), vol. 2, p. 217. From Yisraeli's letter it appears that in his original responsum R. Ovadiah was even sharper, writing "*ve-leita*" after mentioning the Vilna Ga'on's opinion.

For those who only know the R. Ovadiah of today, who towers over Shas with great political clout, it will be surprising to read how the party itself was brought to prominence with the blessing and guidance of R. Shakh. In those early years R. Ovadiah was a pawn of the Ashkenazic *haredim*, who always took the Sefardic ultra-Orthodox for granted. The story of how R. Ovadiah finally summoned the courage to break out of the Ashkenazic hegemony and take Shas in a new direction is inspiring and speaks to his great motivation and his faith that the people would follow him.

He has accomplished the rare feat of altering the course of Torah history in a sociological and religious sense.

The *haredi* response was severe, as R. Ovadiah knew it would be, but as so often in his career he had made a shrewd move and it catapulted him to real political power. The notion that a Sefardic party with incredible drawing power should take orders from the Ashkenazic *haredim*, whose political clout was relatively insignificant, was an idea that only those with a paternalistic attitude towards the *Sefardim* could ever have imagined. Non-*haredim* reading the two biographies will likely feel some satisfaction at seeing the *haredi* parties dwarfed in representation by the very people they tried to convince were not worthy of deciding their own destiny.

In terms of his long-term significance, there is no question that R. Ovadiah is the most important Sefardic figure since R. Joseph Karo, and it can be truthfully stated that "from Yosef [Karo] to [Ovadiah] Yosef there has arisen none like Yosef."[17] Unlike other *gedolim* who were his contemporaries and were true giants of their time, such as R. Moses Feinstein and R. Shlomo Zalman Auerbach, R. Ovadiah is not only a giant for his generation, for he has accomplished the very rare feat of altering the course of Torah history in both a sociological and religious sense. Typically, even the greatest of *poseqim* have real influence only in their lifetimes, and after their deaths their influence soon begins to wane. There is no question that today the halakhic influence of the two outstanding figures mentioned earlier in this paragraph is nowhere near what it was during their lifetimes, when they dominated Torah Jewry.[18] Yet, the halakhic enterprise that R. Ovadiah created has altered permanently the halakhic tradition of Sefardic Jewry.

R. Ovadiah's tendency is to be lenient, and in the months leading up to his election as Chief Rabbi he publicly stated that his approach, and that of the Sefardic rabbinate in general, was that of Beit Hillel. He contrasted this with the Ashkenazic sages who push *humrot* and are followers of Beit Shammai. While there are exceptions to this lenient tendency, most notably his consistent ruling that sheitls (wigs) are forbidden,[19] his tendency is certainly in the other direction. Examination of his many responsa dealing with issues of *mamzerut* and *agunot* show a man keenly aware of his responsibility and almost always able to arrive at a lenient decision. Today there is no doubt that the final address for the most complicated problems of personal status is R. Ovadiah.

In other issues as well we see this lenient tendency. The *kashrut* of gelatin is an

[17] R. Ovadiah himself uses this expression with regard to R. Joseph Karo and the *Hida*, R. Hayyim Joseph David Azulai. See *Yehaveh Da`at,* vol. 6, p. 261 (quoting R. Judah Sid, *Ner Mizvah* [Salonika, 1810), vol. 1, p. 186a).

[18] To give just two examples by way of illustration, from matters currently in the news: R. Moses Feinstein's position that an *eruv* could not be erected in Brooklyn is no longer taken seriously by many of the residents, but during his lifetime was virtually unchallenged. R. Shlomo Zalman Auerbach declared that the notion that the Sages' scientific knowledge was imperfect is an acceptable, though not the mainstream, approach. See R. Joseph Isaac Lerner, *Shemirat ha-Guf ve-ha-Nefesh* (Jerusalem, 1992), vol. 1, p. 54. Yet during the Slifkin controversy, the *haredi gedolim* in Israel, led by R. Yosef Shalom Elyashiv, declared that this position can no longer be tolerated.

[19] *Yabi`a Omer,* vol. 4, *Even ha-Ezer* no. 3, vol. 5, *Even ha-Ezer* no. 5.

example. The American Orthodox community has generally followed the rulings of R. Aaron Kotler and R. Moses Feinstein that gelatin is not kosher, and this policy is adhered to by the major *kashrut* organizations. If anything is able to change matters in the United States, it is R. Ovadiah's emphatic responsum that all gelatin, whether from bones or pigskin, is kosher.[20] Similarly, his responsum arguing that one dishwasher is sufficient for both meat and dairy,[21] eminently reasonable on pure halakhic grounds, goes against the consensus in the United States, but as with all consensuses, this is liable to change. Another great leniency, which would be unthinkable in this country, is his ruling that a restaurant that serves milk products immediately after meat, or even together if they are both cold, must be given a *hashgaḥah* if it is requested. He terms this obligation a *ḥovah qedoshah* (sacred obligation), since by giving the *hashgaḥah* the rabbinate prevents even more serious violations of kashrut.[22] I have noticed that even when it comes to using hot water on the Sabbath, R. Ovadiah shows flexibility. Although in an early responsum he ruled that it is forbidden (*asur*),[23] in his most recent volume of responsa he explains why it should be permitted, concluding that nevertheless it is better to avoid using (*ra'ui le-haḥmir*) the hot water. He is careful not to use the word "forbidden", implying that in certain cases, e. g., children, old people, an *istenis* (person of delicate constitution) it is permitted.[24]

Operating in an environment removed from Conservative Judaism, and thus not feeling any threat to the halakhic process from those with an alternative halakhic vision, R. Ovadiah is able to reach decisions without considering the meta-halakhic dimensions so popular in Ashkenazic responsa. A prime example of this is his responsum dealing with the *bat mitsvah* celebration, concerning which much ink has been spilt focusing on meta-halakhic concerns that lead to a negative view of the practice. In R. Ovadiah's responsum permitting the *bat mitsvah* celebration, such concerns are conspicuously absent.[25]

R. Ovadiah reaches decisions without considering the meta-halakhic dimensions so popular in Ashkenazic responsa.

R. Ovadiah's vision is clear, namely, a Torah society in which the Sefardic authorities lead. The *halakhot* of this society are to be decided in accordance with R. Joseph Karo's opinion in the *Shulḥan Arukh*. In some of his writings one gets the sense that R. Ovadiah also regards *Ashkenazim* as bound in this way, as the Land of Israel is the "place of *Maran* [R. Karo]." But at other times one must conclude the opposite, that he is only speaking to *Sefardim*. If this were not the case, it would make no sense for him to discuss a practice such as *qitniyot* (avoiding consumption of legumes on Passover) without noting that in Israel even *Ashkenazim* can dispense with it. In fact, however, his responsa assume that *Ashkenazim* are indeed bound by this custom.[26]

Yet even with regard to *Sefardim*, R. Ovadiah's position—held since his youth—has proven quite controversial. It first came to the fore when as a young man he lectured before his own Iraqi community. During

[20] *Yabi`a Omer,* vol. 8, *Yoreh De`ah* no. 11.
[21] *Yabi`a Omer,* vol. 10, *Yoreh De`ah* no. 4.
[22] *Yabi`a Omer,* vol. 4, *Yoreh De`ah* no. 7. See R. Eliezer Waldenberg's strong opposing view, *Ziẓ Eli`ezer,* vol. 11, no. 55, and R. Ovadiah's response, *Ziẓ Eli`ezer,* vol. 12, p. 242, *Yabi`a Omer,* vol. 8, *Yoreh De`ah no.* 12.
[23] *Yabi`a Omer,* vol. 4, *Oraḥ Ḥayyim* no. 35.
[24] *Yabi`a Omer,* vol. 10, p. 117.
[25] *Yeḥaveh Da'at,* vol. 2, no. 29.
[26] See *Yabi`a Omer*, vol. 5, *Oraḥ Ḥayyim* no. 37, *Yeḥaveh Da`at,* vol. 1, no. 9, vol. 5, no. 32. See also *Yeḥaveh Da`at,* vol. 1, no. 68, where he explicitly states that his strong criticism of women reciting a blessing on *miẓvot aseh she-ha-zeman*

these *shi`urim* he dissented numerous times from the rulings of the *Ben Ish Hai,* the unquestioned halakhic guide of the Iraqis. In recalling those days, R. Ovadiah mentions that he received encouragement from his teacher, R. Ezra Attieh,[27] but his actions were controversial and turned a segment of his community, including many rabbis, against him. The opposition reached its peak in the early 1950's when the Iraqi community came close to putting him in *herem*. As it was, people disrupted his *shi`urim* and there were some that burnt his newly published *Hazon Ovadiah*. For them it was unforgivable that R. Ovadiah could dare assert that their communal practices, based on the rulings of the outstanding sage, R. Joseph Hayyim, were no longer binding in the Land of Israel when they conflicted with the opinion of R. Joseph Karo.

He is the first poseq *to make such a far-reaching claim as to the significance and binding nature of the* Shulhan Arukh.

In fact—and this point is not stressed adequately in any of the books under consideration—R. Ovadiah's position is hardly traditional. As far as I know, he is the first *poseq* in history to make such a far-reaching claim as to the significance and binding nature of the *Shulhan Arukh* in its entirety. Previous decisors recognized that various communities had long-standing practices that diverged from the *Shulhan Arukh,* and that since these practices had the sanction of great rabbinic authorities they could not be abolished. Yet R. Ovadiah is less tolerant than this, and for reasons I cannot comprehend, insists on a uniformity under the *Shulhan Arukh*'s rulings that R. Joseph Karo himself never insisted on.

Despite this insistence, which is repeated again and again throughout his works, there are times when R. Ovadiah in fact differs from the *Shulhan Arukh*, and not because he is following any pre-*Shulhan Arukh* practice. The divergence in some cases is so striking that it surprises me that Lau makes no mention of it. To give one example that is of constant relevance, according to R. Ovadiah, a *Sefardi* may eat at a restaurant in which a non-Jew cooked the food and the only involvement of the Jew was in turning on the fire.[28] Understandably, this makes life much easier for those who enjoy restaurants, where, at least in the United States, most establishments rely on this practice. Yet this is in direct contradiction to what R. Joseph Karo rules in *Yoreh De`ah* 113:7, and R. Ovadiah arrives at his decision by using a *sefeq sefeiqa* (a compound uncertainty regarding the existence of the prohibited condition) even though the *Shulhan Arukh* rejects each of the uncertainties.[29] According to R. Joseph Hayyim, such a *sefeq sefeiqa* is invalid,[30] yet R. Ovadiah relies on other authorities to reach an opposing conclusion.

Let me offer another example where R. Ovadiah diverges from the *Shulhan Arukh,* this time based on a long-standing practice in the Land of Israel. R. Ovadiah rules that at a *berit milah* (circumcision), the blessing should be recited before the circumcision,[31] even though the *Shulhan Arukh* rules that it be recited following *milah* and before *peri`ah* (uncovering the corona).[32] This is hardly a unique case, and while Lau only cites a

gerama is not directed to the Ashkenazic community.

[27] See *Halikhot Olam* (Jeruslem, 1998), vol. 1, p. 5. See also *ibid.,* pp. 8-9 and *Yehaveh Da`at,* vol. 4, no. 45, where he defends himself further.

[28] *Yehaveh Da`at,* vol. 5, no. 54.

[29] R. Yitzhak Abadi independently arrives at the same conclusion. See *Or Yizhaq* (Jerusalem-Lakewood, 2003), *Yoreh De`ah* no. 24. As many are by now aware (thanks to the popularity of www.kashrut.org), Abadi has a unique halakhic approach which merits its own study.

[30] *Rav Pe`alim,* vol. 2, *Yoreh De`ah* no. 7, vol. 3, *Yoreh De`ah* no. 9.

[31] *Yabi`a Omer,* vol. 7, *Yoreh De`ah* no. 21.

[32] *Yoreh De`ah* 265:1. The Moroccan practice is in accord with the *Shulhan Arukh*. See R. Eliyahu Biton, *Netivot ha-*

couple of such examples, R. Shlomo Toledano cites another fifteen,[33] and more can easily be added to his list.[34] This would not be significant but for the fact that elsewhere R. Ovadiah insists with great stridency on the primacy of the *Shulḥan Arukh*. He does so not simply when dealing with kabbalistically based divergences, but even with regard to practices of long standing, meaning that there is a problem of consistency in his writings.[35]

Perhaps the strangest example I have found in this regard relates to *Birkat Kohanim* (the priestly blessing). According to the *Shulḥan Arukh, kohanim* are to begin the blessing by reciting the first word, without waiting for the *ḥazzan* to call it out.[36] This was the opinion of R. Sa`adiah Gaon[37] and Maimonides,[38] and R. Joseph Karo testifies that this was the practice "in the entire kingdom of the Land of Israel and Egypt."[39] It was also the practice in Iraq, and R. Joseph Ḥayyim testifies that he was able to change things so that the *ḥazzan* recited the first word out loud, as this is in line with kabbalistic considerations.[40] This would appear to be a perfect case where one would expect R. Ovadiah to follow his pattern of defending the *Shulḥan Arukh* against the kabbalistically based objections of R. Joseph Ḥayyim. Yet for reasons that are never explained, R. Ovadiah agrees with R. Joseph Ḥayyim and informs us that when he became chief rabbi of Tel Aviv he was able to convince the *kohanim* in his synagogue to abandon the *Shulḥan Arukh*'s ruling. "And now the practice has changed in virtually all the synagogues of Jerusalem, and they call out to the *kohanim* also the word "*yevarekhekha*".[41]

There is another problematic element of R. Ovadiah's relationship with R. Joseph Karo that Lau does not mention. Despite R. Ovadiah's acceptance of the *Shulḥan Arukh*, he also maintains that if there is a position of the major *rishonim* that R. Karo was unaware of, such as in a newly published responsum, especially from one of the three *rishonim* that the *Shulḥan Arukh* is generally based upon, then the *Shulḥan Arukh*'s ruling is not necessarily to be followed. The reason for this is that R. Ovadiah operates on the assumption that if R. Joseph Karo had known of this responsum, then he would have decided the halakhah differently.[42] This

Ma`arav (Jerusalem, 1998), p. 138; R. Michael Azrad, *Torat Imekha* (Ma'alot, 2000), pp. 124ff.; R. Shlomo Toledano, *Divrei Shalom ve-Emet* (Jerusalem, 2000), vol. 1, pp. 119-120.

[33] *Divrei Shalom ve-Emet* (Jerusalem, 2005), vol. 2, pp. 159ff.

[34] See e. g., *Yabi`a Omer,* vol. 4, *Yoreh De`ah* no. 25:4.

[35] Another example of inconsistency, particularly noteworthy because the responsa appear in the same volume only a few pages away from each other, is *Yabi`a Omer,* vol. 9, *Oraḥ Ḥayyim* nos. 105 and 108. In the former responsum, p. 225, R. Ovadiah states that the acceptance of R. Joseph Karo's view is not *mi-torat vadai,* but *mi-torat safeq*, and therefore one can use a *sefeq sefeiqa* in order to oppose a ruling of the *Shulḥan Arukh*. Yet in no. 108, pp. 228-229, he states the exact opposite, that the acceptance of R. Joseph Karo is "*mi-torat vadai*," and the reason one can use a *sefeq sefeiqa* against the *Shulḥan Arukh* is because of R. Ovadiah's assumption that had Karo known of the opposing views that create the *sefeq sefeiqa,* he too would have decided leniently. For other examples where R. Ovadiah uses this dubious principle, see R. Yitzhak Yosef, *Kelalei ha-Hora'ah: Kelalei ha-Shulḥan Arukh,* no. 45 (found in vol. 1 of the new eds. of *Yeḥaveh Da`at*).

[36] *Oraḥ Ḥayyim* 128:13.

[37] See Israel Davidson, et al., eds., *Siddur Rav Sa`adiah Ga'on* (Jerusalem, 1979), p. 39 (Hebrew numerals).

[38] *Commentary on the Mishnah, Berakhot* 5:4, *Mishneh Torah, Hilkhot Tefillah,* 14:3.

[39] *Beit Yosef, Oraḥ Ḥayyim* 128:13. R. David Arama also testifies that this was the practice in the Land of Israel. See his *Perush al ha-Rambam* (Amsterdam, 1706)*, Hilkhot Tefillah* 14:3.

[40] *Rav Pe`alim,* vol. 3, *Oraḥ Ḥayyim* no. 5, *Ben Ish Ḥai, parashat Tezavveh,* no. 1.

[41] *Yalkut Yosef* (Jerusalem, 2004), *Oraḥ Ḥayyim* 128, p. 284.

[42] See e. g., *Yabi`a Omer,* vol. 7, *Oraḥ Ḥayyim* no. 53:7: "It is certain that had *Maran ha-Shulḥan Arukh* seen all the aforementioned *rishonim* . . . he would have ruled in accordance with their opinion." See similarly *Yabi`a Omer,* vol. 5, Introduction, vol. 6, *Oraḥ Ḥayyim* nos. 15:11. 26:5, vol. 7, *Yoreh De`ah* no. 21:7, vol. 8, *Oraḥ Ḥayyim* no. 23:33, *Yoreh De`ah,* no. 24:8, *Yeḥaveh Da`at,* vol. 2, no. 42, vol. 4, no. 19, *Yalqut Yosef, Shabbat,* vol. 1, pp. 580-582.

is a controversial stance based on a dubious assumption,[43] and shows that R. Ovadiah is actually less of a defender of the *Shulḥan Arukh*'s primacy than his rhetoric would lead one to believe.[44]

If R. Karo was unaware of a position of the major rishonim*, the Shulḥan Arukh's ruling is not necessarily followed.*

R. Ovadiah himself uses newly published responsa to overturn long-standing practices, and a good example of this is his ruling that one must not rise for the reading of the Ten Commandments. Although he notes that previous authorities, including R. Ḥayyim Joseph Azulai, permitted this, they were all unaware of a responsum of Maimonides that forbids doing so.[45] Based on this responsum, R. Ovadiah feels no compunction about forbidding an extremely widespread practice.[46]

Returning to R. Ovadiah's (usual) insistence on the primacy of the *Shulḥan Arukh,* let me cite an example to illustrate the difficulties his position has created. There is an old question whether women may recite a blessing on positive time-bound commandments (such as taking the *lulav*), since they are not obligated to perform them. The *Shulḥan Arukh, Oraḥ Ḥayyim* 589:6, rules that they may not, but R. Moses Isserles defends the practice. This is a continually relevant dispute since every year women take the *lulav*. Despite the *Shulḥan Arukh*'s ruling, in many Sefardic communities women did make the blessing over the *lulav*, and they were reflecting long-standing tradition that predated the *Shulḥan Arukh* and was supported by some of Sefardic Jewry's most outstanding halakhists.[47]

Yet for decades now R. Ovadiah has been intent on ensuring that all *Sefardim* adopt the *Shulḥan Arukh*'s ruling, which means that many *Sefardim* are being called upon to abandon a centuries-old practice which R. Ovadiah considers to be nothing less than a *berakhah le-vatalah* (a blessing uttered in vain).[48] In fact, in this case it isn't even a matter of R. Ovadiah acknowledging the validity of the practice in the Diaspora while insisting that in Israel all must bow to the authority of the *Shulḥan Arukh*.[49] Rather, he

[43] See R. Yaakov Ḥayyim Sofer, *Berit Ya`aqov* (Jerusalem, 1985), pp. 310ff.

[44] In this regard, there is one further point worth noting. In his classic responsum permitting the "sale" of Israeli land to Arabs during the Sabbatical year, one of the premises upon which he relies is the view shared by some *rishonim* that there is no longer even a rabbinical obligation to observe *shemittah*. Yet this is in direct contradiction with the *Shulḥan Arukh*'s ruling, *Yoreh De`ah* 331:19. R. Ovadiah's responsum is found in *Yalqut Yosef, Mizvot ha-Teluyot ba-Arez*, pp. 639-715.

[45] This responsum first became known when it was published in A. H. Freimann, ed., *Teshuvot ha-Rambam* (Jerusalem, 1934), no. 46. A sentence from the original Arabic version of this responsum appears in R. Jacob Castro, *Ohalei Ya`aqov* (Livorno, 1783), no. 33 (p. 57a).

[46] *Yeḥaveh Da`at,* vol. 1, no. 29.

[47] See. R. Yaakov Hayyim Sofer, *Shelom Ya`aqov* (Jerusalem, 1999), pp. 168ff.

[48] See *Yabi`a Omer,* vol. 1, *Oraḥ Ḥayyim* nos. 39-42, *Yeḥaveh Da`at,* vol. 1, no. 68. Again, however, I must point out that R. Ovadiah is inconsistent. When it comes to the morning blessings, which according to *Shulḥan Arukh, Oraḥ Ḥayyim* 46:8, should only be recited if relevant to one's circumstance (e.g., if one heard a rooster crow), R. Ovadiah affirms the general practice, based on R. Isaac Luria, to say all the blessings as a matter of course. See R. Ḥayyim Vital, *Sha`ar ha-Kavvanot* (Salonika, 1852), p. 1b; *Yeḥaveh Da`at*, vol. 4, no. 21. The inconsistency is magnified since R. Ovadiah is usually adamant that the *Shulḥan Arukh*'s ruling cannot be set aside due to kabbalistic considerations (see Lau, pp. 290ff). With regard to his opposition to women reciting a blessing on the *lulav*, R. Ovadiah has a further problem because he accepts the principle *safek berakhot le-haqel bi-meqom minhag lo amrinan* (where there is a custom to recite a blessing, we do not apply the principle that in a case of uncertainty, the blessing is not to be recited) and is therefore forced to say that this only applies to valid customs that have rabbinic support (*Yabi`a Omer,* vol. 1, *Oraḥ Ḥayyim,* no. 40:14-15). Yet despite what R. Ovadiah states, there is no question, as his own responsa clearly illustrate, that recitation of *berakhot* on *mitzvot aseh she-ha-zeman gerama* has plenty of rabbinic support and must therefore be regarded as a valid *minhag*.

[49] One such example is R. Ovadiah's view of the recitation of *Hallel* with a blessing on Rosh Ḥodesh. He

is strongly opposed to Sefardic women reciting the blessing no matter where they live. While some rabbinic figures have attempted to defend their communities' practice, faced with the overwhelming authority and charisma of R. Ovadiah, this has become a very difficult task.

In addition to this, R. Ovadiah's son, R. Yitzaq, has published the very popular *Yalqut Yosef*. This is nothing less than a new halakhic code based on R. Ovadiah's writings, and it too has helped in uprooting the practice. Finally, and perhaps most important, have been the various *siddurim* published by R. Ovadiah and others who follow his rulings, which play an enormous role in guiding the masses in matters like this. Not surprisingly, the full-court press by what can be termed "Team R. Ovadiah" has been very successful in uprooting the variety of local practices that developed in the Sefardic diaspora and creating a unified Sefardic Land of Israel practice.

He has been intent on ensuring that all Sefardim *adopt the Shulhan Arukh's ruling, which means that* Sefardim *abandon a centuries-old practice.*

While most *Sefardim* have fallen into line, this is not the case with the Moroccans. Perhaps the one figure who had the credentials to stand up to R. Ovadiah in the defense of local practice, and carry along a following, was R. Shalom Messas, late Chief Rabbi of Jerusalem and, prior to that, Chief Rabbi of Morocco. He refused to acknowledge that just because Moroccans were now in Israel that they were obligated to abandon their time-honored traditions in favor of the *Shulhan Arukh*'s rulings. Following his lead, numerous works by Moroccan rabbis have recently appeared, recording Moroccan practices and demonstrating their legitimacy, all the while showing great respect for R. Ovadiah, who despite this dispute is regarded by most of the Moroccans as the *gadol ha-dor* (leading Torah sage of the generation).[50]

Another interesting example where R. Ovadiah has taken on a widespread Sefardic practice concerns the lighting of Shabbat candles. According to the common and most likely understanding of *Shulhan Arukh, Orah Hayyim* 263:5, one is supposed to recite the blessing and then light the candles.[51] R. Ovadiah has ruled that this is how Sephardic women must conduct themselves.[52] However, in many Sephardic communities the long-standing practice was in line with the Ashkenazic practice of first lighting the candles and then reciting the blessing.[53] This practice was supported by the *Hida*,[54] whose dominant position among the *Sefardim* is seen in the fact that until modern times, he was the only authority other than R. Joseph Karo who was routinely referred to as *Maran* ("our master").

By insisting that women first recite the blessing and then light, R. Ovadiah also went against the practice of his own Iraqi community. As mentioned above, before R. Ovadiah's rise to prominence, R. Joseph Hayyim (*Ben Ish Hai*), was held by the Iraqis

acknowledges the legitimacy of this practice for Jews in Morocco, but insists that they alter their practice upon arrival in Israel, in accordance with *Shulhan Arukh, Orah Hayyim* 424:2. See *Yalqut Yosef, Hilkhot Birkhot ha-Shahar*, pp. 12ff; *Hilkhot Tefillin ve-Sefer Torah,* pp. 104ff.

[50] See Biton, *Netivot ha-Ma`arav;* Azrad, *Torat Imekha*; Toledano, *Divrei Shalom ve-Emet*; R. Raphael Moshe Dluyah, *Zokher Berit Avot* (Har Berakhah, 2004; R. Kefir Barukh Mevorakh Dadon, *Noheg Bam* (Jerusalem, 2005); R. Shalom Messas, *Yalkut Shemesh,* ed. Eliyahu Aryeh Edrei (Jerusalem [2005]); R. Mordechai Akiva Aryeh Lebhar, *Magen Avot* (Jerusalem, 2005).

[51] I say "common and most likely understanding" since the wording of the *Shulhan Arukh* is ambiguous, and some have understood ir to mean lighting and then blessing.

[52] *Yabi`a Omer,* vol. 2, *Orah Hayyim* no. 16, *Yehaveh Da`at,* vol. 2, no. 33.

[53] See Toledano, *Divrei Shalom ve-Emet,* vol. 2, p. 52.

[54] *Mahaziq Berakhah, Orah Hayyim* 263:4.

as the unquestioned authority, and he affirmed the practice of first lighting and then blessing.[55] Shabbat candle lighting is a ritual that is enveloped in holiness for women, who perform it the same way their mothers taught them. Yet R. Ovadiah was willing to take on such a practice.

By now, R. Ovadiah's victory is nearly complete. He has been able to accomplish almost the impossible, namely, influence thousands of women to change a well-entrenched practice. While his ideological adversary R. Mordechai Eliyahu, who represents the old guard of the Iraqi community, continues to assert the primacy of the *Ben Ish Hai*'s opinion, and attempts to hold the line though his *Siddur Qol Eliyahu*, he cannot compete with the popularity or scholarship of R. Ovadiah. Yet make no mistake about it: by declaring that a practice which has such deep roots in the Sefardic halakhic tradition creates a problem of *berakhah le-vatalah*,[56] it is R. Ovadiah who is radical and revolutionary, a fact which very few realize.

I never encountered such a mind in academia.

Finally, I must say a word about the most astonishing feature of R. Ovadiah's writings, and that is his breath-taking *beqi`ut*, an encyclopedic knowledge the likes of which has never been seen in Jewish history. There have been great *beqi`im* prior to R. Ovadiah, and I think of R. Joseph Zechariah Stern and R. Hayyim Palache as two examples. But neither of them can compare to R. Ovadiah, if only because in the intervening century the responsa literature has more than doubled in terms of published works. R. Ovadiah has mastered all of it and continues to master every new volume of any significance that appears. The knowledge that his mind encompasses is beyond belief and hard to describe. It is the product of an unequalled memory that has no use for the various electronic data bases that have made *beqi`ut* less valuable in this day and age.

I was recently asked if I have ever encountered such a mind in academia. Indeed, I have not. Yet this question led me to consider how someone like R. Ovadiah would be viewed in the academic world. This helps us understand why the Lithuanian yeshiva world has been less than overwhelmed by him. Considering the famous twentieth-century Lithuanian *roshei yeshiva,* you find personages with great minds who were able to produce stunning new talmudic insights. Had R. Aaron Kotler, for example, not remained in the yeshiva world, he could have used his great intellect in some other field. Had R. Joseph B. Soloveitchik not devoted himself to Torah, he could have excelled in philosophy, mathematics, or any other field to which he set his mind. The same can be said about the other Lithuanian Torah geniuses.

In contrast, when one surveys the work of R. Ovadiah, one finds not analytical brilliance, but a photographic memory that marshals a dazzling array of materials—and by the standards of the both the academic and the Lithuanian yeshiva worlds, this does not count for much. In the academic world one is judged by the significance of one's publications, and in the yeshiva world by the profundity of one's *shi`urim* (lectures). In the academic world a photographic memory may not even get one an interview, and in the Lithuanian yeshiva world he will not be regarded as suitable to offer *shi`urim.*

This is the challenge that R. Ovadiah presents to those in the academic and

[55] Unlike other practices that R. Ovadiah attempted to change, candle lighting appears to have been one on which the Baghdad community was split before the *Ben Ish Hai* issued his ruling. See R. Isaac Nissim, *Yein ha-Tov* (Jerusalem, 1979), vol. 1, p. 39.

[56] In *Yabia Omer,* vol. 2, *Orah Hayyim* no. 16, he states that it is a *berakhah le-vatalah.* However, in *Yehaveh Da'at*, vol. 2, no. 33, he states that it is a *safeq issur berakhah le-vatalah.*

Lithuanian yeshiva worlds, where for good or bad, his type of knowledge is good for casual conversation, but has little true significance. Looking at the truly groundbreaking thinkers, such as those winning Nobel prizes or those reinventing fields in the humanities and social sciences, I cannot recall any with photographic memories. Having such a memory may even stand in the way of one's mind charting new directions and creating new paradigms—the true stuff of genius. From an academic perspective, as well as from the outlook of the Lithuanian yeshiva world, it must be said that in the final analysis R. Ovadiah's great knowledge amounts to a collection of facts, an encyclopedia, without real and lasting scholarly significance.

While R. Ovadiah is certainly a great technician, able to collect sources and come to conclusions by balancing views off one another, we are not confronted by any advanced thinking or grand theories that make a contribution to knowledge. There are no *hiddushim* (novellae) in the classic sense in R. Ovadiah's writings. Even in his responsa, which overwhelm one with their sheer breadth, one finds that on almost every page R. Ovadiah cites a view, notes that this view is not *mukhrah* (necessary), and then cites a group of *aharonim* who disagree with this view. Yet hardly ever does he explain *why* the rejected opinion is wrong, or how its author has misread the Talmud or *rishonim*.

There is something deeply unsatisfying about declaring that an opinion is to be rejected because it is contradicted by a group of other scholars. It is not hard to see why someone trained in a great Lithuanian yeshiva would not regard this as a proper approach to *pesaq*. In the Lithuanian Torah tradition, a *poseq* is engaged in a search for truth, and if such a *poseq* feels that his interpretation is correct, then the fact that ten *aharonim* have a different opinion is irrelevant. To convince this *poseq* that his view should be rejected, one must show how he has misinterpreted the sources, rather than point out that many others disagree.

As mentioned above, Lau's volume is a study of R. Ovadiah's halakhic method and is an excellent introduction to his works.[57] Among the topics he discusses, particularly important are the roles of R. Joseph Karo and Kabbalah in R. Ovadiah's system. He does not present much in the way of comparing R. Ovadiah to other *poseqim*, and he makes no use of the numerous academic studies focusing on Jewish law. For some this will be seen as a drawback, while others will view it positively. Scholars who themselves have gone through R. Ovadiah's writings will not find much in the way of illumination, and will regard Lau's book as more of an encyclopedia of R. Ovadiah's views on the gamut of issues that he has been confronted with. On the other hand, for those not familiar with R. Ovadiah's corpus, there is nothing better than Lau's book as an introduction to the significant aspects of R. Ovadiah's halakhic *oeuvre*.

To convince this poseq *that his view should be rejected, one must show how he has misinterpreted the sources.*

Lau has done a magnificent job in culling this material from R. Ovadiah's many writings. He also had access to R. Ovadiah's early notebooks, written while he was still a teenager. While these are not of any great significance, they do offer a perspective on the youthful prodigy that was until now hidden from view. No doubt some will regard as a weakness Lau's avoidance of any

[57] A more sophisticated treatment of R. Ovadiah's halakhic system, which shows awareness of modern discussions of identity and gender, is Ariel Picard, "*Pesiqato shel ha-Rav Ovadiah Yosef le-Nokhah Temurot ha-Zeman*" (unpublished doctoral dissertation, Bar Ilan University, 2004). It is soon to be published by Bar Ilan University Press.

[58] *Yabi`a Omer,* vol. 3, *Yoreh De`ah* no. 9.

discussion of R. Ovadiah's public role, yet this is not a serious criticism. Lau makes clear that he is not attempting a complete study of the man's life, and his book should be regarded in the same genre as the numerous studies of Maimonides' halakhic writings that rightfully avoid focusing on the latter's biography. R. Ovadiah is so significant that one book can simply not do justice to his multifaceted nature and significance, and the two biographies, which are very limited in their halakhic discussions, can serve as good introductions to Lau.

Lau's book does not offer a critical perspective. He gives us the facts without trying to get under the surface and determine if there are meta-halakhic forces motivating R. Ovadiah in reaching his conclusions. Unfortunately, Lau is satisfied with offering a competent summary of R. Ovadiah's views without asking any hard questions or seriously analyzing the problems and inconsistencies presented by R. Ovadiah.

Nothing is better than Lau's book as an introduction to R. Ovadiah's oeuvre.

For example, Lau discusses R. Ovadiah's attitude towards Judah David Eisenstein's Hebrew encyclopedia, *Otsar Yisra'el* (pp. 137-139). He first notes that in a responsum about the permissibility of using the secular calendar, R. Ovadiah cites *Otsar Yisra'el* as a source that the secular year is not to be traced to Jesus' birth, since he was actually born before the beginning of the Common Era.[58] Lau notes that R. Ovadiah is not consistent in how he relates to this encyclopedia. In R. Ovadiah's responsum dealing with the halakhic status of the Ethiopian Jews, he refers to R. Eliezer Waldenberg's reliance on *Otsar Yisra'el* to demonstrate that they are not descended from Jews and harshly attacks Waldenberg for relying on this work, "which contains some matters of heresy."[59] Lau is content to note the inconsistency without probing further if perhaps this can be explained by R. Ovadiah's eagerness to conclude that the Ethiopians were Jewish, which led him to delegitimize *Otsar Yisra'el* in this case. It appears likely that the delegitimization is ad hoc polemical rather than substantive, and thus able to be used when R. Ovadiah feels warranted.[60]

As noted, this is hardly the only example of R. Ovadiah's inconsistency. Those who study his writings know that there are times when in one responsum he will rely on a view advocated by a certain *aharon,* and in another responsum he will reject this view. Some of these examples are no doubt to be explained by R. Ovadiah changing his mind, but the problem is that, for some mysterious reason, he doesn't tell you that he has changed his mind and that his earlier decision is to be reversed.[61] The reader is therefore confronted with two contradictory decisions arrived at by mutually exclusive arguments. In fact, it is often the case that the word "argument" is too strong. Thus, R. Ovadiah can cite book X and then state that book Y has disproved book X, without telling us anything substantive about why book Y is to be preferred. In another place he can say the exact opposite, namely, that book Y is to be

[59] *Yabi`a Omer,* vol. 8, *Even ha-Ezer* 11:3.

[60] For another negative comment about *Ozar Yisra'el,* see *Yalqut Yosef, Orah Hayyim* 131, p. 415.

[61] R. Ovadiah's son, R. Yitzhak, has called attention to a number of examples where his father changed his mind. See *Yalqut Yosef, Hilkhot Tefillin ve-Sefer Torah*, pp. 5ff.

[62] See, e. g., his *haskamah* to R. Yehoshua Mamon, *Emeq Yehoshu`a* (Jerusalem, 2001), vol. 6. In his reply, Mamon notes that while in his *haskamah* R. Ovadiah quotes the *Hida* and then states that the *Erekh ha-Shulhan* has proved differently, in *Yabi`a Omer* it is the *Hida* that is the accepted view and *Erekh ha-Shulhan* the one he rejects. In *Yabi`a Omer,* vol. 9, p. 225, R. Ovadiah responds to Mamon by stating that he changed his mind and the *haskamah* represents his current opinion. Had Mamon not called attention to the contradiction, this point would not have been clarified. Many other such contradictions remain.

rejected in favor of book X, again without offering any substantive reason.[62]

As mentioned already, this is a problem throughout R. Ovadiah's responsa. He will state that a position is not compelling because it has been rejected by books X, Y, and Z (and often ten more) without explaining why, in any substantive way, the logic of these latter sources is to be preferred**,** or why even with their greater numbers they are qualitatively superior to the *poseqim* who hold the opposing position.. After all, I would think that one Hazon Ish, R. Isaac Herzog, or R. Moses Feinstein will often equal at least five other twentieth-century decisors. Because of the problems I have described, I have no doubt that R. Ovadiah's form of halakhic "number-crunching" will lead some to conclude that, for reasons of his own, he sometimes manipulates the sources. I am not asserting that this is so, but it is certainly something that must be examined in a study of his halakhic method. Yet Lau avoids doing so.

Most surprising for what has been billed as an academic work, Lau even includes a letter from R. Ovadiah at the beginning of the book, in which he praises the volume just as he does in the numerous *haskamot* he writes for traditional rabbinic works. While Lau's purpose in including this letter might be to increase sales by showing R. Ovadiah's many followers that this is a "kosher" academic work of which the master himself approves, it demonstrates that Lau lacks the requisite scholarly distance from the subject of his research. A work that is written with the idea of achieving approval from its subject is one in which scholarship has been subverted to a form of advocacy. Lau presumably is not disturbed by the consequence of including this letter, which is that the sophisticated reader will conclude that his book does not measure up to academic standards. In an academic work, the author is prepared, if need be, to follow the evidence and reach conclusions which make him and his subject uncomfortable. Lau cannot do that, and academics will therefore regard his book as "politically correct" scholarship. On the other hand, many non-academics will no doubt welcome the arrival of a work that is neither hagiography nor academic, but sits in the middle, combining real learning with deference to its subject. No size fits all, and perhaps this is a genre whose time has come.

Meorot
A Forum of Modern Orthodox Discourse

REVIEW ESSAY

A Lifetime Companion to the Laws of Jewish Family Life, by Deena R. Zimmerman

Aviad Stollman

Abstract: *A Lifetime Companion to the Laws of Jewish Family Life* by Deena R. Zimmerman is an excellent book for English readers wishing to study the laws of *niddah* in a serious manner. It enables one to learn the *halakhot* from the original sources placing them in a comprehensible framework. The companion is well structured and written in a clear and empathetic style. It discusses practical medical issues typically not discussed in popular manuals. While the book is a great contribution to the field of family purity laws (*hilkhot niddah*)—specifically to the genre of theoretical books teaching the basic issues involved with keeping these laws—it suffers from the tendency, seen in many other such manuals, to direct the reader to a rabbi rather than resolving issues directly.

Biography: Rabbi Dr. Aviad A. Stollman is the Rabbi of Congregation Zemer ha-Zait in Efrat, Israel and teaches at the Pardes Institute of Jewish Studies in Jerusalem.

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REVIEW ESSAY

A Lifetime Companion to the Laws of Jewish Family Life, by Deena R. Zimmerman (Jerusalem and New York: Urim Publications, 2006 [Second Revised Edition] 223 pp.)*

Aviad Stollman

Deena R. Zimmerman is a physician with exceptional knowledge in Talmud and *halakhah*. One of the first graduates of the Nishmat Keren Ariel Program as a *yo`etset halakhah* (women's halakhic advisor), she now directs the Nishmat Women's Online Information Center websites dedicated to women's health and *halakhah*, for the general public and for health care providers. Dr. Zimmerman has written a number of articles related to women's health issues and Jewish law and answered thousands of questions in the laws of *niddah* (family purity). Now she has published *A Lifetime Companion to the Laws of Jewish Family Life,*[1] which is a modern halakhic guide to the laws of *niddah*.

The companion is divided into four independent parts. The first is perhaps the most significant, not merely in size (61 pages), but also in its contribution to the genre, especially in the English language. It is a "study guide" to the *halakhot* of *niddah* containing six chapters meant for those who wish to learn the *halakhot* together with the original Talmudic and post-talmudic sources. The sources found in this part are in vocalized Hebrew and are accompanied by English paraphrases.

The first chapter of the first part describes the laws of *niddah* as articulated in the Torah and later in the Talmud. It describes the halakhic developments that took place in the days of the *tanna'im* and *amora'im*. It thus elucidates such fundamental terms as *zavah* and *niddah* and provides the reader with a broad understanding of the material. The

*I am pleased to express my appreciation to Leib Moscovitz and Haym Soloveitchik for their helpful comments. I bear sole responsibility for the contents of this review essay.

[1] It seems that the title "Jewish Family Life" was coined by the author as an attempt to render a more politically correct term than the now conventional euphemism *tahorat ha-mishpahah*. According to Evyatar Marienberg, the term, '*tahorat ha-mishpahah,*' itself is of German-Jewish origin, late in the nineteenth century, probably a translation of the expression *"Reinheit des Familienslebens."* The original expression was most likely coined as an attempt to suppress the obvious halakhic fact that a woman who menstruates is impure. Instead of discussing the impurity of the *niddah,* one is encouraged to think of the purity of the family. It is also probable that the term came into use to emphasize the talmudic notion that not keeping the laws of *niddah* can have consequences on the purity of the offspring. See: Evyatar Marienberg, *Niddah: Lorsque les juifs conceptualisent la menstruation* (Paris: Les Belles Lettres, 2003), pp. 40–41; Haviva Ner-David, "*Niddah*: A Case in Point of Feminist Reinterpretation," in *To Be a Jewish Woman, Part B: Proceedings of the Second International Conference: Women and Her Judaism*, ed. Margalit Shilo, (Jerusalem and New York: Kolech—Religious Women's Forum and Urim Publications, 2003), pp. 110–111; Tirzah Meacham, "An Abbreviated History of the Development of the Jewish Menstrual Laws," in Rahel R. Wasserfall, ed., *Women and Water—Menstruation in Jewish Life and Law* (Hanover: Brandeis University Press, 1999), pp. 32–33; Jonah Steinberg, "From a 'Pot of Filth' to a 'Hedge of Roses' (and Back): Changing Theorizations of Menstruation in Judaism," *Journal of Feminist Studies in Religion* 13:2 (1997), pp. 5–26.

second chapter deals with the onset of the *niddah* status and relates to bleeding, stains, childbirth and other factors that render a woman *niddah*. The third chapter focuses on the requisite time interval that has to elapse before a woman may go to the *miqveh* to finalize the process of cessation of *niddah* status. The fourth chapter discusses all the relevant laws related to immersing in the *miqveh*. The fifth chapter illustrates the various issues related to the time when a woman is expecting her period, i.e. *dinei vesatot*. Finally, the sixth chapter discuses *dinei harḥaqot*, i.e., a couple's behavior while the wife is considered *niddah*.

The second part is intended for those who simply wish to know what to do, and are not especially interested in familiarizing themselves with the talmudic and post-talmudic sources. This section is primarily an abridged version of the first part and can be used as a review for those who have read the former part of the book. It is divided into five chapters; the first four roughly match the contents of the first part of the book while the fifth contains an assortment of a dozen frequently asked questions in the field of *hilkhot niddah*.

The questions include solid halakhic queries such as "I saw a bit of red on toilet paper and none on my underwear. What do I do?" and "Does a small spot on a sanitary napkin make me *niddah*?" along with practical questions not usually addressed in ordinary halakhic manuals, such as: "I have to go to the *miqveh* the night we are invited to a wedding. What do I do?" and "It is three months since I had a baby and I have not yet been able to complete seven clean days and go to the *miqveh*. Help!" Incorporating FAQ in a halakhic manual is a refreshing and useful idea.

The book's third part consists of a review of the *halakhot* arranged according to a woman's life-reproductive cycle, while the fourth part deals with medical issues and their halakhic implications.[2] It contains six concise yet informative chapters dealing with general diagnostic examinations, infertility, birth control, medical conditions, therapeutic medical procedures and sexual dysfunction. Many will find this part indispensable, since it puts into words some practices and advice never before collated in a halakhic manual. The author's medical knowledge is evident not only in this part of the book, but also in numerous comments and remarks spread throughout the book. On a deeper philosophical level, however, the author seems to have been careful (and justifiably so) to separate her scientific from her halakhic knowledge. For instance, modern

[2] I was quite surprised to observe that Dr. Zimmerman barely mentioned her own authoritative article on the subject of *veset ha-guf*, published not long ago. My understanding is that her significant findings and formalization in that *Teḥumin* article should have challenged the way the laws of *vesatot* are conservatively taught. Based on the conclusions of that article, I would begin teaching the *halakhot* by saying that most women have premenstrual symptoms which signal the onset of menstruation. Therefore most women are not forced to rely on the problematic and complicated calculations of *vesatot* described in most manuals. This would simplify both the instruction and practical behavior for most women. See: Tova Ganzel and Deena R. Zimmerman, "*Veset ha-guf — hebet refu'i hilkhati*," *Teḥumin* 20 (5760 [2000]), pp. 363–375.

[3] For an analysis of the social forces that contributed to the construction of the scientific defense of *niddah* regulations, see: Beth Wenger, "Mitzvah and Medicine: Gender, Assimilation, and the Scientific Defense of 'Family Purity,'" *Jewish Social Studies*, 5, double issue nos. 1 & 2 (1999), pp. 177–202.

[4] When the author discusses the obscure nature of *dinei vesatot* she does not ask the obvious question: is there any scientific basis for these laws and if so, what could be the consequences of such understanding? There was once a rabbi, actually one of the greatest talmudists of all times who did raise this question. Naḥmanides, himself a physician, wrote in his novellae on *Niddah*, 64a: "'[Such] knowledge [is] too wonderful for me; it is high, I cannot [attain] unto it' (Ps. 139:6): is a woman's period governed by the horoscope of the day or by the horoscope of the hour so that it depends on which the day of the week it is or which day of the month it is?! When certain time has passed since the previous period, it only makes sense that [a woman will get her period] … this is the way of all women… According to my humble opinion the *rishonim* were not right when they dealt with many types of *vesatot*. I

scientific rationalizations for the laws of *niddah*, so popular in other manuals,[3] are ignored in her book. Likewise, the book does not contain a scientific analysis of the *halakhot*.[4]

The book also contains nine valuable appendices that provide advice on caring for oneself during and after pregnancy in addition to presenting the physiology of menstruation, pregnancy and sex. One appendix is dedicated to explaining *miqveh* construction and another includes a *veset* calendar. Another appendix contains a checklist prior to *miqveh* immersion and another discusses the *ketubbah*. There is even an appendix elucidating the issues involved in a married woman covering her hair. The author justifies its inclusion: "While not actually part of the laws of *niddah*, the issue of hair covering is one that is unique to marriage. Therefore a summary of the relevant aspects is provided here."

It puts into words some practices and advice never before collated in a halakhic manual.

Meeting Implicit Expectations

In her recent book, *Expanding the Palace of Torah: Orthodoxy and Feminism*, Tamar Ross raised the possibility that "women's gradual entry into the realm of halakhic deliberation" will have substantial influence on *halakhah*. While Ross does not believe that any given *halakhah* will be decided differently by women, it is probable nevertheless that active female presence in halakhic discourse will facilitate greater attention to halakhic precedents and possibilities,[5] specifically in *hilkhot niddah*.[6] I believe that this book shows that Ross' predictions have yet to be confirmed. at least for now. Some might consider certain characteristics in Zimmerman's presentation to hint at the author's gender. Nevertheless, the book is far from articulating a feminist analysis of these *halakhot*.

For example, the attitude of the author towards various emotional difficulties facing women is ambivalent. At times she exhibits much understanding of the emotional needs of women. Such is the case when she stresses that while "frivolous talk or behavior is frowned upon," it "does not preclude being friendly—something husbands should seriously consider, as women often feel 'unloved' at this point, especially because of the constant reminder of their *niddah* status engendered by *harḥakot"* (p. 79). Zimmerman's practical advice for husbands conveys a sensitivity lacked by some male rabbis: "Thoughtful gestures—sending letters or cards, small gifts, flowers for Shabbat[7]—-can help counterbalance this negative message." Another case in point is permitting the husband to attend to his wife in labor. The author does seem to believe in the importance of the husband's emotional support and attendance in the process of labor. Yet her halakhic conclusion is based

think that the only *veset* which actually exists is when there are perfectly even intervals. Menstruation comes on time, on fixed time intervals, because this is the nature of human beings." I don't expect Dr. Zimmerman to draw practical conclusions from theoretical inquiries, but it would be worthwhile to treat this intriguing subject in a footnote. On Nahmanides' approach, see: Shalem Yahalom, "The Halakhic Thought of Naḥmanides According to his Provencal Sources" (Hebrew), Ph.D. dissertation, Bar-Ilan University, Ramat-Gan 2003, p. 124.

[5] Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Waltham, Massachusetts, Brandeis University Press: 2004), pp. 233–235.

[6] See: Ross, pp. 238–241.

[7] It is possible that the author accentuates "for Shabbat" because she feels that it is halakhically improper for the husband to give flowers to his wife while she is *niddah* on regular weekdays; Cf.: Rabbi Shmuel Wasner, *She'elot u-Teshuvot Shevet ha-Levi*, 115, 116.

[8] See: p. 134–135. There are sound halakhic reasons to allow a husband to hold his wife's hand when she is in labor, at least up until she sees blood; see: Rabbi David Yosef in *Torat ha-Taharah* (Jerusalem: Yḥave Da'at, 1999), 13:16 (p. 144). Cf. my article: "*Taharat ha-Mishpaha ha-Datit Le'umit*", *Akdamot* 14 (2004), pp. 239–242. Since I feel that one of

on stringent, albeit common, opinions that set up barriers between the birthing couple. These opinions forbid the husband even to hold his wife's hand (unless there is no one else to assist her) during delivery.[8]

My impression is that the author is willing to show sensitivity and understanding up to the limit where it does not require her to make actual halakhic determinations. Such is the case in the first cited example, where no halakhic novelty is presented but rather a sympathetic and compassionate style is expressed. However, when sensitivity entails making halakhically significant concessions—though not necessarily on a groundbreaking scale—and it is essential to choose between various existing halakhic opinions, the author prefers not to do so. My previous assertions are in no way judgmental, but descriptive.

The author shows sensitivity up to the limit where it does not require her to make halakhic determinations

Allow me to cite one example bearing broader ramifications that will lead to a more critical assessment of *one* aspect of the book. I assume that Zimmerman's personal experience facilitates her careful practical instructions stressing that all the exams of the *hefseq tahorah* should be made with extra gentleness (e.g. p. 89). On the other hand, her hesitation to be lenient regarding the necessity of *mokh dahuq* in *hefseq tahorah* in women "who find this exam uncomfortable" is most unexpected. The halakhic basis for not following the stringency of *mokh dahuq* in these cases is so obvious, as implicit in many manuals,[9] that I did not anticipate the author's instruction to consult a rabbi in this case. In such an uncomplicated matter that has a clear answer, why does Zimmerman compel a woman to seek the advice of a halakhic authority (in most cases a male rabbi) and discuss her intimate irritation? I am well aware that people go to see physicians all the time and describe their most intimate problems. But as Professor Ross has written, "In a day and age when standard kits have been developed by medical labs even for home pregnancy exams, why should similar procedures not be developed for determining women's menstrual status?" (p. 240, quoting Ross). When there is a simple solution to a simple problem, why not put it in writing?[10]

This leads us to discuss a broader question: Zimmerman's consistent policy of directing the reader to a halakhic authority. This trend, quite fashionable in today's halakhic literature, stands in sharp contrast to her emphasis on the importance of setting *halakhah* in a framework that one "could

the most basic duties of a reviewer of any halakhic manual is to supply the reader with a general evaluation of its approach to decision-making, I initially thought to map Dr. Zimmerman's rulings similarly to the model in the above mentioned article. However, when I started collecting data, I realized that for two reasons, this would be quite impossible. First, the condensed form of this book means that many particular halakhic issues are not explored. Second, Dr. Zimmerman abstains from ruling where halakhic questions are debated among contemporary authorities. For instance, I could not gather enough information about the five halakhic cases I used to determine the nature of halakhic rulings in the aforementioned Hebrew review essay (a stain found on a paper subsequent to urinating [in an external exam without sensation]; a large stain on a sanitary napkin; opening of the uterus in various gynecological procedures; wearing colored garments on the seven "clean days"; woman in labor with 4 cm. opening of the uterus).

[9] Cf. Rabbi Yitzhak Mordekhai Rubin, *Mar'eh Kohen* (Jerusalem: 1996), pp. 49–50; Rabbi Yekutiel Farkas, *Tahorah ke-Hilkhatah* (Jerusalem: Torat Haim, 1998), p. 279. Rabbi David Yosef (ibid.), 2:23 (p. 16) rules explicitly that a woman who feels pain from this examination should avoid it.

[10] I would not go so far as Ross, who wrote: "… the very notion that women must submit themselves to this method of outside surveillance is questionable… The mystique surrounding the degree of expertise such questions require raises the suspicion that here is merely another device for keeping women in their place" (p. 240). Nevertheless, I think that in today's reality authors of manuals should endeavor to inform their readers as fully as possible.

comprehend and thus retain" (p. 15). The author, who dismisses the approach of many other manuals that simply include "laundry lists of what to do and not to do" (p. 15), went to the trouble of providing the reader with the original Hebrew and Aramaic talmudic sources, paraphrasing them in English and elucidating the meaning of the *halakhot* in the context of their original sources. She thus attempted to educate her able readers and provide them with solid fundamental information about the topic. As a practical matter, however, she minimizes the ability of her intelligent, informed readers to make everyday decisions based on the learning they acquire from her book.

The author stresses unequivocally that "This book cannot and is not meant to take the place of rabbinical consultation." I realize that the condensed form of this book precludes exploration of many particular halakhic issues,[11] but I have found more than a score of cases where specific halakhic questions are brought up and no definite conclusions are established.[12] In these cases the author simply directs the reader to a halakhic authority.[13] Obviously, were this book merely a theoretical halakhic work, it would be proper to omit any practical rulings. But that is not the case at hand: the book is meant to be "a lifetime companion to the laws of Jewish family life." For that reason it includes many practical guidelines, of halakhic and non-halakhic nature.

It is possible that the author's reluctance to give clear cut rulings in some halakhic matters is linked to the fact she is one of the very few and very first women to engage in this discipline. Alternatively, she may believe that her intended audience appreciates this type of reticence. These are plausible assumptions, but it is better to carefully examine the author's own explicit justifications for following a conservative, if fashionable, policy. My criticism in the subsequent paragraphs is not solely directed at the author of the reviewed book. It targets, rather, the growing tendency in modern halakhic manuals, primarily of the *haredi* sort.

The author minimizes the ability of her readers to make decisions

The first reason is straightforward. The author claims that "just as no medical manual can take the place of individual consultation with a physician, this book is not meant to take the place of a rabbi" (p. 16). This rationale, based on a simplistic comparison of medicine and *halakhah*, is problematic. Physicians possess diagnostic skills that are acquired through rigorous education and practical experience. They must interpret what disease underlies the manifest symptoms. Except in the area of *ketamim* (stains), there is little demand for diagnostic expertise in halakhic matters of "Jewish family life." When a husband and wife have a

[11] There are various issues where the author justifiably did not provide a detailed ruling due to the complexity of the issues. See, for example, whether various items are considered barriers when immersing (pp. 52, 54); *huppat niddah* (p. 87); family planning (p. 163).

[12] To mention some of the cases: the status of blood found on a beige garment (p. 34, n. 18); *hefseq tahorah* several minutes after sunset (p. 43); necessity of *mokh dahuq* in *hefseq tahorah* (p. 43); (Ashkenazim) waiting less than the usual five days before performing *hefseq tahorah* (p. 46); immersing on the eighth day (p. 50); the removal of permanent makeup, hair dye, manicure before immersing (p. 54); immersing without a *miqveh* lady (p. 59); basing anticipation on premenstrual symptoms (p. 70); the permissibility of the husband to sit on his wife's bed when she is *niddah* (p. 76); red on toilet paper (p. 102); small spot on sanitary napkin (p. 103); premature immersing prior to the wedding (p. 119); whether a pap smear exam renders a woman *niddah* (p. 149); whether endometrial ablation or dilation and curettage (D&C) render a woman *niddah* (p. 182); whether *harhaqot* apply during *aveilut* (p. 185).

[13] In the introduction (p. 16) the author implies that she is simply coaching her readers on when and how to ask rabbis intelligent questions. But I have found at least two cases where (certainly according to her own policy) the author should have informed her readers of the possibility of asking a halakhic authority: wearing colored garments on the "seven clean days"; immersing on the seventh day before the evening falls.

problem or a question they don't need to diagnose it—the problem is obvious! They merely require an answer to their individual question. Given condition X, "Can we share a mutual king-size bed?" "Can I immerse in the sea?", etc. If the manual is able to supply the solution to the specific problem, there seems to be no reason to ask a rabbi for a ruling. If there is any room for comparison between halakhic matters that concern everyday situations and medicine, I believe it should be made between halakhic literature and the usage of over-the-counter (OTC) medications. Notwithstanding the possible risks, contemporary practice is to reclassify many drugs as OTC allowing "self medication." Many papers in medical journals endorse this policy, while considering both benefits and risks. In other words, contemporary medical research tends to trust the consumer to make correct medicinal choices, despite the possible risks.[14] Analogously, halakhic consumers can be trusted to make educated independent halakhic choices based on good manuals. Not providing people with the opportunity to reach personal halakhic decisions independently has potentially unfortunate consequences. What sociologists label as "professional authority" may lead to negative feelings on the part of ordinary people. This can give the impression that halakhic authorities are controlling their lives—specifically their sex lives—regulated by the laws of *niddah*.

The debate between oral transmission and literacy has been resolved in favor of literacy.

The second reason for excessive deference to rabbinic consultation is rather obscure. Zimmerman writes: "Individual questions should be addressed to a couple's own rabbi, particularly as in many matters local practice is determinative of the *halakhah*" (p 16). I fail to understand this rationalization.[15] It is possible that the author intended to relate to the *pesaq* of the local rabbi, the *mara de-atra* (communal rabbinic authority) who theoretically determines the local practice. But today, the concept of *mara de-atra* has been substantially diminished by historical, sociological, and technological processes, especially in matters of domestic *issur ve-heter*.[16] People no longer observe *halakhah* exclusively in accordance with their *mara de-atra*'s opinions. But even if Zimmerman meant that the couple should abide by the rabbi whom they usually follow, it is unreasonable to attempt to turn back time in today's reality, where people are used to seeking halakhic guidance in manuals and in

[14] Many articles discuss this phenomenon. See for example: C. Bradley & A. Blenkinsopp, "Over the Counter Drugs: The future for self medication", *BMJ* 1996; 312:835–837. In this article, the authors write: "The patient empowerment that flows from deregulation can be seen as a good thing. Doctors who encourage and support responsible self medication will be seen by their patients as a more acceptable source of independent advice. The role of the doctor will then evolve to one of a collaborator with patients in the management of their health problems rather than an exclusive controller of access to medicines. The alternative approach of fighting to retain control over access to medicines will mean that, as patients gain more and more access to the means to treat their own illnesses, doctors will be rejected as a source of help and advice. Patients will, naturally, continue to need access to special information to deal with health problems that are often complex, but they may turn to other sources such as other health professionals who have more 'liberal' attitudes, or, increasingly, to written and electronic sources of information." My personal thoughts about halakhic empowerment are similar and perhaps analogous.

[15] In matters of "Jewish family life" one can hardly speak of a family *minhag*. In these intimate issues, much is concealed from the children (especially in the Ashkenazi family) and I doubt whether anyone is actually familiar with their parents' customs. I presume that the author did not intend to relate to the family custom, which obviously can not be determined by the rabbi.

[16] Cf.: Aaron Kirschenbaum, "*Mara de-atra*: A Brief Sketch", *Tradition* 27:4 (1993), pp. 35–40. In n. 15, Dr. Kirschenbaum refers to much literature on the subject. Cf. also: Rabbi Rahamim Brakhiyahu, *Tal li-Verakha* (Jerusalem: Maaliyot, 1999), pp. 259–265 and Rabbi Shlomo Levi's remark in his approbation to Rabbi Brakhiyahu's book.

[17] Cf. Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition*

internet websites. It seems that the historical debate between oral transmission and literacy has long been resolved in favor of literacy.[17]

Legally, when both facts and *halakhah* are known to a person, there are very few instances where he or she is required to acquire an explicit specific ruling from an independent halakhic authority. *Mishnah Nega`im* 2:5 mentions three cases where one has to seek halakhic authority, even when one is well informed with the details of the relevant *halakhah*: 1) where he has a *nega* (skin blemish possibly imposing impurity) 2) when he needs to nullify his own *neder* (vow); 3) when he has a blemished *bekhor* (first-born) animal. The Vilna Ga'on (ad loc) interprets: "In all of the laws of Torah, one rules for himself, except for the three mentioned here: *nega`im, nedarim and bekhorot*, which depend on pronouncement (*ma'amar peh*)." Some halakhic authorities believe that even the permission to remarry subsequent to receiving a testimony on a husband's death does not require an official verdict from a halakhic authority or court.[18]

Nowhere do we find in the Mishnah, Mishneh Torah *or* Shulhan Arukh *the advice to "ask a rabbi."*

Accordingly, to the best of my knowledge, nowhere do we find in the *Mishnah,* in Maimonides' *Mishneh Torah* or in the *Shulhan Arukh* a ruling that ends with the now frequent remark among authors of halakhic manuals: "ask a rabbi" or "ask your local rabbi."[19] When one is able to understand the relevant law, particularly when one has already grasped the basic fundamentals of the topic, it seems that one does not have to seek the supplementary guidance of a rabbinic authority. Consulting a rabbi is not a bad idea, but when you purchase a practical "lifetime companion to the laws of Jewish family life," you expect it to prove useful for everyday life. The author also writes: "Another reason to consult one's own rabbi is that some of the halakhic opinions expressed here may not be those quoted in some other books—there are areas of disagreement in many areas of *halakhah*" (p. 17). But the author mentions that "the opinions expressed in this the book have the approval of the rabbis whom I consulted, Rabbis Reuven Aberman, Yehudah Henkin and Yaakov Warhaftig." These rabbis and the author herself[20] are well competent to give halakhic decisions in matters of *hilkhot niddah*. When you decide to follow a certain halakhic book, in some way it becomes your rabbi.[21] When the book is clear, there seems to be no reason to seek the specific guidance of another rabbi.

When the late R. Kalman Kahana published his bestseller manual of *Hilkhot niddah*,[22] he wrote in the preface that one of his chief concerns was not to leave elementary issues unresolved and not to direct the reader to a rabbi in matters of everyday life. He stated that he was able to accomplish this policy because the *Hazon Ish*, with whom he was closely connected, was willing to give

28:4 (1994), pp. 64–130; Moshe Rosman, "A Prolegomenon to the study of Jewish Cultural History", *JSIJ* 1 (2002), pp. 109–127.

[18] See commentators on *Shulhan Arukh*, *Even ha-Ezer* 17:39.

[19] However, this trait is very common in the *Kitzur Shulhan Arukh* of R. Shlomo Ganzfried.

[20] On the possibility of women being *posqot*, see the sources cited by Ross, p. 255, n. 51. I am well aware that the graduates of the *Nishmat* program are called *yo`azot* and not *posqot*. However, like Ross (p. 233), I believe this is merely a tribute to Orthodox political correctness. See also the two sources cited by Ross in p. 304, n. 9.

[21] See: Rabbi Yehiel M. Epstein, *Arukh ha-Shulhan,* Yoreh De`ah 242:63; *Inziqlopediyah talmudit*, VIII, p. 504; Rabbi Yekutiel Yaakov Halberstam, *She'elot u-Teshuvot Divrei Yaziv*, *Yoreh De`ah* 131; Yoseph Ahituv, "*Mi-pi sefarim ve-lo mi-pi soferim: le-sugyat hofesh ha-hora'ah"*, *Sinai* 107 (1991), pp. 133–150 (I would like to thank Rabbi M.M. Honig for calling this article to my attention).

[22] The edition published by Feldheim Publishers in 1995 has Hebrew and English on facing pages. It is a translation of

conclusive decisions on debatable matters. Nevertheless, the authority of the *Hazon Ish* was not effective in preventing criticism directed at R. Kahana. In subsequent editions of the manual, R. Kahana revealed that he received a letter from a person who claimed that the author (R. Kahana) erred in seven rulings: he was too stringent in one and too lenient in the remaining six. The specifics of that debate are not of our current concern, but it is imperative to emphasize the foundations of this dispute. The critic claimed:[23]

> Our rabbis who have compiled halakhic manuals avoided deciding in halakhic discrepancies of the *aharonim* and thus ruled according to the stringent opinions or at most left the issue for a rabbi to decide. The rabbi can rely on the lenient opinion when needed. But to determine the *halakhah* in a practical manual according to one of the opinions, do we have the potency to deal with them?

The *Hazon Ish* himself decided to answer the criticism. He begins his short reply in a paradigmatic statement:

> It is true that there are some matters which should not be disclosed in the presence of an *am ha'arets*, and there are matters that should not be publicized. But I did not see anything in the matters which were mentioned which ought to be concealed and not be written in a book.

The words of the *Hazon Ish,* which reject the assertions set by the anonymous critic and agree with R. Kahana's initial intent, draw guidelines for all halakhic manual composers. They should provide the reader with practical halakhic solutions, unless they discuss matters that *halakhah* itself demands should not be made known for the general public.

If the author wishes to be humble and to avoid choosing between several legitimate opinions, she can bring the various opinions and leave it for the reader to decide which authority to follow.[24] Why would a personal rabbi be more qualified than the author or her own rabbis to decide which opinion it is right to follow? Naturally, I refer not to unusual and sophisticated halakhic cases that cannot be predetermined, but to conventional, mundane cases that the author hesitates to resolve.

The book *A Lifetime Companion to the Laws of Jewish Family Life* by Deena R. Zimmerman is an excellent book for English readers who wish to study the laws of *niddah* in a serious manner. It enables one to learn the *halakhot* from the original sources, placing them in a comprehensible framework. The companion is well structured and written in a clear and empathetic style. It discusses a number of practical medical issues that are not discussed in other popular manuals. There is no question that the book makes a serious contribution to the field of *hilkhot niddah*, specifically to the genre of theoretical books that teach the basic issues involved in keeping these *halakhot*. Nevertheless, it suffers from the same syndrome that is evident in many other manuals who time after time, direct the reader to a rabbi.

the sixth Hebrew edition: *Daughter of Israel: Laws of Family Purity* (English translation by Leonard Oschry).

[23] The citations are my own translation from the Hebrew edition.

[24] By analogy, I am sure that there are medical experts who believe that letting the patient decide which course of action to take is wrong. They don't believe that people who are nonprofessionals should be making critical decisions by choosing—often, in uninformed fashion—between different opinions.