

TORTURE: JUDAIC TWISTS

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“If one speaks about torture, one must take care not to exaggerate.”

—Jean Améry¹

INTRODUCTION

Perhaps in part because Jews did not enjoy sovereignty for most of their history and thus rarely organized, much less directed, military institutions, the Jewish textual tradition says relatively little about the exercise of corporal punishment during warfare.² This dearth of classical sources, however, does not mean that Judaism has nothing to offer contemporary deliberation about the ethics of torture. On the contrary, modern Jews plumb the textual tradition in search of prooftexts that ground their passionately held positions vis-à-vis torture. And this is precisely one of the methodological conundrums torture poses. In their search for corroborating principles, verses and *halakhah* (law) for their positions, Jewish scholars often gloss over countervailing values, texts and laws. Some trot out such broad principles as *betzelem elohim* (the notion that every human is made in the divine image), *al tonu* (do not oppress the stranger), or *lagoyim* (a light unto the nations), *kavod habriot* (respect creatures), *chillul hashem* (desecrating God’s name), or *lo ta’amod al dam re’echa* (do not stand on your neighbor’s blood) so as to condemn or condone torture without considering countervailing principles. Others point to certain laws, such as those pertaining to the *rodef* (stopping a pursuer who has lethal intent against another) or *hora’at sha’ah* (emergency exigency) to justify their positions on torture—without entertaining other relevant legal precedents. And a few others blandly state Judaism’s position vis-à-vis torture without providing much or any evidence supporting those claims.

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1. JEAN AMÉRY, *AT THE MIND’S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* 22 (Sidney Rosenfeld & Stella P. Rosenfeld trans., Ind. Univ. Press 1980).

2. There is increasing debate among scholars, however, about Jews’ actual participation in and exercise of military power. See, e.g., Derek Penslar, *An Unlikely Internationalism: Jews at War in Modern Western Europe*, *J. MODERN JEWISH STUDIES* 309 (2008).

Such approaches both exaggerate and unnecessarily silence aspects of the Jewish textual tradition that nevertheless ought to be considered *before* reaching a conclusion about torture. By presuming a conclusion and only subsequently searching for supportive material in the classic sources, such approaches put the proverbial—or methodological—cart before the horse. Such arguments perforce articulate and highlight the authors' opinions at the expense of obfuscating, eliding or outright misconstruing the textual tradition's actual positions on this morally fraught issue. In a way, these arguments twist the tradition, broadly conceived, so as to provide theological, legal and historical imprimatur to the political opinions of the authors.

This paper endeavors to demonstrate how these modern arguments twist the textual tradition. As will be shown, these vexing methods are employed by those who abhor torture as well as by those who favor it. After reviewing these vexing modern texts, I turn to classical sources in the Judaic tradition that portray, deliberate or speak of torture. The last section offers preliminary thoughts about torture if one takes the textual tradition both seriously and without exaggeration before reaching a political conclusion about the ethics of torture.

Before turning to the texts themselves, I must first clarify what I mean by the term torture. I understand torture to be a series of physically and psychically damaging techniques deployed against, upon, in and through captives by state agents for a variety of reasons. Some motivating reasons for torture are to extract a confession regarding alleged prior action, to induce an epiphany for immediate conversion, to compel a captive's capitulation to the authority's desired outcome, or to confirm or corroborate information about a possible future action.³ I say

3. This definition incorporates many of the elements found in the United Nations' Convention Against Torture, Article 1.1. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984). That definition does not include torture done for the sake of conversion, however. Also, UNCAT has rightly been critiqued for dismissing domestic abuse as a form of torture insofar as it is not perpetrated by state agents. Though this critique could also be levied against my definition, my focus is precisely state torture and not torture performed by non-state agents.

Klapper suggests that "the torturer inflicts pain so as to convince the prisoner to do his or her will, whereas killing acknowledges an irreconcilable conflict of wills." Aryeh Klapper, *Warfare, Ethics and Jewish Law*, 6/1(Shevat 5767) MEOROT 3, 9 (2006), available at http://www.edah.org/backend/coldfusion/journal_images/Meorot%20Complete%20Version-Jan%202007.pdf. See the definitional discussion of torture in DARIUS REJALI, TORTURE AND DEMOCRACY 36 (Princeton Univ. Press 2007). AARON KIRSCHENBAUM, TORTURE CONFESSION, AND AMERICAN PLEA BARGAINING: A JEWISH LEGAL PERSPECTIVE 1 (Univ. Cincinnati Judaic Stud. Program 1991) distinguishes judicial torture in criminal administration that seeks confession from torture "for purposes of revenge, terrorism or sadism."

confirmation because, typically, torture victims are seen as sources to corroborate or clarify information already produced or procured elsewhere. Rarely is an individual tortured for the *mere hope* of extracting something interesting or actionable. Torture is employed to confirm suspicions already afoot.⁴

It is also important to differentiate torture from torturous execution. The latter does not seek confession, conversion, capitulation or confirmation; rather it includes those means that necessarily produce a specific end: a captive's death. Despite superficial similarities between the methods of torturous execution and the methods of torture, torture is designed to keep a captive alive, however painful that existence may be.⁵ For this critical reason I avoid martyrological texts in this discussion.⁶

Himself a victim of Nazi torture, Jean Améry asserts a qualitative difference between medieval torture and contemporary torture. During the Inquisition, both the torturer and the captive shared a theological assumption about their pained relationship: "The torturer believed he was exercising God's justice, since he was, after all, purifying the offender's soul; the tortured heretic or witch did not at all deny him this right." JEAN AMÉRY, *supra* note 1, at 34. In today's torture, Améry concludes, such theological commonality no longer obtains; the torturer "is solely the other." This distinction remains to be proven. *Id.*

4. See David J. Bleich, *Survey of Recent Halachic Literature: Torture and the Ticking Bomb*, 39 TRADITION 89, 91 (Winter 2006); Dov S. Zakheim, *Confronting Evil: Terrorists, Torture, the Military and Halakhah*, 6/1(5767) MEOROT 3, 12 (2007), available at http://www.edah.org/backend/coldfusion/journal_images/Meorot%20Complete%20Version-Jan%202007.pdf.

5. This is why the recent American Attorney General Alberto Gonzales' definition of torture as that which may lead to organ failure and death is misguided. Such treatment deserves to be called torturous execution, not torture. See discussion in *Testimony of Douglas A. Johnson, Executive Director, The Center for Victims of Torture, Hearing on the nomination of The Honorable Alberto R. Gonzales, Counsel to the President George W. Bush to be the Attorney General of the United States* 6, 8 (Jan. 6, 2005), <http://www.cvt.org/files/pg55/Gonzales%20confirmation%20testimony.pdf> (last visited Dec. 18, 2010).

6. Some of the most famous Jewish martyrological texts pertain to the so-called Ten Martyrs: sages killed by the Roman government. Their crime: teaching Torah publicly. See BT *Sanhedrin* 14a; BT *Semahot* 8.9; BT *Avodah Zarah* 18a; *Sifre Devarim* § 307; BT *Berachot* 61b; and elsewhere. The Ten Martyrs are remembered liturgically in the *Eleh Ezkarah* prayer, invoked on Yom Kippur and, in a variant by some communities, on Tish B'Av. See Louis Finkelstein, *The Ten Martyrs*, in *ESSAYS AND STUDIES IN MEMORY OF LINDA R. MILLER* 29 (Israel Davidson ed., Jewish Theological Seminary Am. 1938); Gerald J. Blidstein, *Rabbis, Romans, and Martyrdom—Three Views*, 21 TRADITION 54 (Fall 1984).

For a discussion differentiating punishment from torture, see REJALI, *supra* note 3, at 561. In a similar vein, the Biblical injunction 'ayin tachat 'ayin (eye for eye) recalibrated punishment so that aggressors were not punished more (or less) than what they inflicted on their victims. This retaliatory (*lex talionis*) mode of punishment was reinterpreted by the rabbis into pecuniary and penal punishments. For these reasons it is misleading to incorporate these texts in this deliberation of torture.

Nor does this paper examine the complex issue of capital punishment. By definition, one goal of capital punishment is a captive's death, not continued life (however painful). The Talmudic notion of *mitah yafah*, a beautiful or good death, refers to hastening a captive's death instead of unnecessarily prolonging the pain of dying, as is involved in normal execution procedures. See BT *Sanhedrin* 45a, 52a.

I. VEXING TEXTS

Contemporary scholars deliberating torture frequently skew the textual tradition in favor of their pre-selected positions. This holds for those scholars who find torture abhorrent as well as those who do not find it so repugnant. Because their arguments both prioritize political conclusions and misconstrue the textual tradition, they fail to offer robust and honest arguments that reflect and are consistent with the breadth and depth of the Judaic textual tradition. Moreover, it is worrisome that prominent and respected Jewish scholars and rabbis articulate these normative yet problematic arguments on torture because they could affect not only policy but people. Indeed, they speak not just of life and death but also of quality of life and quality of death.

Two major camps are readily identifiable in the contemporary Jewish discourse on torture.⁷ The antitorture camp, on the whole, articulates a stringent position vis-à-vis torture: they do not want it regulated; they want it relegated to the dustbin of history. As will be shown, this camp's rhetoric functions primarily on meta-ethical levels, invoking Jewish principles and morals and sometimes pointing to international human rights instruments to bolster their positions. At the other end of the proverbial political spectrum is the protorture camp. Here more lenient arguments are brought forth that either require torture or merely permit it. Such arguments usually lean heavily on *halakhic*, or legal, reasoning. Both discursive approaches have their strengths, but neither offers satisfactorily robust, consistent or honest Judaic arguments about torture.

A. Antitorture

The late British rabbi, Louis Jacobs, best summarizes the antitorture camp position: "There can be no doubt that Judaism with its stress on compassion, its hatred of violence, and its respect for human dignity, approves of the abolition of torture."⁸ Jacobs's terse three paragraph treatment of the subject cites two Talmudic references, one saying that flogging is worse than death and the other denying the validity of self-incriminating confessions.⁹ He concludes emphatically, "Nowhere, in fact, in the whole range of discussion in Jewish law

7. This paper examines modern Jewish scholarship primarily but not exclusively developed in North America. Though court decisions in Israel and in the United States are referenced, this paper does not offer an exhaustive analysis of state jurisprudential treatment of this topic.

8. LOUIS JACOBS, WHAT DOES JUDAISM SAY ABOUT . . . ? 319 (Quadrangle 1973).

9. BT *Ketubot* 33b and BT *Yevamot* 25b. More on self-incrimination *infra*.

regarding penal methods, is there any suggestion that the courts are entitled to resort to torture as a means of extracting confessions.”¹⁰ Jacobs not only exaggerates Jewish allergy to violence (it is well known that Judaism is not a purely pacifist tradition), he also ignores the fact that *halakhah* does countenance the use of moderate physical force to secure a captive’s capitulation.¹¹ And his invocation of human dignity is both unfounded and lopsided. It is unfounded insofar as he does not demonstrate that or how this principle functions in classical texts; and it is lopsided because he fails to highlight other principles, principles that may in theory and in fact compete and perhaps even outweigh dignity as a guiding principle in times of lethal conflict, such as *pikuach nefesh*—doing what is necessary to save a life. To the degree that Jacobs’s argument lacks honest deliberation of the textual tradition, it is best called a biased account.

Criticisms aside, such an approach to banning torture is common among Jewish antitorture advocates. Others also use exaggerated claims to condemn torture. For example, “Jewish sources would favor a near total ban on torture,”¹² and “the use of torture and other cruel, inhuman or degrading treatment of human beings is in direct violation of Jewish tradition and, in particular, of the Jewish view that every human being is created in the image of God.”¹³ These broad statements are less inaccurate than they are myopic. By highlighting certain principles (many of which are listed above), such arguments focus and fixate on them at the expense of attending to details extant in the textual tradition that, for better and for worse, challenge the authors’ desired positions.

To illustrate, some scholars point to humiliation (*boshet*) and to rabbinic teachings that embarrassing others is tantamount to murder.¹⁴ They then assert that torture inherently humiliates and, as such, is murder. Insofar as murder is illegal and morally condemnable, torture

10. Jacobs, *supra* note 8, at 319.

11. Capitulation differs from confession, and these *halakhic* texts are discussed *infra*.

12. Jeremy Kalmanofsky, David Rosenn & Melissa Weintraub, *Torah Against Torture*, N.Y. JEWISH WEEK, Oct. 6, 2006, available at <http://www.rhr-na.org/resource/torah-against-torture-a-sample-oped>.

13. Reconstructionist Rabbinical Association, Resolution on the Use of Torture and Abuse of Detainees by the United States (2005). See also Reconstructionist Rabbinical Association, Resolution on Further Steps in the Struggle to Abolish Torture under United States’ Authority (Mar. 2008), http://www.therra.org/resolutions/RRA_Resolution_Anti-torture_2008.pdf (last visited Dec. 18, 2010).

14. M *Avot* 3.15; BT *Baba Metzia* 58b-59b; BT *Sanhedrin* 99a and 107a; Mishneh Torah, *Teshuvah* 3.14; Mishneh Torah, *De’ot* 6.8. See discussion of these and related shame-full texts in Jonathan K. Crane, *Shameful Ambivalences: Dimensions of Rabbinic Shame*, AJS REV. (forthcoming 2011).

should be as well.¹⁵ Such logic elides the point that humiliation also has prosocial functions by holding people accountable for actions not legally punishable.¹⁶ Another popular principle invoked by antitorturists is human dignity (*kavod habriot*).¹⁷ Again, it is asserted that torture destroys dignity and for this reason alone it should be abhorred and outlawed.¹⁸ Yet these scholars do not consider whether or how this principle outweighs other principles, such as *pikuach nefesh*. Obviously arguments of this sort work analogically. Yet they do so by ignoring substantial pieces of the textual tradition that do not comport with this logic or challenge it outright. Eliding countervailing texts and principles necessarily blurs and truncates these scholars' depictions of the Judaic textual tradition. This is not to say that such statements are wholly wrong; they may express reasonable summaries of the Judaic textual tradition.¹⁹ But they have yet to demonstrate that this is the case.

International human rights instruments that define and prohibit torture serve for other antitorture advocates as justifications for modern Jews to condemn torture.²⁰ The establishment of the United Nations Convention Against Torture in 1984 and Israel's status as a signatory thereto serve as proof-positive that Judaism abhors torture.²¹ Yet this line of reasoning conflates politics and religion insofar as UNCAT is external to the Judaic textual tradition—even were it conceived

15. This line of reasoning is found in Melissa Weintraub, *Kvod Ha-Briot: Human Dignity in Jewish Sources, Human Degredation in American Military Custody*, Rabbis for Human Rights—North America (2005), available at http://www.rhr-na.org/kvod_habriot/treatise; Reconstructionist Rabbinical Association, *supra* note 13 (2005); David Luban, *Human Dignity, Humiliation, and Torture*, 19 KENNEDY INST. ETHICS J. 211 (Sept. 2009).

16. See Jeffrey L. Rubenstein, *The Bavli's Ethic of Shame*, 53 CONSERVATIVE JUDAISM 3, 27-39 (2001); Barry Wimpfheimer, "But It Is Not So": *Toward a Poetics of Legal Narrative in the Talmud*, 24 PROOFTEXTS 51, 51-86 (2004).

17. BT *Berachot* 19b; BT *Shabbat* 81a-b; YT *Kilayim* 9.1; YT *Nazir* 7.1; YT *Berachot* 3.1; MT *Kilayim* 10:29; Menachim Meiri, *Beit HaBechirah, Berachot* 19b.

18. See Edward Feld, *Developing a Jewish Theology Regarding Torture*, 63 THEOLOGY TODAY 324 (2006), reprinted in *TORTURE IS A MORAL ISSUE: CHRISTIANS, JEWS, MUSLIMS, AND PEOPLE OF CONSCIENCE SPEAK OUT* 141 (George Hunsinger ed., William B. Eerdmans Publ'g Co. 2008); Ellen Lippmann, *These Things I Remember as I Pour Out My Heart: A Sermon for Kol Nidre 5766*, in *TORTURE IS A MORAL ISSUE: CHRISTIANS, JEWS, MUSLIMS, AND PEOPLE OF CONSCIENCE* 152 (George Hunsinger ed., William B. Eerdmans Publ'g Co. 2008), available at <http://www.kolotchayeinu.org/rabbi/KolNidre5766.pdf>; Weintraub, *supra* note 15.

19. Another overarching principle that antitorturist advocates could invoke states that "a man should always strive to be of the persecuted rather than of the persecutors." BT *Baba Batra* 93a. Scholars would then need to demonstrate that this principle also applies to governments and their agents.

20. See, e.g., EDWIN C. GOLDBERG, *SWORDS AND PLOWSHARES: JEWISH VIEWS OF WAR AND PEACE* (URJ Press 2006); Luban, *supra* note 15; Zakheim, *supra* note 4.

21. It should be no surprise that the Israeli Supreme Court acknowledges Israel's allegiance to this body of international law. See ISC (1999), ¶ 23 ("Text of Supreme Court Decision on GSS Practices: September 6, 1999." Authored by A. Barak).

expansively. Time and again, antitorture advocates citing such international human rights instruments fail to demonstrate that these instruments have substantial or any Judaic roots.²² Such arguments merely articulate that antitorture international human rights instruments comport with the authors' own values and commitments; they do not offer Judaic rationales inexorably leading to these positions.

Not all antitorture scholars remain at the meta-ethical level. Some engage *halakhah* and practical ethics in their efforts to thwart torture.²³ Some argue that insofar as torture is used as a tactic of warfare, it must be considered from within the *halakhic* categories of warfare. Even if war is considered an exceptional moment (*hora'at sha'ah*) requiring temporary exemptions from normal restrictions of what is considered legal and moral, torture is still not legally or ethically warranted.²⁴ Others examine such principles as *pikuah nefesh* (the obligation to do what one can to save a life) and *rodef* (the obligation to intervene personally even to lethal levels to save an intended victim from an aggressor), and similarly find no legal or ethical foundations for torture.²⁵ These scholars admit that *rodef* laws could conceptually permit killing someone visibly intending to kill others, like a suicide bomber, before that individual detonates. But this sort of preemptive strike differs in kind and in degree from torturing a captive, even if the captive were associated with the hypothetical "ticking-bomb" (more on this below). And still others subsume torture under the death penalty; they argue that just as a court may not condemn a captive to death based on the captive's own admission of guilt, so too a court may not torture a captive.²⁶ But this logic fails to show how the death penalty rightly

22. Similarly, scholars who argue that Judaism supports modern notions of human rights and such international conventions often conflate politics and religion. See discussion in Jonathan K. Crane, *Why Rights? Why Me?*, 35 J. RELIGIOUS ETHICS 559 (2007).

23. Some also make grand assertions about history—what Jews actually did—but do so primarily from the laws on the books and not from historical studies. For example, "torture as a mode of investigation is virtually unheard of in Jewish history. The police authorities gain nothing from confession and the accused loses nothing by such confession. Perhaps the obviation of torture as a judicial tool was the very intention of Biblical law and rabbinic interpretation." Isaac Braz, *The Privilege Against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law*, in JEWISH L. & CURRENT LEGAL PROBLEMS 161, 163 (Nahum Rakover ed., Libr. Jewish L. 1984).

24. Klapper, *supra* note 3. See *infra* notes 136-41 for further discussion of *hora'at sha'ah*.

25. Zakheim, *supra* note 4; Melissa Weintraub, *But Does Torture Save Lives?: Torture, Pikuah Nefesh, and the Rodef Defense*, RABBIS FOR HUMAN RIGHTS—NORTH AMERICA (July 31, 2005, 6:00 AM), <http://www.rhr-na.org/files/docs%20torture%20save.pdf> (last visited Dec. 20, 2010); Jonathan K. Crane, *With a Mighty Hand: Judaic Ethics of Exercising Power in Extraordinary Warfare*, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT: A GUIDE TO THE ISSUES 184-206 (David K. Linnan ed., Praeger Security Int'l 2008).

26. See KIRSCHENBAUM, *supra* note 3 for an example of this line of reasoning. Instead of

incorporates torture.

With only a few exceptions, antitorture arguments tend toward the meta-ethical and the universal.²⁷ Such lofty rhetoric attracts a great deal of support among modern Jews, many of whom admire the notion of human rights generally and would like to see both international institutions and national laws given the teeth to protect those rights. Still, these kinds of arguments are unsatisfactory to the degree that they portray only those portions of Judaic textual tradition that support their cause, and these portions rarely touch the practical ground. Such arguments are neither thorough nor balanced. By twisting the textual tradition, they offer skewed perspectives begging questions.

B. Protorture

Moving away from the antitorture camp's abolitionist rhetoric, we encounter the protorture camp's perspectives extolling torture's advantages. Not all protorture advocates agree that torture is an obligatory measure to be taken against just any and every captive,

presuming that torture automatically leads to death, Kirschenbaum could have focused on court-ordered flagellation, a permitted though disparaged punishment. Had he focused on this non-lethal punishment, he still could have reached his desired conclusion that self-incrimination warrants no torture and would have done so by focusing on texts that relate more directly to torture *per se*.

The sagacious Israeli Supreme Court Judge Haim Cohn claims:

While it is nowhere said in so many words, the reason for the exclusion of all self-incriminatory evidence may well have been the desire to prevent confessions being elicited by torture or other violent means. It is a fact that—unlike most contemporaneous law books—neither Bible nor Talmud provide for or know of any interrogation of the accused as part of the criminal proceedings, so that there was no room at all for attempts to extort confessions.

HAIM H. COHN, HUMAN RIGHTS IN JEWISH LAW 214 (Dtav Publ'g House, Inc. 1984).

See discussion in Irene Merker Rosenberg & Yale L. Rosenberg, *In the Beginning: The Talmudic Rule Against Self Incrimination*, 65 N.Y.U. L. REV. 955, 1038 n. 303 (1988). Cohn, surprisingly, either glosses over or is ignorant of *halakhic* texts structuring interrogation procedures. More on these procedures of extracting confessions *infra* at 126.

27. An interesting exception to these patterns is a statement by Rabbinical Assembly, the professional organization of Orthodox rabbis. Their 2005 "Resolution on Freedom, Democracy, and the Humane Treatment of Prisoners," states that because "Jewish history and tradition teach that justice must triumph over violence," and because "serious questions have been raised about the ethics of torture by any nation as a means of gaining information, even under emergency circumstances," they therefore "affirm that only by preserving the rule of law and the rights of the individual does any nation earn its place as a moral leader on the world scene." Rabbinical Assembly *Resolution on Freedom, Democracy and the Human Treatment of Prisoners*, in Passed Resolutions 16 (2005), <http://www.rabbinicalassembly.org/docs/2005resolutions.pdf> (last visited Dec. 23, 2010). Why they engage neither Jewish principles nor *halakhah* seriously in this document (they do both in other resolutions) remains unclear. And it is curious when they state that questions arise because of torture, but do not clarify which questions. Such ambivalence begs questions about their resolve.

however. Some in this camp think torture is merely a permissible tactic and not required. Nevertheless, they agree that torture remains on the table, so to speak, of admissible military tactics during warfare. Because of their complexity, I spend some time examining these arguments.

1. Permitting Torture

The argument to permit torture is best put forward by Michael Broyde, an outstanding and outspoken legal scholar. Broyde concludes “that torture is permissible and consistent with *halakhah* in all situations where there is a proper, thoughtful military chain of command (the higher up a decision goes, the more thought tends to be put in) and no other reasonable alternative is available.”²⁸ At first glance, and given his understanding of *halakhah*, this conclusion seems reasonable. At second glance, however, his caveats demand interrogation. First, “a proper, thoughtful military chain of command” may exist “in all situations,” but it is not always the case that command chains are actually utilized. Second, he assumes that “the higher up [a command chain] a decision goes, the more thought tends to be put in it.” But it is unclear what he means by thought or height. To what level of authority must a decision go until it reaches a sufficient level to acquire the epithet “thoughtful”? Does he suggest that lower-level members of the military are incapable of thoughtful decision-making? Or are they necessarily (or only) less capable than superior officers? And what quality does “thoughtfulness” provide or instill in a military policy or case decision? It could well be that regardless of the height it reaches, a certain decision does not comport with law, Jewish or otherwise. And third, Broyde assumes that torture is permissible when “no other reasonable alternative is available.” In war, as in most every moment of human existence, alternative actions exist, if only they are imagined and conceived. Even well-trained interrogators acknowledge that they are equipped with a substantial repertoire of tools to extract information from captives before resorting to anything remotely similar to physical duress, much less torture.²⁹ Broyde’s assumption does that no other reasonable alternatives exist unreasonably strips interrogators of their training.

28. Michael J. Broyde, *Jewish Law and Torture*, N.Y. JEWISH WEEK, Jul. 7, 2006, at 20 [hereinafter Broyde, *Jewish Law & Torture*]. He makes a similar point in Michael J. Broyde, *Only the Good Die Young?*, 6/1 (Shevat 5767) MEOROT 19, 22 (2006), available at <http://www.edah.org/backend/JournalArticle/Conversation%20-%20Final.pdf> [hereinafter Broyde, *Only the Good*].

29. See discussion in REJALI, *supra* note 3; RICHARD MATTHEWS, *THE ABSOLUTE VIOLATION: WHY TORTURE MUST BE PROHIBITED* (McGill-Queen’s Univ. Press 2008).

Thus, to understand Broyde's conclusion that torture is permissible, we begin with his assumptions. The major assumption throughout his arguments is that "wartime entails the general suspension of our ethical sensibilities."³⁰ It thus follows logically for him that even the Jewish notion that human life is sacred falls by the wayside, as do any secondary human rights concerns, such as protecting human dignity or avoiding corrupting soldiers.³¹ He also surmises that the sole goal of warfare participants is to kill each other, an assumption that betrays a naïveté about warfare insofar as a great deal of military strategy involves nonlethal methods that may, in fact, be more efficient and effective than lethal ones. And he assumes tit-for-tat is a reasonable—if not the best—military and legal strategy. Broyde thus reasons that

International law, which Jewish law generally expects its adherents to obey,³² is limited in its scope to those who pledge themselves to its obedience. Neither Hezbollah nor Hamas nor al Qaeda are signatories to the Geneva Convention and do not conduct themselves in accordance with its provisions. They certainly do not treat prisoners they capture in accordance with its requirements (as shown by the recent murder of two captured American soldiers in Iraq).³³ Thus we are not required as a matter of international law to treat their prisoners in accordance with the convention on the treatment of prisoners.³⁴

30. Broyde, *Jewish Law and Torture*, *supra* note 28. See also Michael J. Broyde, *Just Wars, Just Battles and Just Conduct in Jewish Law: Jewish Law is Not a Suicide Pact!*, in *WAR AND PEACE IN THE JEWISH TRADITION* 1, 4 (Lawrence Schiffman & Joel B. Wolowelsky eds., Yeshiva Univ. Press 2007) [hereinafter Broyde, *Just Wars*].

31. "The basic argument is 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, the fear of the ethical decline of our soldiers, or even the historical fear of our ongoing victimhood." Broyde, *Jewish Law and Torture*, *supra* note 28, at 20. His use of "wholesale" is similarly suspicious, for contemporary warfare also includes efforts to sustain civilian—and military—lives. Klapper, *supra* note 3 challenges these assumptions.

Broyde also rejects the proposition to prohibit torture based on "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." Broyde, *Only the Good*, *supra* note 28, at 4. It is unclear why Broyde highlights this "secondary" rabbinic principle and not another, such as modeling righteous behavior to Gentiles (*or l'goyim*)—a principle the Talmudic sages repeatedly cite to remonstrate Jews to act individually and collectively in ways that will strengthen Jewish-Gentile relations. Even if the latter principle challenges his conclusion, he must still demonstrate how and why the former principle takes priority.

32. Broyde fails to demonstrate the veracity of this claim here.

33. Broyde may be referring to the incident involving Pfc's Menchaca and Tucker. See Dexter Filkins, *Bodies of G.I.'s Show Signs of Torture, Iraqi General Says*, N.Y. TIMES, June 20, 2006, available at <http://www.nytimes.com/2006/06/20/world/20cnd-iraq.html>.

34. Broyde, *Jewish Law and Torture*, *supra* note 28. Elsewhere, Broyde, *Just Wars*, *supra* note 30 supports the notions of punishing enemy combatants collectively, regardless of their

This logic is legally specious. It posits that the United States (the country in which Broyde resides and about which he speaks) must uphold the Geneva Convention that outlaws torture, yet simultaneously, may treat enemy combatants contrary to that Convention. Internal inconsistencies aside, Broyde repeatedly assumes that warfare is a monolithic moment in human relations both constrained by law and free from it, and yet wholly a-ethical. Further, during warfare commitments to protect human beings from lethal and nonlethal abuses do not hold, particularly when fighting enemies who do not share those commitments. Finally, Broyde assumes that the enemy's death—individually and collectively—is the ultimate goal.³⁵

In regard to torture itself, Broyde concludes that,

according to Jewish law and ethics, torture in the context of war is no more problematic than death itself, and is permitted by the general license to wage war. There is no logical reason that halacha would categorically prohibit duly authorized wartime torture as a method for acquiring information otherwise not available, in order to save lives in the future.³⁶

Here Broyde subsumes torture into the category of killing, much as other scholars do. Yet he takes this link further by saying that “the right to kill [enemy combatants] as necessary in the course of warfare includes the lesser right to torment them when doing such [sic] is needed to conduct the war.”³⁷ He bases this right to torment upon the assumption that torture is a “less severe violation of the rights of a person than is his death.”³⁸

Broyde correctly asserts that Judaism licenses killing in wartime. But he fails to show exactly how the Judaic textual tradition supports this last assumption, that torture is a less severe violation of a human being; nor does he show the Judaic roots of subsuming torture under killing. This lack of support is troubling philosophically because the notion of severity is inherently vague: claiming a qualitative difference between the violations torture and death pose to a person's rights can

individual guilt, and punishing them beyond the letter of the law.

35. See Broyde, *Only the Good*, *supra* note 28; Broyde, *Jewish Law and Torture*, *supra* note 28; Broyde, *Just Wars*, *supra* note 30.

36. Broyde, *Jewish Law and Torture*, *supra* note 28. See discussion of this conclusion at Zakheim, *supra* note 4, at 18.

37. Broyde, *Only the Good*, *supra* note 28, at 4. A few sentences earlier, Broyde states, “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.”

38. *Id.* at 5. He makes a similar move from greater to minor in Broyde *Just Wars*, *supra* note 30, at 4.

only be vacuous.³⁹ And legally this omission is vexing insofar as Broyde relies upon the *halakhic* category of the *rodef*, a person who pursues another with lethal intent. He rightly notes that *halakhah* asserts that every Jew is obliged to intervene to save an intended victim from a pursuer by using nonlethal force, although if this would not be successful to save the victim, lethal force is to be used.⁴⁰ Yet Broyde does not show that every or any particular captive constitutes a *rodef* and therefore warrants such treatment. Moreover and surprisingly, Broyde invokes *rodef* legislation inconsistently. In one place he asserts that these laws have no relevance whatsoever to warfare, and in another he insists that these very laws apply equally “to the defense of a group of people . . . [and] to the defense of a single person.”⁴¹ These philosophical and legal problems hamstringing his overall argument that Judaism permits torture.

On the other hand, Broyde is careful to say that Judaism does not obligate torture. Indeed, he asserts that permitting torture does not mean it is a wise public policy.⁴² He defers to the wisdom of military strategists and politicians to decipher when, precisely, torture should be employed—a reliance that begs the question, especially given the recent track record of the United States’ war against and within Iraq. His desire, it seems, is for torture to be a legally permitted weapon in the nation’s defense arsenal.

39. See MATTHEWS, *supra* note 29, at 32ff.

40. Broyde, *Only the Good*, *supra* note 28, at 5, (citing Shulchan Aruch, *Choshen Mishpat* 425:1). In Broyde, *Just Wars*, *supra* note 309, at 33, n. 30, he interprets this same *halakhah* dramatically differently: “Jewish law compels a Jew to take the life of a pursuer (Jewish or otherwise) who is trying to take the life of a Jew.” Here Broyde dismisses this interpretation by silencing the *halakhah*’s insistence that nonlethal intervention be used first and foremost. Maimonides insists that such over-aggression is tantamount to murder (Mishneh Torah, *Rotzeach U’Shmirat Nefesh* 1.13). Other classical sources that preference nonlethal intervention include BT *Sanhedrin* 74a; Mishneh Torah, *Rotzeach U’Shmirat Nefesh*, 1.8; *Piskei haRosh* to BT *Baba Kama* 3:13, 126a; and Shulchan Aruch, *Choshen Mishpat* 421:13.

41. In regard to the former, Broyde, *Only the Good*, *supra* note 28, at 3, states

War is thus not the law of pursuer writ large, and it is not the rules of *ba ba-machteret* [laws about anticipating a supposedly lethal attacker, extrapolated from *Exodus* 22:1; see also BT *Sanhedrin* 72a; Rashi at *Exodus* 22:1 and at BT *Sanhedrin* 72a, *s.v.*, *mai tama d’machteret*; MT *G’neivah* 9.7] albeit in a bigger home.

For the latter, see Broyde, *Just Wars*, *supra* note 30, at 9, especially leading up to note 30. See discussion in Crane, *supra* note 22, about the problems of extending *rodef* legislation, pertaining as it does to personal intervention to save an intended victim, to governmental agencies (e.g., militaries, interrogators).

42. Broyde, *Only the Good*, *supra* note 28, at 3; Broyde, *Jewish Law & Torture*, *supra* note 28.

2. Requiring Torture

Another perspective in the protorture camp is one that obligates torture as a tactic of national defense. The respected and prolific scholar J. David Bleich champions this perspective. Even though torture “deprives the victim of the essence of humanity; it strips a person of dignity and renders him or her bereft of autonomy,”⁴³ Bleich nevertheless figures that “there is license, and perhaps even an obligation, to apply torture, if necessary, in order to elicit the requisite information” from “an innocent [sic] non-Jew in possession of information regarding a ticking bomb.”⁴⁴ He reaches this dramatic conclusion through both *halakhic* and general legal reasoning.

Bleich begins from the premise of “the ticking bomb.” He describes the scene as follows:

Imagine a scenario in which a terrorist is known to have information regarding the location of a weapon of mass destruction, e.g., a chemical, biological or nuclear bomb, that has already been armed and is set to explode imminently. Explosion of the weapon will assuredly cause the death of countless thousands of innocent victims. Unspeakable tragedy can be averted only if the terrorist discloses where the bomb may be found so that it can be disarmed and rendered harmless in a timely manner. But the terrorist refuses to cooperate. May one morally apply physical duress rising to the level of torture in order to elicit essential information that will save thousands of innocent lives?⁴⁵

Even this description itself, laden as it is with biased terms (e.g., terrorist, innocents, unspeakable tragedy), already inclines toward a particular stance and away from balanced deliberation.⁴⁶ It also assumes

43. Bleich, *supra* note 4, at 89. See similar sentiment *id.* at 96.

44. *Id.* at 111. He claims that “the same line of reasoning yields an identical result even in cases in which the terrorist was not at all complicit in constructing or arming the bomb but merely possesses detailed knowledge of the actions of others.” *Id.* at 107. Earlier he says that torture is a permitted, if not required, tactic. *Id.* at 105, 106, 107.

45. *Id.* at 94. He offers two variants of this scenario at page 96. The first “classic example is that of a fanatic who has set a hidden nuclear device to explode in the heart of a major metropolis and only he knows where the bomb has been secreted. The device has been timed to explode imminently with the result that there is no time to evacuate the innocent populace.” *Id.* at 96. The second “involves a scenario in which a bomb has been placed in one of several hundred school buildings. It is impossible to evacuate all of the schools but only the terrorist knows which school has been targeted.” *Id.* He assumes that the solution to both scenarios is the same: “In each of these examples torture is the only available means to elicit the information necessary to save innocent lives.” *Id.* at 97. See also the variant of someone who knows about the bomb but did not plant it. *Id.* at 97 & n. 37.

46. For critiques of these biased hypotheticals, see MATTHEWS, *supra* note 29; REJALI, *supra* note 3; Luban, *supra* note 15, at 225; The Use of Torture or Lesser Forms of Coercion to Obtain

that the captive has accurate information and will divulge same—albeit only under duress. This raises the issue of certainty, a question Bleich acknowledges but dismisses later on.⁴⁷ It similarly assumes that the torturer's compatriots will have the capacity to disarm the bomb once found, an assumption that is more technical than legal in nature. The important question he raises here about the moral permissibility of torture he eventually abandons when he restates the ticking bomb scenario. There is no moral question in these later versions, for torture is assumed to be the *only* tactic available to elicit the necessary information.⁴⁸ Similar to Broyde, Bleich's assumption here betrays a poor understanding of properly trained expert interrogators, for they always have at their disposal a variety of nonlethal and nonviolent techniques to inspire a captive's trust and eventual cooperation. Bleich stacks his scenario in such a way that his interrogators' toolboxes are completely exhausted and torture the *only* tactic left to try. For these reasons Bleich's hypothetical ticking bomb is so contrived and is so much more fantasy than reality that its rhetorical utility is undermined.

Moreover, his imagined scenario challenges his major plank that torture can protect against imminent danger. Insofar as torture takes time to implement and would take time to evoke accurate and actionable data, it would have to be deployed as a method of first resort. For surely were torture a method of last resort, it would be rendered too late to prevent the supposedly impending disaster of the ticking bomb scenario. And already being too late to prevent the disaster, torturing such a captive would be superfluous, which would be philosophically unjustifiable and legally inexcusable.

Bleich disagrees; he thinks making torture legally excusable is both plausible and defensible. To do this, he welcomes the practice of *post facto* jury nullification of punishments that would otherwise be meted out to a torturer.⁴⁹ Though this legal move may excuse torture, it neither justifies it nor establishes precedent. Indeed, "an approach that does not sanction torture *ex ante* but allows for *post factum* ratification does have one positive aspect, *viz.*, it does not require the law to sanction the unsanctionable but in egregious cases permits society to tailor its

Information from Prisoners, Resolution of the Central Conference of American Rabbis, 116th Annual Convention. Houston, TX (Mar. 2005), available at <http://data.ccarnet.org/cgi-bin/resodisp.pl?file=torture&year=2005> (last visited Jan 25, 2011).

47. Bleich, *supra* note 4, at 105.

48. See *supra* note 45.

49. "A jury may do so simply because its members have come to believe that in the case before them the interests of justice are better served by withholding penal sanctions." Bleich, *supra* note 4, at 95.

response to the circumstances of the case.”⁵⁰ Such an approach would devolve the responsibility of deciding when and who to torture into the “hands of police interrogators, security officials or military commanders” on a case-by-case, *ad hoc*, basis.⁵¹ Interrogators would torture captives “only if they are convinced that their breach of legal norms is so obviously justified that no jury would impose criminal sanctions.”⁵²

Why does Bleich stipulate this moment of conscience? Were an interrogator truly racing against a ticking bomb, such conscientious meditation about a future jury’s deliberation would undoubtedly consume precious time and mental energy—and could distract an interrogator altogether. Insofar as this step requires the interrogator to imagine a future jury and its findings, Bleich places yet another layer of unreality onto the hypothetical bomb scenario. Fantasies aside, even if this policy did not put torture *de jure* into the tool box of interrogators, it would place it there *de facto*. As such, torture would have *a priori* legal sanction. Though Bleich considers jury nullification plausible he does not ground it with Judaic roots until the very end of his argument.⁵³ Might this be because the institution of juries does not exist in the Judaic legal tradition?

His construction of Judaic reasons to require—and not merely permit—torture begins with the invocation of the Talmudic principle that one who saves a single life is regarded as if one has preserved the entire world.⁵⁴ This principle articulates the competing values embodied in the ticking bomb scenario. On the one side are the values of human freedom, autonomy and dignity, and on the other side is the duty to preserve life. Bleich expresses no surprise, then, that the Geneva Convention proscribing torture prioritizes the former over the latter. In contrast to these “contemporary Western mores,” Bleich understands Judaism to posit “a duty of rescue that is virtually absolute in nature,” and this duty triumphs over all other values.⁵⁵ He points to the *rodef* as the fundamental *halakhic* construct that concretizes this life-preservationist principle. When he views the classical sources (woven together with American folklore) about interventionist pursuit of a lethal

50. *Id.* at 96. Such an approach was considered yet ultimately rejected by the Israeli Supreme Court when it ruled on torture in 1999.

51. *Id.* at 95.

52. *Id.*

53. He could have referenced the *halakhic* jurisprudential principles of *lehatchilah lo (ab initio)* and *b’dyavad (post facto)*. See discussion at BT *Berachot* 15b.

54. BT *Sanhedrin* 37a. Cited in Bleich, *supra* note 4, at 96.

55. Bleich, *supra* note 4, at 97, 99.

aggressor, he sees “a simple principle, *viz.*, society must take whatever measures may be necessary in order to eliminate violence.”⁵⁶ This principle and the laws instantiating it lead him to conclude that, “the law of pursuit sanctions any form of bodily force, including mayhem, when necessary to preserve the life of the victim.”⁵⁷ Like Broyde, Bleich provides no adequate argument for why *rodef* legislation that pertains to individual action is or can or must be applied to society as a whole.⁵⁸

Bleich then moves on to suggest that if martyrdom is required of Jews by *halakhah*, so too is torture.⁵⁹ This logic, however, flips torture on its head: insofar as *halakhah* obliges Jews to *suffer* torture at the hand of Gentiles, Bleich thinks Jews are permitted *to* torture. He argues that the *halakhic* permission to apply duress to restrain someone from transgressing religious laws also permits the use of torture.⁶⁰ Though he acknowledges that this duress is applied to those who wrongfully observe religious holidays, he fails to demonstrate how, or that religious noncompliance is (sufficiently) analogous to the ticking bomb scenario.

Next, Bleich imposes a Jewish notion of rationality upon a supposed terrorist to insist that even a terrorist is duty bound to rescue innocents. Just as a rational Jew is to expend resources, including enduring physical pain, to fulfill commandments (which are, he admits, religious and not militaristic duties), so too the “infliction of physical pain below that threshold [of expending a person’s entire fortune] is warranted as a means of compelling the obligation of rescue . . . in the case of the ticking bomb.”⁶¹ This argument untenable, for it assumes both that a captive hell-bent to murder innocents is a rational agent, and

56. *Id.* at 101.

57. *Id.* at 105.

58. On this problematic extension of personal laws to the collective, *see* Crane, *supra* note 25.

59. Bleich, *supra* note 4, at 106, reaches this position by reading BT *Ketubot* 33b (a discussion about which is worse: limited or limitless lashes) and stating,

it is thus clear that the consensus [!] of halakhic opinion is that, when martyrdom is required, acceptance of torture is [required] as well. Since there is no provision in Jewish law mandating acceptance of any sanction more severe than death, it follows that Jewish law does not regard torture as more onerous than death. By the same token, it follows that when preventative measures, including mayhem and death, may be imposed in order to restrain a pursuer, torture may be employed as well.

Torture, though, is not meant to restrain someone on the loose; torture is applied to someone already captured, unarmed and controlled. There may be situations where egregious force is used to prevent a *rodef* from fulfilling his or her lethal intent, but this is not the same as torture *per se*. And contrary to Bleich’s insistence otherwise, the Talmud (BT *Ketubot* 33b) expresses no consensus on this issue; it concludes, “the difficulty remains.”

60. BT *Baba Kamma* 28a; *Netivot ha-Mishpat* 3:1, *Minchat Chinukh* 8. Bleich, *supra* note 4, at 106-07, and *see* discussion in *id.* at 120 & n. 26.

61. Bleich, *supra* note 4, at 108.

that whatever this captive divulges is rational, even actionable, information.

Finally, Bleich invokes the *halakhah* permitting physical duress to secure a recalcitrant husband's assent to grant his wife a divorce document (*get*).⁶² He combines this law with Maimonides' view that the human psyche is a theatre of "war" in which the "good inclination" and the "evil inclination" battle for domination and manifestation in human action. Because the "evil inclination" lusts after pleasure and abhors pain, if pressured sufficiently it would renounce its pursuits. "Thus, in terms of Jewish teaching, physical duress designed to assure compliance with divine law does not at all compromise individual autonomy. Quite the contrary, it serves to eliminate impediments to expression of that autonomy."⁶³ That is, Bleich ultimately understands torture as a therapeutic tool for the captive: it cleanses the tortured of impediments that otherwise block the captive's presumably rational and autonomous pursuit of saving innocent lives. Torture not only heals the tortured, it saves the tortured from the "evil inclination," and rehabilitates the captive to a more righteous existence.

Bleich acknowledges that the aforementioned Jewish sources permit torture only of fellow Jews. In regard to torturing Gentiles, he offers these arguments. Though the Noahide Laws do not explicitly oblige Gentiles to intervene to save intended victims from a lethal aggressor, Bleich follows two modern legal scholars who opine that on the whole Gentiles have the discretion to intervene.⁶⁴ From this thin foundation Bleich claims that Gentiles may and perhaps must intervene to prevent violence; indeed, "a non-Jewish terrorist intent upon an act of aggression may be thwarted by any available means."⁶⁵ He then asserts that the last of the Noahide Laws, requiring the establishment of laws (*dinin*), licenses and even obliges torture.⁶⁶ According to Maimonides, failure to punish perpetrators constitutes a capital offense; moreover, Gentile courts "must be established in order to judge violators and also '*le-hazhir et ha-am*—to admonish the populace."⁶⁷ Gentile courts,

62. He cites Mishneh Torah, *Gerushin* 2.20 at Bleich, *supra* note 4, at 108. Maimonides rules here that a Jewish court anywhere and at any time may hit the husband until he says "I want" to divorce his wife (*mekin oto 'ad sh'yomar rotzeh ani*). Such a *get* would be *kosher*; that is, ritually acceptable. This law is examined in greater detail below.

63. Bleich, *supra* note 4, at 109.

64. Bleich, *supra* note 4, at 110 n 31 (citing Joseph Babad, *Minhat Hinukh* 296 (19th-century Galicia) and R. Shlomoh Zevin, *Le-Or Ha-Halakhah*, 2d ed., p 17 (20th-century Israel)).

65. *Id.* at 110.

66. *Id.* at 111.

67. *Id.* (citing Mishneh Torah, *Melachim* 9:14).

Bleich reasons, must deal with both the case at hand and deter future criminal activity. Bleich then converts this rule for courts to individuals, saying that even though

the potential [gentile] informant may be innocent of any wrongdoing and not be bound by a duty of rescue, he nevertheless has an obligation to prevent a crime from taking place. Hence he can be compelled to divulge the information necessary to effect that end.⁶⁸

Thus in Bleich's view, Judaism condones, promotes and even requires Gentiles torturing Gentiles so as to punish and perhaps prevent criminal activity.

Bleich finally returns to the notion of legitimizing torture *post facto*. Acknowledging that his reasoning is "highly novel and probably not reflective of mainstream halakhic opinion," he argues that claiming a *hora'at sha'ah*, a "constructive" emergency measure, "is similar to the doctrine of necessity in that it is an *ad hoc* acceptance of a lesser evil over a greater evil not incorporated in any statutory code."⁶⁹ In these emergency situations, shedding blood is permitted "for the purpose of preserving the entire Jewish people."⁷⁰ It would be necessary, he reasons, to torture this captive because it is the lesser evil, and this will be permitted (in the future) by a *bet din*, a Jewish court. This lesser evil argument is inherently vague, if not dangerous, because it empowers unauthorized people (interrogators, officers and commanders) to judge whether a circumstance has reached this critical stage of "necessity." Only Jewish courts have authorization to make this assessment (see below), and they do so only after due deliberation. This unorthodox reliance upon individual perception and interpretation provides no real, legal or philosophical limits to when or which torture would be deployed.⁷¹

68. *Id.* at 112.

69. *Id.* at 113-14. He bases this line of reasoning on R. Abraham Isaac Kook's reading of Esther's adulterous relations with King Ahasuerus (see BT *Sanhedrin* 74b), proposed in *Mishpat Kohen* 143 & 144, § 6-8. Broyde, *Only the Good*, *supra* note 28, at 4 also entertains the notion of *hora'at sha'ah*. For Broyde this notion refers to "general reality, which is that wartime allows for the suspension of many provisions of Jewish law." See below for further examination of this principle allowing exceptions to normal procedures.

70. Bleich, *supra* note 4, at 113. Bleich apparently subsumes torture under bloodshed or killing. He also supports Alan Dershowitz's call for "torture warrants." [Alan K. Dershowitz, *The Case for Torture Warrants* 2002, <http://www.alandershowitz.com/publications/docs/torturewarrants.html> (last visited Dec. 26, 2010)]. It should be noted that Dershowitz's argument does not rely explicitly or even implicitly on Judaic sources, despite Bleich's claim that there is Judaic precedent for such warrants.

71. Recent U.S. history demonstrates that a leader may decipher data incorrectly or be given inaccurate data and nevertheless declare a state of emergency that would permit torture. For other

Before leaving the protorture camp, we should note dissensions in this camp about the ethics of warfare. Whereas Broyde suspends ethical sensibility during war to preemptively permit torture, Bleich retains some ethical sensibility in war yet allows *post facto* protections for those who torture. For the one, war is inherently devoid of ethics, and laws have few if blunted teeth therein; for the other, war retains ethicality only insofar as laws (theoretically) function and can be bent back on themselves to allow if not require what they otherwise prohibit in different circumstances.

There is also a substantial differential between Broyde and Bleich in regard to applied theology. Bleich avers that “morality is the product of the halakhic system which itself is the embodiment of divine revelation.”⁷² His reading of *halakhah*—however biased it may be—must perforce be moral; it cannot be otherwise. It then follows that lest they be immoral and also lack divine imprimatur, military strategy and tactic should comport to his position. Broyde, by contrast, holds that “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.”⁷³ Reason, not revelation, is thus responsible to discern what is (more) moral within extant *halakhah*. Yet Broyde is reluctant to “impose external moral and ethical frames of reference onto the corpus of Jewish law” for “*halakhah* speaks for itself.”⁷⁴ He would rather emulate the Talmudic wont of balancing competing values and interests, and in this particular instance and despite his fractured efforts, he finds that on balance the *halakhot* of warfare permit torture. So though Bleich understands torture to have divine imprimatur and Broyde thinks it is the most reasonable among legally permitted warfare tactics, both nonetheless approve of torture as such. Not unlike antitorture arguments, protorture arguments skew and contort the Judaic textual tradition by gleaning support for positions apparently chosen prior to an honest assessment of the tradition. In sum, neither camp has yet developed a robust reading of the Judaic textual

arguments against this line of “lesser evil” reasoning, *see* MATTHEWS, *supra* note 29, especially ch. 4.

The Israeli Supreme Court (1999): ¶ 36, *see* note 21 *supra*, found the necessity defense to be a reactive judgment based on the peculiarities of an immediate situation. The court also found that the necessity defense cannot proactively authorize torture; more on this below. MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* 136-43 (Princeton Univ. Press 2004) also dismisses necessity defense arguments.

72. Bleich, *supra* note 4, at 114.

73. Broyde, *Only the Good*, *supra* note 28, at 5.

74. *Id.*

tradition that does not exaggerate one way or another.⁷⁵

II. TWISTING TEXTS

I now turn to the textual tradition itself in search of sources that speak about torture directly. A critical question here is how the textual tradition defines torture. Does it, for example, understand torture as I defined it above: physical and psychical duress applied by government agents in search of conversion, confession, capitulation or corroboration? How does the textual tradition tighten, if you will, this definition of torture? Subsequent to this definitional project, how does the textual tradition valence torture: is it something commendable or condemnable? And how do the rabbis, embedded as they were in real history, understand its benefits and dangers? It is my hope that a picture of the textual tradition's view(s) on torture can be sketched without imposing preconceived desired ends or exaggeration.

The earliest textual mention of torture *per se* may be found in the book of Judges. When the Israelites engaged in battle against the Canaanite king Adoni-Bezek, they overwhelmed his troops and, despite his attempt to flee, they captured him. The Israelites then cut off Adoni-Bezek's thumbs and big toes.⁷⁶ As it is unclear from the Biblical text whether this was punishment for warring against Israel or if it was to induce contrition, rabbinic commentators offer diverging interpretations of this event. Some assert that this was done primarily because cutting off thumbs and feet was commonly done by Canaanite kings at that time; that is, Israel did to Adoni-Bezek only what he admits to imposing upon others.⁷⁷ Some rabbis claim that this was done so as to spread a

75. Both camps demonstrate Nietzsche's "art of reading badly" insofar as they do not read the textual tradition honestly.

76. Judg 1:6. Some rabbis connect this treatment to the ritual of consecrating and anointing Jewish priests by covering the right ear, right thumb and right toe with blood (e.g., Exod 29:20; Lev 8:23-24, 14:14, 17, 25, 28); see commentary in *Metzudat Zion* at Judg 1:6 (co-authored by R. David & Hillel Altschuler in the early 18th century). Cutting off the hand is found in *Deuteronomy* 25:12. Cutting off hands and feet was considered an appropriate method of treating criminals already executed (2 Sam 4:12), which contrasts with the earlier rule to bury corpses before nightfall (Deut 21:22-23). 1 *Maccabees* 7:47 and 2 *Maccabees* 15:30 record that Nicanor's head, hand and shoulder were severed from his dead body and displayed in the gates of Jerusalem; this is reinforced by the rabbis in BT *Ta'anit* 18b. Mention of a cut beard (Jer 9:25, 25:23) is more descriptive than prescriptive punishment.

77. Judg 1:7. See Rashi there. See also *Pesikta Zutra (Lekach Tov)*, *Devarim, Re'eh*, 24b, which says that, "just as they ruled over each other, so shall we rule over them." Tracy M. Lemos, *Shame and Mutilation of Enemies in the Hebrew Bible*, 123 *J. BIBLICAL LITERATURE* 225, 236 (2006) adds that Adoni-Bezek's treatment of other kings—including forcing them to crouch under tables to vie for scraps of food (Judg 1:7)—shamed and dehumanized them to be the equivalents of begging dogs at the king's knee. Lemos also notes that thumbs and toes are "the parts of the

lesson to other kings who were tempted to war against Israel.⁷⁸ Others suggest that Adoni-Bezek's thumbs were cut off so as to prevent him from grasping a sword, and his big toes were lopped off so that he could not flee.⁷⁹ Though some sages view this treatment as appropriate punishment for previous crimes, others laud it as preventing future Israelite suffering.⁸⁰ Regardless if he was treated this way for retribution, deterrence or prevention, there is agreement among the rabbis that Adoni-Bezek was tortured.

A more famous instance of early torture regards Samson, also found in Judges.⁸¹ It was none other than Delilah, hired by the governing Philistines, who repeatedly bound Samson and had him assaulted—all in search of information about the source of his surprising strength. Time and again Samson resisted capitulating and withheld the

body that most clearly distinguish humans from the members of the animal kingdom." *Id.* at 237.

78. Ralbag at Judg 1:6.

79. See comments by Avraham Shoshanah at Judg 1:6.

80. Nosson Scherman's anthology of rabbinic commentary augments Ralbag by asserting a historical distancing from this divinely inspired torture: "In no other case do we find Jews mutilating their opponents, as they did to Adoni-bezek. . . . The history of the Jews proves that they did not take this as a precedent, for they did not treat any other captives this way." NOSSON SCHERMAN, *THE PROPHETS: JOSHUA & JUDGES* 119 (Mesorah Publications 2000). Malbim, by contrast, asserts that Adoni-bezek died a natural death in Jerusalem, which Scherman interprets to mean "this shows how much Judaism values sincere confession of sin, even by its non-Jewish enemies" *Id.*

Richard Rogers, a Christian preacher in Wethersfield in Essex from 1575 to 1618, understands this ancient incident both demonstrates the divine imprimatur for torture and instructs its use against contemporary malefactors:

[W]hy the Israelites did not kill this tyrant Adonibezek out of hand, but reserve him to this bondage, and to die so? The answer is, God giving them commandment, not to spare the Canaanites, and he having been more cruel than some other; God (to be sure) inclined their hearts to do so, both that he might have the measure that he had offered other, and also that it might be known, that he died not in war, which had been some glory to him; it being unmeet, that so cruel a person should have so honest a death. . . . [From this] we may learn that it is meet that monstrous doing and villainies, with the persons who wrought them, should be made odious according to the desert of them. As murderers of Princes, the Lords anointed, to be put to the extremest torments before their fearful death. As we have been certified of the exquisite tortures that were lately executed in France upon a popish and base fellow, which imbrued his hands in the blood of his Sovereign, so willful and common murderers to be hanged up in chains to the view of all, for the unnatural killings of their neighbor or companion. And so it is meet, that other malefactors should be dealt with all according to their wicked ways, and according to the commandment of God, that evil may be taken away from the land, as it was said of Joab (I Kings 2:31). Our laws have well provided for many such: and if it pleased our Governors to think well of it, that Atheists, Blasphemers and Adulterers might have their share among the rest according to their deserts, the case would be much better with us by many degrees at this day.

Richard Rogers, *A Commentary Upon the Whole Book of Judges* Third Sermon: 26-27 (Felix Kyngston 1615).

81. Judg 16.

desired information. Delilah nonetheless persisted, pestering Samson constantly about this issue to compel him until “it wearied him to death.”⁸² Some rabbis interpret this to mean that she resorted to sexual relations to compel him.⁸³ Indeed, she even manipulates him emotionally until Samson finally relents and divulges his secret. Delilah then shaves his hair, and he became powerless to resist capture.⁸⁴ The Philistines gouge out his eyes, bind him to a grinding machine in the prison house, and abandon him.⁸⁵ The Philistines kept Samson alive to serve as a public spectacle: he was living proof of their god’s deliverance from a scourge.⁸⁶ Samson then turns the Philistine’s celebration on its head by overturning the pillars of their temple, and in that moment killing more than he did during his entire lifetime, including himself.⁸⁷

The theo-political motivation behind Delilah’s treatment of Samson was to prove a god’s relative redemptive might. At the practical level, she did not torture him in search of conversion, corroboration or confirmation; nor did she torture him to prevent him from living or to punish him for prior crimes. Rather she sought his confession about the source of his strength, and through her torturous guiles she succeeded. It might be tempting to read this text as proving torture’s ultimate efficacy in extracting actionable information. On the other hand, insofar as it took four attempts before accurate information was obtained through emotional and sexual pressure, it may also be understood to speak about torture’s inefficacy and eventual futility.⁸⁸ That is, after the information was eventually divulged, the society sanctioning torture was ultimately and massively attacked by the victim. Torture, the text seems to say, ultimately backfires.

Yet torture did not die with Samson. King Zedekiah was besieged in Jerusalem by Nebuchadnezzar from 588 to 586 BCE. When the city’s walls were finally breached, Zedekiah fled in the middle of the night only to be captured and brought to trial. There, his sons were slaughtered before his eyes and his eyes were gouged out; he was then

82. Judg 16:16.

83. See comments by Radak and *Metzudat David* here.

84. Judg 16:19-20.

85. Judg 16:21. Early and later Talmudic sages opine that this blinding punishment was justified because Samson was visually attracted to Philistine women. BT *Sotah* 9b.

86. Judg 16:23ff.

87. Judg 16:30. Samson’s prayer to die parallels such prayers by Elijah (1 Kings 19:4) and Jonah (Jonah 4:8).

88. See MATTHEWS, *supra* note 29, about the innate sexual dimension of torture. See also Weintraub, *supra* note 15.

fettered and taken to Babylon where he was to fester in prison until death.⁸⁹ Certainly being forced to witness the murder of one's children and then being blinded constitutes torture, and according to the rabbis, these punishments were rightfully inflicted on Zedekiah.⁹⁰ Other sages construe this incident as a cry to be killed before witnessing such treatment of one's children.⁹¹ That is, such torture would be worse than death—a theme we will explore momentarily.

Another form of torture, cutting off someone's hand, persisted well into the rabbinic period and was understood to be an appropriate means to punish someone who regularly threatened to hit others.⁹² Medieval legists reinterpreted this punishment away from its literal meaning so that such an aggressor was to be fined monetarily.⁹³ This shift from physical to fiscal punishment may articulate rabbinic acknowledgment that such torture was ineffective and/or an opinion that such torture does not belong in the repertoire of rabbinic courts. Either way, this shift demonstrates an increasing allergy toward torturous physical punishment.

On the other hand, the rabbis envisioned another way to torture—albeit to death. This tactic involves placing a recidivist criminal in a tiny cell and feeding him “bread of adversity and water of affliction” until his intestines contract and his stomach bursts.⁹⁴ Many rabbis interpret this tactic to permit hastening the death of an unrepentant transgressor who

89. Jer 52:1-11; 2 Kings 25:1-7.

90. See BT *Sotah* 10a.

91. *Sifrei Bamidbar*, 91, s.v., *lo ochel*.

92. See Rav Huna's position at BT *Sanhedrin* 58b. Rashi insists that this is fitting punishment for a recalcitrant aggressor. See Rashi, BT *Sanhedrin* 58b, s.v., *ketz yada*. Elsewhere, other rabbis approve of hand removal for those men who engage in autoarousal. See BT *Niddah* 13b.

93. Tosafot, BT *Sanhedrin* 58b, s.v., *ketz yada*. Yom Tov ben Avraham Ashvili (16th-century Spain) also champions this interpretation: hand cutting means fine. See *Chidushei HaRitba*, *Niddah* 13b, s.v., *iba'ei laho*. Joseph Karo (16th-century Israel) disagrees. He would rather the punishment fit the crime up to the level permitted by Toraitic law. If the need of the hour demanded such a severe punishment, Karo would permit this penalty. He cites the case of R. Eleazar, son of R. Simeon, who was pressed to be an informant for the state (at BT *Baba Metzia* 83b) to illustrate that sometimes the state demands injustice. Though Karo permits doing the dreaded deed in that hour of need, the people's intentions should always be inclined toward heaven. See *Beit Yosef*, *Choshen Mishpat*, 2, s.v., *af'al*. Karo abandons this ruling altogether in his more authoritative *Shulchan Aruch*.

94. This gustatory punishment is first mentioned in M *Sanhedrin* 9.5. The “bread of adversity and water of affliction” hearkens to *Isaiah* 30:20. The captive here is someone liable for repeatedly transgressing a prohibition (or several prohibitions) whose punishment is excision, but is to be fed barley instead. See discussion in the Gemara at BT *Sanhedrin* 81b, as well as at MT *Sanhedrin* 18.4. This punishment is also meted out to a murderer whose actions were observed by only one witness or by disjoined witnesses. See discussion on the next *mishnah* at BT *Sanhedrin* 81b.

deserves flagellation, if not excision, for his crimes. One sage, however imagines such an individual to be one who desires to sin, and since repentance would thus be plausible for this person it would be impermissible to hasten this person's death.⁹⁵ This minority opinion holds that such treatment unfairly condemns to death people who would otherwise convert from their waywardness if given sufficient time and support. And yet we should note that the rabbinic majority insist that this form of torturous execution is not applied to first-time criminals; only those who have repeatedly (the rabbis disagree if this means three or four times) transgressed and been found guilty by a *bet din* are to be given this treatment. That is, this would be a method of last, not first, resort. Maimonides echoes this concern when he rules that this barley treatment is not used even upon those guilty of other capital crimes.⁹⁶

On a more abstract point, the notion that living painfully is worse than death arches back to King Saul. When Saul was morbidly wounded by Philistine bowmen he asked his loyal guardsmen to kill him lest he be abused by the Philistines when they captured him. After his officer refused to kill him, Saul took his own sword and fell upon it, after which the officer also committed suicide.⁹⁷ Saul's anticipation of excruciating pain warranted, for him at least, ending his life. That a painful life is too onerous and should be ended is reflected in many stories about suffering rabbis.⁹⁸

95. See opinion of R. Yaakov at BT *Sanhedrin* 81b.

96. Misheh Torah, *Rotzeach U'Shmirat Nefesh* 4.5. See discussion in Rosenberg & Rosenberg, *supra* note 26, at 1026-27.

97. 1 Sam 31:3-5. Other instances of Biblically-recorded (calls for) suicide or assisted-suicide include Abimelech (Judg 9:54); Samson (Judg 16:30); Ahitophel (2 Sam 17:23); Zimri (1 Kings 16:18).

98. When Judah HaNasi was suffering from something that caused him to go to the privy frequently, his handmaiden interrupted prayers that supposedly kept him alive so that he could die. BT *Ketubot* 104a. Honi the Circle Maker could not conceive of living without companionship and thus prayed for his own death and died. BT *Ta'anit* 23a. Such stories, obviously, do not refer to torture *per se* but to physical and emotional suffering. And yet if these stressors were too difficult to bear, it stands to reason that physical and emotional pain impressed upon a captive during torture would also be (if not more so) unbearable.

It would be curious how Emmanuel Levinas would respond to these texts, especially in light of his brief essay, "Useless Suffering." Emmanuel Levinas, *Useless Suffering*, in *THE PROBLEM OF EVIL: A READER* 370 (Mark Larrimore ed., Wiley-Blackwell 2000). There he asserts that the suffering of the other is meaningless for it is, essentially, useless; it has no purpose *per se*. The "suffering in the other" is unpardonable to me and solicits my intervention. My suffering, by contrast, may be congenitally useless but can take on meaning if and only if it becomes "a suffering for the suffering—be it inexorable—of someone else." *Id.* at 374. Though perhaps Levinas would say that viewing a torture victim would spark "the just suffering in me for the unjustifiable suffering of the Other," what might he say about viewing my own suffering as unjustifiable and not worth enduring? *Id.* Suicide, he says elsewhere, presupposes a being "already capable of sacrifice"—that is, of living—for the Other. EMMANUEL LEVINAS, *TOTALITY*

Even some punishments are too painful to bear. For example, the rabbis think that suffering lashings would inspire idolatry, which itself is so heinous a crime that a Jew should rather be killed than commit it.⁹⁹ The rabbis go on to insist that there is a qualitative difference between beatings that have a limit, such as those meted out by Jewish courts, and beatings that have no limit, such as those done by Gentiles.¹⁰⁰ This rabbinic discussion brings forward in history a Biblical concern that excessive punishment inherently degrades the captive in the eyes of the punisher.¹⁰¹ An early twentieth-century rabbi put it bluntly: “one cannot generalize and say that all humiliation is punishment, since there is also private humiliation, [but] one may generalize and say that all punishment is humiliation. . . . [Indeed,] *the purpose of punishment is humiliation*.”¹⁰² To the degree that the rabbis view torture as a form of punishment, it must necessarily incorporate humiliation. Further, Jean Améry says, “torture has an indelible character. Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected.”¹⁰³ If he is correct, then it stands to reason that the un-killed tortured captive should anticipate a life of persistent humiliation and degradation. It would be a life allergic to itself, noxious of its existence, ever conscious and ashamed of its tortured past and torturing future.¹⁰⁴

AND INFINITY: AN ESSAY ON EXTERIORITY 149 (Alphonso Lingis trans., Duquesne Univ. Press 1961).

99. BT *Ketubot* 33b. It should be noted that this is a counterfactual hypothetical about Hananyah, Mishael and Azaryah being threatened with lashes instead of (what they were indeed threatened with) death (by Nebuchadnezzar). These three characters are identified with Shadrach, Meshach and Abednego, mentioned in *Daniel* 3:12-23. About being killed instead of engaging in idolatry, see BT *Sanhedrin* 72-75.

100. BT *Ketubot* 33b. In his translation of the Talmud, Steinzaltz interprets this to mean that beatings without end constitute torture.

101. Deut 25:3. Irrespective of the crime committed, the punished captive ever remains “your brother.” This reinforces the innate critique of torture expressed in the case of Adoni-Bezek mentioned, *supra* text accompanying notes 76-80, namely that torture in and of itself degrades.

102. R. Isaac Jacob Reines, *Sefer Haarakhim* 49-51 (1926). Emphasis added. The intervening section includes this statement:

For punishment is meted out for an improper deed, and when someone is punished, the punishment attests to him [i.e., his character] and his wicked deed, and this is itself a sort of humiliation. Now, if the punishment itself involves suffering of the body, for it is the body that feels the pain of the flogging and so forth, then the humiliation [that accompanies the punishment] involves emotional suffering, for one’s feelings of dignity suffers the punishment that publicly attests to one’s having turned aside from the straight path.

Id.

103. AMÉRY, *supra* note 1, at 34.

104. On nausea, see EMMANUEL LEVINAS, ON ESCAPE (Bettina Bergo trans., Stanford Univ. Press 2003) (1935). On rabbinic notions of shame, see Crane, *supra* note 14 (forthcoming 2011).

Despite these trends away from torture as punishment, rabbinic Judaism does countenance physical duress to evoke a captive's confession or capitulation. To illustrate, a Talmudic rabbi suspected an individual of stealing private property because he saw that person misuse someone else's belongings. To confirm his suspicions, he had this suspect bound, which eventually produced a confession.¹⁰⁵ Binding is also applied to a husband suspected of sexually engaging his menstruating wife.¹⁰⁶ And in order to expedite the dissolution of an obstinate husband's marriage so that his wife would be legally free to marry again, a court may bind him until he says, "I desire it," that is, until he capitulates.¹⁰⁷

Elsewhere, the Talmud rules that someone who alters a marriage or business contract in his favor after it had been signed and witnessed is also subject to being bound.¹⁰⁸ Maimonides says that courts anywhere and at any time may use hitting to extract the willful participation of a recalcitrant husband.¹⁰⁹ Lest one conclude that these texts constitute Judaic endorsement of torture, we should note that elsewhere Maimonides shies away from this treatment when it comes to someone who has changed a marriage contract or business document after it was signed.¹¹⁰ Maimonides's ambivalence about such treatment reverberates among later scholars. While Yom Tov ben Avraham Ashvili holds that a court should merely bind the individual until he capitulates,¹¹¹ Joseph Karo disagrees: a court is permitted both to bind and to strike this person who has altered official documents until the person admits the crime, and moreover, the court should resort to this tactic so true justice prevails.¹¹²

105. BT *Baba Metzia* 24a.

106. BT *Niddah* 25b.

107. M *Arakhin* 5.6. The phrase in question (*kofin oto 'ad sh'amar rotzeh ani*) invariably refers to dissolving a marriage—either through *gittin* (divorce documents) or *halitzah* (the refusal of a woman to wed her dead husband's brother).

108. BT *Baba Batra* 167a.

109. Misheh Torah, *Gerushin* 2:20.

110. Misheh Torah, *Malveh U'Loveh* 27:12.

111. Fourteenth-century Spain. *Chidushei HaRitba*, BT *Baba Batra* 167a, s.v., *kafteha v'ovdei*.

112. Shulchan Aruch, *Choshen Mishpat*, 42.3. The phrase in question (*v'im tzarich l'kof b'al hashtar v'l'hakoto k'dei shyivadah, ye'aseh, k'dei sh'yotzi hadin l'amito*) translates as "if it is necessary to bind the master of the [altered] document, and to hit him so that he admits it [that he changed it after it was signed by witnesses], do so, so that true justice prevails." Ritba would rather a *bet din* avoid employing such methods. See *Chidushei HaRitba*, BT *Baba Batra* 167a, s.v., *kafteha v'ovdei*. Stephen Passamaneck remarks that the Judaic textual tradition "recognizes, without any particular negative comment, the practice of confinement and some sort of physical pressure, though not severe torture, to extract confession in some pecuniary matters." STEPHEN M. PASSAMANECK, POLICE ETHICS AND THE JEWISH TRADITION 155 (Charles C. Thomas

It would still be premature to declare this a protorture stance *per se*. For starters, these laws are on the books: they would have been known to stubborn husbands and deceitful business partners *before* they acted. Second, these methods would apply only to those who have engaged in deceitful business practices or are reluctant to sign divorce documents—as determined by a Jewish court—and not to those who have (supposedly) engaged in any other crimes, such as (attempted) lethal assaults; no laws mandate binding and hitting someone suspected of attempting lethal assault. I want to stress the middle clause, “as determined by a Jewish court,” because such physical duress is only legally plausible in the highly regulated structures of Jewish courts. The decision to use these procedures is not left in the hands of politicians much less interrogators or military personnel. In sum, only judges, in the pursuit of true justice, may authorize the use of these methods—and only for the purpose of securing the capitulation of a man *already* found guilty of obstructing justice. These methods may not be applied willy-nilly upon someone who is merely suspected of possessing information; this treatment would be extrajudicial and illegal.¹¹³

What about extradition? What might the Judaic textual tradition say about the practice of extraordinary rendition, of sending captives to regimes where it is known they will be tortured? While the Judaic system insists on rigorous interrogation of witnesses, especially in murder cases, this is done to ensure that the accused would not be wrongly punished.¹¹⁴ Yet it also acknowledges that lethal punishments are sometimes warranted so as to protect society as a whole. And since other legal systems, such as royal and Gentile systems, function alongside and are even superior to the Judaic system, the sages turned to these other systems when lethal punishments were needed.¹¹⁵ As early as the Talmud, the rabbis made it impermissible to seek justice in Gentile courts.¹¹⁶ Maimonides reinforces this by saying that any Jew

Publisher 2003). See also KIRSCHENBAUM, *supra* note 3.

113. We should keep in mind that there is a difference between a textual tradition and actual history. Though it is unclear whether such methods were actually deployed by rabbinic courts, it is probably accurate to say that in some jurisdictions and at some points in history these tools were utilized; it would be inaccurate to claim that all Jewish courts in every age used these methods.

114. See, e.g., BT *Sanhedrin* 40b.

115. Multiple legal systems have an early provenance: the Torah commands the establishment of a royal government (Deut 17:14-15) to function concurrently with judges (Deut 16:18). On deference to other legal systems, see BT *Avodah Zarah* 8b; Mishneh Torah, *Melachim U'Milchamoteichem* 3.10. See discussion in Yehuda Gershuni, *Extradition*, in JEWISH L. & CURRENT LEGAL PROBLEMS 127, 129 (Nahum Rakover ed., Libr. Jewish L. 1984).

116. BT *Gittin* 88b. A similar sentiment is found at BT *Baba Metzia* 83b and *Midrash Tanhuma, Mishpatim* 3.

who seeks litigation in Gentile courts blasphemes and revolts against the Torah.¹¹⁷ Were both litigants to desire using a Gentile court, Karo would still forbid them: they must resolve their suit within the Judaic legal system.¹¹⁸ Karo also prohibits delivering a criminal to Gentiles.¹¹⁹ On the other hand, if there is no other way of protecting the Jewish community from a criminal's recidivism, Karo conceives it permissible to extradite that individual to Gentiles even if their system is less strict about evidence and the punishments they could impose would be harsher than what *halakhah* mandates.¹²⁰

But other legists disagree with Karo. Maimonides and others follow a Talmudic ruling that grudgingly permits transferring an explicitly identified guilty convict who deserves death according to *halakhah* to Gentiles, even if this convict may possibly meet the death penalty. But they do not permit transferring an individual not deserving the death penalty according to *halakhah* if he most definitely will be executed by Gentiles.¹²¹ In theory this could serve as a Judaic foundation for extraordinary rendition—but only for a captive who does not deserve death and is to be sent to another jurisdiction that also will not execute him. On the other hand, because torture must keep a captive alive and the Judaic textual tradition expresses increasingly grave concerns about its legality and philosophical underpinnings, it would be internally inconsistent—both theoretically and practically—to extradite a captive for the purposes of torture.

The vast majority of these twisting texts pertain to punishing captives for crimes already committed. They bespeak torturous investigation and punishment, or torture for confession and sometimes capitulation, more than torture in search of conversion or corroboration.¹²² Of the few texts that promote torquing or cutting so as

117. Mishneh Torah, *Sanhedrin* 26.7.

118. Shulchan Aruch, *Choshen Mishpat*, 26.1.

119. Shulchan Aruch, *Choshen Mishpat*, 388.9.

120. Beit Yosef, *Choshen Mishpat* 388.9. He cites a *responsum* of the Rashba to reinforce his opinion. See discussion in Shaul Yisraeli, *Extradition*, JEWISH L.: EXAMINING HALACHA, JEWISH ISSUES & SECULAR L. (1990), <http://www.jlaw.com/Articles/extradition.html> (last visited Dec. 29, 2010). Gershuni, *supra* note 115, at 136, disagrees with Karo: "Extradition is only conceivable when there is complete congruence between the other state's law and Torah law regarding the matter at hand."

121. Mishneh Torah *Yesodei Hatorah* 5.5; R. Joel Sirkes (16th-century Poland), *Bach, Responsa* 43. See YT *Terumot* 8.4/46b for the origin of this ruling concerning Sheva ben Bichri.

122. One might argue that torturous punishment to prevent crimes can also find a proof-text in the laws pertaining to the *ben sorer u'moreh*, the rebellious child (Deut 21:18-21). Typically, flogging with whips or scorpions was used to discipline such wayward and defiant sons (1 Kings 12:11). In the rabbinic mindset, to become such a child would require copious amounts of alcohol, eating raw meat, and engaging in sexual deviance—among other bad habits. And the

to prevent possible future crimes, they do not speak about employing these techniques to prevent supposedly immediately impending military disasters, such as the so-called ticking bomb scenario. Rather, these few laws seek to prevent a particular individual—who, it must be stressed, has been found guilty through the due process of the law—from possibly engaging in criminal behavior again; and these techniques are used only in a highly regulated manner. Indeed, no texts exist, as far as I know, that grant permission to twist or cut or degrade so as to preempt or prevent an uncertain—better, merely a theoretical—military disaster, such as a ticking bomb.

III. THWARTING TORTURE?

If we take the textual tradition seriously without exaggerating the relevant pieces therein, we can reasonably say that although in its earliest historical layers, the Jewish textual tradition countenanced and condoned the use of mild physical force to compel a captive to capitulate and to confess a crime, the tradition has since removed support for such methods. It would be as wrong to say that the Jewish textual tradition absolutely condemns all forms of torture as it would be to claim the opposite, that the tradition sanctions all forms of torture. Either extreme misleads and exaggerates. Asserting that Judaism never considered duress a reasonable method to extract compliance is just as mistaken as saying that it still considers duress reasonable, much less requires it in every or any circumstance. Both assertions silence the historical trends readily evident in the textual tradition.¹²³ Other claims are similarly flawed, in particular the claims that Jewish condemnation or promotion of torture stems from, on the one hand, contemporary human rights conventions prohibiting torture, or, on the other hand, the supposed principle that signatory nations to those conventions who are defending themselves against attackers not beholden to those conventions are free to do anything they see fit. Both claims presume inherent links between modern political conventions (such as rights) and modern political practices (such as national military strategies), and the Judaic textual

rabbis thought it implausible that such a child ever existed or ever would exist. See BT *Sanhedrin* 71a. The Biblical verses pertaining to the rebellious child are merely hypothetical, the rabbis say, and their sole purpose is to be intellectually interrogated, not physically enacted. See discussion in 1 MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* 365-66 (Bernard Auerbach & M.J. Sykes trans., Jewish Publication Soc'y Am. 1994).

123. To claim that *halakhah* is not beholden to or influenced by time, or that it is timeless or ahistorical, excises *halakhah* from reality. Law, almost by definition, presupposes time: it seeks to shape behavior in this moment as well as the next. Just as the future looms large for law, so too does the past. *Halakhic* literature overflows with claims to precedents.

tradition. As demonstrated above, these links are fabrications at best, tenuous at most, and misrepresentations at worst. All such exaggerated arguments are dangerous to boot because peoples' lives are at stake.

To return to our initial definition of torture as techniques of physical and psychical pressure to elicit a captive's confession, conversion, corroboration or capitulation, how does the Jewish textual tradition understand torture? The textual tradition admits that mild physical duress was once conceivable for the sake of capitulation, confession, punishment or deterrence. The textual tradition never—and I say this without exaggeration—positively sanctions torture for the sake of conversion or corroboration because it never speaks about torture for the sake of conversion or corroboration.¹²⁴ This point is critical. It denies the possibility of claiming that the Judaic textual tradition condones, much less requires, torture that seeks corroborative confirmation of information initially supplied elsewhere—the kind advanced by the protorture camp surveyed above. Such claims distort the Judaic textual tradition's sources and its overall historical thrust.¹²⁵

Even if torture for the sake of extracting information somehow had Judaic support, it would be necessary to reconcile this permission with a slew of *halakhic* principles and practices challenging the legal validity of the information procured thereby. Here we get into the thorny issue of self-incrimination, a topic hotly debated among modern Jewish legal and ethical scholars. Pointing to the Talmudic principle *ein adam mesim atzmo rasha* (one may not inculpate oneself, or make oneself evil), scholars contend that confessions by a captive are legally inadmissible.¹²⁶ The question then is what grounds this principle. Are there rational reasons for it, as Maimonides asserts, such as protecting a captive from his own psychological confusion, suicidal proclivities or

124. I return to this silence *infra*.

125. Some additional questions the protorture camp could do well to meditate on include: What advantages does promoting torture grant to either the United States or to Judaism—especially when the prospective torturees and their ilk will ever remain aloof and most likely never completely acquiesce? Could Bleich and Broyde reach their same conclusions if they took the textual tradition more seriously and without exaggeration; that is, if they took the claims put forward by the antitorture camp as well as the growing antipathy toward physical duress readily apparent in the historical trends of the textual tradition?

126. BT *Sanhedrin* 9b. See NORMAN LAMM, FAITH AND DOUBT: STUDIES IN TRADITIONAL JEWISH THOUGHT (Ktav Publ'g House, Inc. 2007); Malvina Halberstam, *The Rationale for Excluding Incriminating Statements: U.S. Law Compared to Ancient Jewish Law*, in JEWISH L. & CURRENT LEGAL PROBLEMS 177 (Nahum Rakover ed., Libr. Jewish L. 1984); Braz, *supra* note 23; Melissa Weintraub, *Ain Adam Mesim Atzmo Rasha: The Bar Against Self-Incrimination as a Protection Against Torture in Jewish and American Law*, RABBIS FOR HUMAN RIGHTS—NORTH AMERICA (Nov. 24, 2007, 4:12 PM), <http://www.rhr-na.org/resource/bar-against-self-incrimination-a-protection-against-torture-jewish-and-american-law> (last visited Jan. 25, 2011).

admission of a false confession?¹²⁷ Perhaps a procedural reason suffices, such as the rule that an individual cannot be convicted on the basis of one witness's testimony.¹²⁸ It is assumed here that a captive's testimony is just as legally meritless as a relative's because *adam karov eitzel atzmo*, an individual is a relative unto himself.¹²⁹ Or perhaps the reason behind the prohibition of self-incrimination is nonrational and ineffable as Maimonides asserts: "the principle that no man is declared guilty on his own admission is a divine decree."¹³⁰ In short, if a captive's testimony is rejected and legally meritless, the tortured captive's confession would be even more emphatically worthless.¹³¹

Regardless of the reason,¹³² it appears no exception to this principle is possible. So if the information a captive divulges has no legal validity or military value whatsoever, why bother expending resources to extract it? Such efforts would be legally superfluous, morally specious, militarily distracting and economically wasteful.¹³³

127. Mishneh Torah, *Sanhedrin* 18:6.

128. Deut 19:15; Num 35:30; Deut 17:6; BT *Sanhedrin* 27b; Mishneh Torah, *Edut* 5:1; Mishneh Torah, *Rotzeach U'Shmirat Nefesh* 4.5.

129. BT *Sanhedrin* 9b. See Rashi there. See also BT *Yevamot* 25a-b; BT *Sanhedrin* 25a. This principle does not apply to crimes involving money or property. See BT *Sanhedrin* 10a. Rashi disagrees: these confessions are also inadmissible. BT *Yevamot* 25b. See also *Responsa Rosh* 11:5.

130. The final phrase is *gezerat melech hi*—refers not to an earthly king but to the divine sovereign. Mishneh Torah, *Sanhedrin* 18:6. Linking this nonrational reason to the procedural one, Radbaz asserts that since one is not the owner of one's own life but God is (*cf.*, Ezek 18:4), one cannot confess about oneself, especially regarding a capital offense. See Radbaz commentary on Mishneh Torah, *Sanhedrin* 18:6. Halberstam, *supra* note 126, at 178, discusses this reasoning.

131. Tortured individuals invariably divulge data that is not militarily actionable, a claim demonstrated through historical and empirical studies. See discussion of these studies in MATTHEWS, *supra* note 29; REJALI, *supra* note 3. IGNATIEFF, *supra* note 71, similarly argues that torture produces nothing of value for militaristic or legal purposes.

132.

Whether confessions were barred because they would lead to torture; or because they were unreliable; or because sick minds might falsely accuse themselves; or because their prohibition served as a mechanism for assuring preservation of all the other procedural safeguards or as a guarantee of equal treatment for all persons accused of crime; or because the use of confessions would lead to laxness in fact-finding; or because man's life and body were not his to forfeit; or because of the uniqueness and dignity of man; or because of a recognition that in dealing with the state there could be no real free choice; or because it was deemed morally reprehensible to allow a person to convict himself; or because the privilege reflected a divine and ineffable understanding of mankind—whatever the rationale, acceptance of the absolute prohibition was a remarkable societal accomplishment.

Rosenberg & Rosenberg, *supra* note 26, at 1041.

133. Bleich, however, might respond to these questions as he did about the use of data procured by Nazis. In his view, the data derived from initially immoral procedures constitutes a forbidden benefit but any subsequent use of that data is not *ipso facto* prohibited. See David J. Bleich, *Utilization of Scientific Data Obtained Through Immoral Experimentation*, 26 TRADITION 65 (1991).

On the other hand, some scholars contend that this principle of rejecting captive confessions is not absolute. They point to the fact that the Judaic textual tradition speaks of (at least) two concurrent authorities governing the Jewish polity: one is Jewish courts, assigned to enforce laws pertaining to rightful worship and basic civil relations, and the other is the (royal and secular) government, which is responsible for the overall protection of the population.¹³⁴ The government has the authority to abandon the strict rules about self-incrimination and the requirement for two witnesses so as to convict and execute a criminal only if this would benefit society (*takanat ha'olam*).¹³⁵ A Jewish court would be permitted to execute a captive if and only if it deems the broader circumstances to require it (*b'hora'at sha'ah im haitah sha'ah tzrichah*).¹³⁶

Since the dismantling of the Sanhedrin, Jewish courts operated under increasingly expansive notions of *hora'at sha'ah* by considering almost every historical moment an emergency, thus allowing them to relax the strict rules about procedure and inadmissibility of self-incrimination that otherwise would apply.¹³⁷ By the fourteenth century, sages urged Jewish courts to abandon the tradition's strict procedural rules lest "the world be destroyed" or because *hora'at sha'ah*—the hour required it.¹³⁸ This trend leads at least one contemporary scholar to assert that Jewish courts should continue to function at this second, "social protection law," level with its less rigorous standards of procedure and evidence.¹³⁹ Such logic would permit violating the strict standards otherwise imposed upon authorities regarding the techniques used to extract testimony, and, ultimately, could permit using torture for this purpose.¹⁴⁰

Yet this *a priori* permission to torture would violate the very foundation of this exemption, which is that exemptions are plausible—in

134. Arnold Enker, *Self-Incrimination*, in JEWISH L. & CURRENT LEGAL PROBLEMS 169 (Nahum Rakover ed., Libr. Jewish L. 1984); KIRSCHENBAUM, *supra* note 3.

135. Mishneh Torah, *Rotzeach U'Shmirat Nefesh* 2.4, 4.5.

136. *Id.* Stanley Levin, *Due Process in Rabbinical and Israeli Law: Abuse and Subversion*, in JEWISH L. & CURRENT LEGAL PROBLEMS 191-94 (Nahum Rakover ed., Libr. Jewish L. 1984), argues that such exceptionalism has Biblical roots. Rosenberg & Rosenberg, *supra* note 26, challenge these claims.

137. See Levin, *supra* note 136; Enker, *supra* note 134.

138. For the rationale about the world being destroyed, see R. Solomon ben Aderet (Rashba) *Responsa* III:393, cited in Karo's *Bet Yosef*, *Choshen Mishpat* 388. See KIRSCHENBAUM, *supra* note 3, at 6-7. For the emergency situation argument, see R. Isaac ben Sheshet Perfet (Rivash). Cited in Levin, *supra* note 136, at 192.

139. Enker, *supra* note 134.

140. See KIRSCHENBAUM, *supra* note 3, at 12.

theory and in practice—for extraordinary circumstances only. *Hora'at sha'ah* cannot, by definition, endorse an ongoing rule permitting abnormal investigative measures.

If it did, it would mean that the multi-millennial historical development of *halakhah* has been within the milieu of an emergency: thus all its laws would be exceptional laws. If this were the case, then law generally would no longer bind from one moment to the next, for each moment would be exceptional.¹⁴¹ Nor can *hora'at sha'ah* endorse the *a priori* periodic permission promoted by the protorture camp. For even if every (or any) war was preordained to be an emergency situation, it would automatically activate the permission to torture; torture would be lawful and not exceptional. Yet since torture, especially in war, has no *halakhic* legitimacy, relying upon *hora'at sha'ah* to permit it would be an internally inconsistent argument.¹⁴²

Still, it would be hasty to dismiss everything a captive says just because it has no actual legal merit. The Talmud acknowledges that litigant testimony has potential value.¹⁴³ So should no effort be made whatsoever to extract potentially critical information from a captive? As already seen, the Judaic textual tradition countenances the use of moderate pressure to secure a captive's capitulation if not confession, albeit in very circumscribed situations. These methods were limited,

141. Franz Rosenzweig, in his *Star of Redemption*, meditates on the temporal stitching that the law provides, binding the future to the past in the present. Put differently, the law is meant to guide behavior, not excuse it retroactively. See discussion in Mordechai Kremintzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the 'Needs' of the Security Service?*, 23 ISRAEL L. REV. 216, 237 (1989).

142. We should note that Maimonides (Mishneh Torah, *Mamrim* 2.4, see *supra*; Mishneh Torah, *Sanhedrin* 24.4) stresses this point: exceptions to normal court and governmental procedures must be just that—exceptions. Anything otherwise would subvert the already established laws regulating their exercise of authority. For more on the discretion *hora'at sha'ah* afforded courts and royal governments, see Rosenberg & Rosenberg, *supra* note 26, at 1019ff, and regarding the notion that exceptional moments were necessarily temporary interruptions of normal procedures, see *id.* at 1021.

Might a completely different, yet related, principle help the protorture camp somehow justify their position? The principle, *chaferu toratecha mishum 'et la'asot l'adonai*—it is a time to act for God because they have violated your Torah (BT *Berachot* 54a and 63a; based on *Psalm* 119:126)—justified Elijah's transgressive behavior when he combated the prophets of Ba'al. Protorturists might have used this principle to argue that war constitutes a moment ('*et*') violating normal Toraitic laws and procedures, which then gives tacit permission to employ whatever means necessary to reclaim normalcy. Yet this argument would fail because it ignores the fact that the moment is for acting for God (*la'asot l'adonai*) and not for the state. Elijah, too, acted extra-Toraitically, or extra-judiciously so to speak, solely to promote God and God's instructions (the Torah itself). It is difficult to understand how permitting state torture would promote either God or God's instructions, unless one lives in a theocracy, a kind of state none of the authors here explicit seek.

143. *Hoda'at ba'al din kemayah edim dami*—the admission of a litigant is worth a hundred witnesses; BT *Gittin* 40b. See discussion in Halberstam, *supra* note 126, at 178.

were strictly regulated, and were public knowledge insofar as they were written in the law books. This fact challenges Broyde's crafty claim that the best military strategy is bluffing.¹⁴⁴ In his view, threatening to use certain tactics (e.g., torture) might deter aggression or escalation of aggression. It could well be that obfuscating one's actual battlefield intentions or being deceitful is advantageous in war. Yet were a nation to bluff about its intention to use torture, would it establish, much less speak, about the legal grounds permitting torture? Perhaps it would be craftier for Broyde to remain silent about his proposal.

It is true that deception has long been a staple among rabbinic court interrogation techniques.¹⁴⁵ But deceptive rabbinic investigation of civic and ritual transgressions is a far cry from the kinds of deception Broyde advocates, that is, by national and military agents. He would need to demonstrate that both deception generally and torture in particular have historical and empirical success by these agents or agencies, or at least better success than non-deceptive strategies.¹⁴⁶ And he would need to demonstrate that bluffing for national security (and not by rabbinic courts) has strong Judaic textual roots. Such arguments are missing thus far in the protorture camp's arguments.¹⁴⁷

A further question remains to be met by the protorture camp. Both it and the antitorture camp share in the view that torture is a *malum per se* and that it should be avoided whenever possible. If torture were truly an option of last resort, why legally establish torture through preemptive permission or *ex post facto* exemption?¹⁴⁸ Despite—or perhaps because of—the protorture camp's arguments, the most cogent reason I can fathom is that legally establishing torture would permit the state and its

144. Broyde, *supra* note 30, at 31.

145. PASSAMANECK, *supra* note 112; Crane, *supra* note 25.

146. Indeed, Broyde and Bleich would have to disprove governmental empirical studies and admittance that torture fails to produce actionable data. And they would have to demonstrate the justifiability of expending vast amounts of personnel and financial resources to examine the misinformation tortured captives do provide—not to mention the social and political capital expenses involved. See Steven H. Miles, *Torture: The Bioethics Perspective*, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS 169 (Mary Crowley ed., The Hastings Center 2008), available at <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2208> (last visited Jan. 25, 2011).

147. He would also have to overturn antitorture rulings passed down by the U.S. Supreme Court, especially those that find torture inherently untrustworthy. E.g., *Brown v. Miss.*, 297 U.S. 278 (1936); *Ashcraft v. Tenn.*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting). See Halberstam, *supra* note 126.

148. The Israeli Supreme Court (1999) ¶ 21, *supra* note 20, probes a similar question. It ultimately rules that it is illegal to preemptively grant authority to torture, even under extreme circumstances, for an otherwise illegal activity.

agencies to act arbitrarily insofar as they could abandon (whenever they see fit) normal national and international protocols regulating captive treatment whenever they see fit.

Yet the protorture camp would need to demonstrate that the Judaic textual tradition condones the arbitrary exercise of authoritative powers. I contend such a demonstration is impossible. As early as *Genesis*, the notion is repeated that the powerful—whether divine or human—should not act arbitrarily.¹⁴⁹ Prophets also called for human authorities—especially governments—to comport with established law, for anything else would subvert the integrity of the legal system and eventually lead to society's demise.¹⁵⁰ And the rabbis function as mutual regulators, even shaming each other, lest one overextend his authority and exercise seemingly arbitrary power.¹⁵¹ Even lay people are responsible to behave in such ways that protect the integrity of the Judaic system as a whole and thereby enhance the security of the Jewish people; compliance with the law is expected of everyone, even interrogators.¹⁵² All these assertions and assumptions, principles and practices, attest that the intelligibility and coherence of the Judaic legal-ethical system—or any system for that matter—are secured only to the degree that arbitrariness is disallowed. Eliminating, not creating, loopholes for authorities to exercise power arbitrarily is therefore a necessity.

In sum, taking the principles championed by the antitorture camp seriously (for they do exist in the textual tradition), and the *halakhic* concerns about protecting society as highlighted by the protorture camp (for those laws also exist in the textual tradition), a balanced and non-exaggerated position vis-à-vis torture could be as follows. Mild physical

149. See, e.g., God's promise not to destroy the world again just because God finds human behavior reprehensible. Gen 8:21, 9:11-16. Abraham, too, insists that God must exercise consistent, or at least intelligible, justice when judging the world. Gen 18:25. And further in the Torah, Moses too argues with God to exercise non-arbitrary power lest God's reputation be harmed. Exod 32. (See also Num 14:13; Deut 9:28). Although his rebellion failed, Korach's challenge to Moses articulates a concern about the apparently arbitrary exercise of power by a human (Num 16). By the time of Joshua, God's reputation may be at stake but God does not seek to act arbitrarily. See Joshua 7.

150. See, e.g., Nathan's rebuke of King David at 2 Sam 12. Samuel, too, warned the Israelites about the proclivity of royal governments to abuse their powers. 1 Sam 8.

151. See rules protecting society from rebellious elders (*zaken mamre*)—or in today's parlance, activist judges—at M. *Sanhedrin* 11.1, 2, 4; BT *Sanhedrin* 14b, 16a, 87a-ff; Mishneh Torah, *Mamrim* 3.4; Mishneh Torah, *Sanhedrin* 5.1, 14.11; *Guide of the Perplexed* III:41; see Jonathan K. Crane, *Defining the Unspeakable: Incitement in Halakhah and Anglo-American Jurisprudence*, 25 J.L. & RELIGION 329 (2010). On the role of shame in rabbinic academies, see Rubenstein, *supra* note 16; Crane, *supra* note 14.

152. See Jonathan K. Crane, *Because . . . : Justifying Law/Rationalizing Ethics*, 55 J. SOC'Y CHRISTIAN ETHICS 55 (2005).

duress at one point existed as an interrogatory technique of last resort for religious and business cases. But through time, rabbinic anxiety about such uses of force in legal procedures rendered these techniques untenable. Exceptions to normal interrogatory procedures, including extradition, which could in theory be granted in circumscribed dire emergencies, must nevertheless protect the intelligibility and integrity of the system as a whole. No exception may extend beyond a moment's needs. And because for thousands of years, no Jewish sage or legislator thought it reasonable to torture a captive merely for the hope of extracting corroborative information, the textual tradition on the whole cannot—nor would not, I contend—countenance such torture. For all these reasons torture is neither a bad option (as some in the antitorture camp admit) nor a less bad option (as the protorture camp claims); it is a non-option altogether.