

# צלם אלהים

## Honor the Image of God: Stop Torture Now

**A Rabbinic Resource  
on Jewish Values  
and the Issue of Torture**



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(The complete versions of all articles by Melissa Weintraub can be found on the web, [www.truah.org](http://www.truah.org))

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## Original Acknowledgements

Rabbi Brian Walt, Executive Director of RHR–NA, supervised and edited this project.

Melissa Weintraub, a student at the Jewish Theological Seminary, authored the extensive treatment of Jewish sources and torture in this booklet.

Jarah Greenfield, a student at the Reconstructionist Rabbinical College and Rabbinic Intern at RHR–NA, gathered and edited material.

Elana Robinson-Lynch, Intern at RHR–NA, assisted with editing and layout.

Harriet R. Goren designed the logo and layout. RHR–NA would like to thank the following people who reviewed material or offered suggestions:

Dr. David Brodsky, Rabbis Edward Feld, Neil Gillman, Margaret Holub, Jane Littman, David Rosenn, Simkha Weintraub and David Golinken.

## T'ruah: The Rabbinic Call for Human Rights

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## Original Introductory Letter

*Menachem Av, 5765*

Dear Colleagues,

As Chair of Rabbis for Human Rights–North America, I am honored to be able to participate in the mitzvah of *Shimush Talmidei Hachamim* by presenting this important addition to your knowledge of Jewish sources and resources for pursuing justice.

RHR–NA, now in our fourth year of existence, continues to be inspired by the work and wisdom of RHR–Israel. While one of our primary goals is to enhance moral and financial support for that work, we have proceeded, with their blessing, to expand our own work into areas of human rights outside the borders of Israel/Palestine and into the communities in which we live. Just as RHR–Israel has worked on diverse issues such as “guest” workers’ rights and economic equity, so to are we concerned with similar violations of human rights in our midst.

This initial Jewish campaign, “Honor the Image of God: Stop Torture Now,” represents a deep conviction that this particular issue fulfills the call of the Jewish people to bring God’s justice to bear among the nations. With God’s help and your support, we may choose to expand our work to other issues parallel to and in coordination with the work of *Shomrei Mishpat*, RHR–Israel.

We are very grateful to our student interns, Melissa Weintraub, a student at the Jewish Theological Seminary, who did much of the research and writing for this resource, and Jarah Greenfield, a student at the Reconstructionist Rabbinical College, who wrote, gathered and edited material for this resource.

We pray that soon this work will no longer be needed as the knowledge of God and our responsibilities spread throughout the world.

—Rabbi Gerry Serotta, *Chair*

## 2017 Introduction

When this sourcebook was published in 2005, it was the beginning of Rabbis for Human Rights–North America’s work on human rights in North America. Ultimately, Nobel Laureate Elie Wiesel (z”l) and over 800 rabbis and cantors signed RHR-NA’s public letter to the Bush Administration calling for an end to torture in all forms. In the intervening twelve years, the organization has grown tremendously, been renamed T’ruah, and become one of North America’s leading Jewish voices for human rights.

The anti-torture campaign that this sourcebook fueled was subsequently transformed into T’ruah’s campaign against solitary confinement, long recognized as a form of torture, and then became part of our larger campaign to end mass incarceration. We hoped that this resource would never again be needed. But with the election of Donald Trump, who has said he would support waterboarding and worse, torture may once again appear on the American agenda. If it does, you may be sure T’ruah will be here to stand against it.

With the passage of time, people move on. The two rabbinical students who wrote and compiled the material are now accomplished rabbis in their own right; Melissa Weintraub worked for T’ruah for several years and Jarah Greenfield served as a board member. We remain grateful for their work and for the new generation of leadership that has taken their place.

Apart from these introductory pages and the concluding list of rabbis, this publication remains unchanged from 2005. Ari Evergreen updated the design for 2017. We pray that we will not need to draw again on the wisdom in these pages, but if we do, we know that the wisdom of our tradition contained in these pages will again inspire us to do the right thing and to oppose torture as a violation of the sacred image of God in each person.

Rabbi Jill Jacobs, *Executive Director*

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## How to use this Resource Booklet

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Torture is a very difficult topic. We prefer not to talk about it or even think about it. It is, by definition, something that happens beyond our vision, behind the walls of a prison. In the face of the violence of terrorism in a post-September 11th world, many of us who once may have been convinced that torture was absolutely reprehensible are now confused. We hope that this rabbinic resource, which contains the first-ever extensive treatment of Jewish values and torture, will help us grapple personally with this issue and open a moral discussion based on Jewish values about torture in our communities.

There are two sections to the booklet. The first section contains abbreviated selections from four articles on Jewish values and torture, written by Melissa Weintraub. The full text of all these articles is available on our website. The second section of the booklet contains some liturgical and educational suggestions for use in your community.

The first section of the booklet will help rabbis wrestle with Jewish texts that speak to the issue, to reflect deeply on the issue and to invite others into this moral reflection by developing sermons and/or adult education sessions.

The second section of the booklet provides some liturgical options for incorporating the issue into services. A supplement to the *Eleh Ezkerah* on *Yom Kippur* and an additional *Al Cheit* are two options that are included. We also offer one adult education session. We have posted more of this material on our website.

The *Rabbinic Letter against Torture*, signed by over 500 rabbis, which appears in the end of the booklet, is the centerpiece of the *Jewish Campaign against Torture*. If you have not yet signed the letter, we urge you to consider doing so. In the second section of this booklet you will find a series of guiding questions to help you decide whether to add your name.

We hope that all rabbis who have signed the letter will address this issue in your communities over *Yamim Noraim* and the coming year in whatever way you choose—by giving a sermon, by adding something to the liturgy, by offering an adult education session, by inviting a speaker. We also hope you will encourage members of your congregation to sign the *Jewish Statement against Torture* and to participate in ongoing activities of the *Jewish Campaign against Torture*.

We understand that some rabbinic colleagues may choose not to sign the letter. If this is the case, we hope that you will participate in a dialogue with us about the issue and that this resource booklet is helpful in your own reflection. We welcome feedback, critique and suggestions from all. We would be delighted to consider posting on our website any material that you write on this issue.

May God bless our efforts.

SECTION ONE: FOUR ARTICLES ON JEWISH VALUES AND THE ISSUE OF TORTURE by *Melissa Weintraub*

**-Ain Adam Mesim Atsmo Rasha | אין אדם משים עצמו רשע**  
**The Bar against Self-Incrimination as a**  
**Protection against Torture in Jewish and American Law**

*Melissa Weintraub*

*This is an abbreviated version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).*

No person shall be compelled in any criminal case to be witness against himself.  
 —Fifth Amendment to the U.S. Constitution

A person may not incriminate himself. (אין אדם משים עצמו רשע)  
 —Babylonian Talmud, Sanhedrin 9b

In 1994, the U.S. joined 140 nations in ratifying the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, an international agreement that prohibits torture and obliges signatories to take action to prevent physical or mental “cruel, inhuman, or degrading treatment” within their jurisdictions. The Senate made a reservation to the treaty defining “cruel, inhuman, or degrading” as conduct prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States. In other words, the Senate agreed to adhere to the Convention insofar as it bans conduct already deemed unconstitutional under American federal law.<sup>1</sup>

The Fifth, Eighth, and Fourteenth Amendments assure protection against abuse on the part of governmental agents—even if performed in the service of thwarting crime or terror—and they have generated a long history of case law that delineates clear red lines of permissible governmental action. They form the foundational rights safeguarded by American constitutional democracy, regularly cited in Supreme Court decisions as constitutive of our legal tradition since the early days of the Republic.<sup>2</sup> The Supreme Court has long used strong language to denounce physical or psychological cruelty on the part of law enforcement officials—whether to extract information, inflict punishment, or intimidate or coerce defendants—as “revolting,” “shocking,” and “alien” to the most sacred values on which America was founded and characteristic rather of the repressive regimes of America’s totalitarian enemies.

Nonetheless, these are the very protections that have come under attack in the shady legal framework erected since Sept. 11th to justify new Army interrogation practices.

This section will focus on the protections secured by the Fifth Amendment and its antecedents in—and influence by—two thousand years of Jewish law.

■ **Doctrine against Self-Incrimination in Jewish Law**

In American law, the right against self-incrimination is a privilege, intended by its framers and interpreters to provide a legal shield against police brutality and physical and psychological coercion in interrogations. This constitutional right excludes involuntary confessions made under duress or without proper warning; a deliberate confession or guilty plea, however, may be submitted as evidence and serve as the basis for conviction.

Jewish law, by contrast, is almost categorical in its ban of self-incriminating statements, declaring confessions inadmissible as evidence whether voluntary or involuntary, in-court or out-of-court, spontaneous or extorted. As two scholars of comparative Jewish and American law note, the *halakha’s* rigid proscription against self-incrimination makes “the Warren Court’s progressive decision” appear “moderate, if not minimal.”<sup>3</sup>

The prohibition against self-incrimination is derived from two Biblical verses: “One witness shall not rise up against a man for any iniquity... At the mouth of two witnesses... shall the matter be established” (Deut. 19:15; cf. Num. 35:30 and Deut. 17:6); and “The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers...” (Deut. 24:16).

The sages read the first verse literally; a person may not be convicted on the basis of one witness’ testimony, even when confirmed by circumstantial evidence.<sup>4</sup> From the second verse, the rabbis derive the law excluding the testimony of relatives (BT Sanhedrin 27b). *On the basis of this second rule, Rava sets forth the principle that becomes the basis of the ban on self-incrimination; a person may not incriminate himself since he is his own kinsman.* Like his relatives, he may not join in the prosecutorial process, serving—through a self-indicting confession—as one of the two witnesses necessary to determine guilt (BT Sanhedrin 9b; see below) ...

The ban against self-incrimination is elaborated on in the Talmud, where Rava extrapolates from the principle to determine that a person may not disqualify himself from serving as a witness on the basis of his own confession to a crime:<sup>5</sup>

R. Joseph again said: If a man says that so and so committed sodomy with him against his will, he himself with another witness may combine to testify to the crime. If, however, he admits that he acceded to the act, he is a wicked man [and therefore disqualified from acting as witness] since the Torah says: *Put not your hand with the wicked to be an unrighteous witness* (Ex. 23:1). Rava said: Every man is considered a relative to himself, and no one may incriminate himself. (BT Sanhedrin 9b; Cf. BT Sanhedrin 25a)<sup>6</sup>

The ban against self-incrimination was extended in later *halakhic* codes to non-capital criminal cases:

No man becomes ineligible [to be a witness] on his own admission of religious delinquency. For example: if a person appears in court and says that he has stolen or robbed or loaned money on interest, although he has to make restitution on his own admission, he is not disqualified as a witness. Likewise, if he says that he has eaten *nevelah*<sup>7</sup> or cohabited with a woman forbidden to him, he is not disqualified—unless there are two witnesses who testify against him—for no man may incriminate himself. (Rambam, Hilkhhot Edut 12:2)

It is a scriptural decree that the court shall not put a man to death or flog him on his own admission [of guilt]. This is done only on the evidence of two witnesses. (Rambam, Hilkhhot Sanhedrin 18:6)

Jewish authorities seem to have adopted a near consensus position that in criminal cases, where punishment, excommunication, or even public reputation were at stake, guilt must be independently established on the testimony of two outside witnesses. A person may not play a role in prosecuting himself.

#### ■ ***Self-Incrimination in Jewish Law as Preventive Measure against Torture?***

Why does Judaism designate such an extraordinarily demanding rule that deprives confessions—what many believe to be the most infallible verification of guilt—of any legal status in a trial? What is the rationale for this unique law, seemingly unparalleled in its reach in any other legal system?

The Talmud itself does not explicate the prohibition. The Rambam famously offers a psychological explanation of a possible ulterior motive for incriminating oneself: “It is possible [a defendant] was confused in mind when he made the confession. Perhaps he was one of those who was in misery, bitter in soul, who long for death...” (Hilkhhot Sanhedrin 18:6). The Rambam questions the trustworthiness of confessions, given the complexity of human psychology, and its periodic masochistic and self-destructive drives...

Many contemporary scholars, recognizing the historical context of Roman persecution and torture in which the law was formulated, present an alternative, persuasive thesis. Perhaps the *halakha* developed a strict prohibition against self-incrimination—part of an elaborate and rigorous complex of procedural safeguards—as a way of repudiating the Roman system of justice, with its official brutality and violations of privacy, human dignity, and due process. The Jewish court must build a case against the accused and may not shortcut the fact-finding process by physically coercing a confession, as did the Roman and medieval European courts.

Saul Lieberman’s biographer reports that he taught:

The purpose of the rule [banning self-incrimination] was to eliminate the possibility of forced confessions and testimony motivated by fear...[Early Jewish law] insisted on a strict standard for the admission of evidence and *eliminated the possibility of torture to compel confessions* at a time when torture and other cruel practices prevailed in the Roman court.<sup>8</sup>

Many other scholars echo Lieberman’s hypothesis:

*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 [prohibiting self-incrimination].<sup>9</sup>

It is to the everlasting glory of the rabbinic tradition that centuries before enlightened citizenries began to protest against police brutality in the interrogation of suspects and to clamor for its cessation, Jewish law proclaimed unequivocally that confessions extorted by words of inducement or by means of threats, though they appear to be true, may not be used to incriminate, convict, or punish anyone.<sup>10</sup>



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.<sup>11</sup>

Whether a moral eschewal of torture was the *rationale* for the prohibition against self-incrimination, its *effect* was to eradicate, by rendering purposeless, torture and lesser forms of intimidation of suspects in order to induce confessions. Given the surrounding inquisitorial legal cultures in which Jews lived throughout the centuries, it is all the more remarkable that Jewish law sustained a nearly absolute interdiction against accepting confessions as evidence of culpability.

Not until seventeenth century English common law—and then, arguably, in part through the influence of Jewish law—did another legal system adopt a principle similar to the ban articulated by Jewish law, perhaps as early as the second century C.E. In our time, the principle has become one of the prideful hallmarks of Anglo-American jurisprudence, and one of the primary constitutional bulwarks against torture and other forms of interrogational coercion in the criminal justice system.

### ■ *The Influence of Jewish Law on U.S. Constitutional Protections*

The Fifth Amendment—the privilege in American law against compulsory self-incrimination—imposes a constitutional check against governmental cruelty and coercion. It reflects an American repugnance towards the “fishing expeditions” associated with inquisitorial justice systems, upholding an absolute right of due process and thorough fact-finding rather than trial by ordeal and forced confessions.

Remarkably, in the classic Fifth Amendment case, *Miranda v. Arizona*—dealing with the interrogation of suspects in police custody and made famous through Hollywood renditions of the police warnings it enshrined—Chief Justice Warren traces the origins of this humane law to the *halakhah*<sup>12</sup>...

### ■ *Conclusion*

While there are important differences between Jewish law and contemporary American law on the subject of self-incrimination—American law prohibits involuntary confessions, whereas Jewish law categorically bars all confessions—both legal systems in effect uphold the fundamental doctrine of presumed innocence, refusing to presuppose the conclusion they set out to establish by subjecting defendants to harsh interrogation on mere suspicion. Both systems view coerced confessions as inherently untrustworthy.<sup>13</sup> Both bespeak a profound respect for the inviolability and dignity of the human personality, refusing to bully a person, physically or psychologically—regardless of what crime he has committed—into involuntarily and perhaps falsely inculcating himself.

It is no secret that Jews have historically often been the victims of a lack of juridical and procedural safeguards. English and American law adopted the principle of self-incrimination—denouncing the rack and screw as abhorrent to Anglo-American values—on the urging of groups who had themselves been subjected to religious persecution and placed at the mercy of arbitrary and repressive legal systems. Perhaps the depth of Jewish law's commitment to an accusatorial rather than inquisitorial system of justice reflects the victimization of our history—and the drive to never inflict what had so often been ruthlessly inflicted upon the Jewish people.

Should the due process protections enshrined in Jewish and American criminal justice systems apply to suspects of crime but not terror? Should different rules apply to the detention and interrogation of prisoners of war and domestic criminals? The Senate, in ratifying the Convention Against Torture, set a constitutional standard for the U.S. obligation to refrain from both torture and “cruel, inhuman, and degrading treatment.” In doing so, the United States determined that the military interrogation room must abide by the same standard as that enforced in the police precinct, unless the United States determines that its treaty obligations apply only in relation to its own citizens.

Perhaps the legal architects of the black hole in which political detainees have been swallowed in the “war on terror” should join the American Supreme Court in learning a few lessons from a long history of humane and prudent Jewish precedent.

This is a shortened version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).

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## NOTES

1. The legal analysis in this introduction is largely drawn from two articles by Seth Kreimer: "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," 6 U. PA. J. Const. L. 278 (2003) and "'Torture Lite,' 'Full Bodied' Torture and the Insulation of Legal Conscience," forthcoming.
2. See for example, *Culombe v. Connecticut* 367 U.S. at 581 (1961) for a summary of "[a] cluster of convictions, each expressive in a different manifestation of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by the officials charged with the investigation of crime. This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American governments."
3. Irene M. Rosenberg and Yale L. Rosenberg, "In the Beginning: The Talmudic Rule Against Self-Incrimination," 63 *New York University Law Review* 955, p. 965.
4. This rule is codified in Rambam, *Hilkhot Edut* 5:1, who states that the two-witness rule applies in both civil and criminal matters.
5. Jewish law bars a *rasha*—a person guilty of certain offenses—from testifying as a witness, on the basis of the verse "put not your hand on the wicked to be an unrighteous witness" (Ex. 23:1). Cf. M. Sanhedrin 3:3 and Rambam, *Hilkhot Edut* 10:1-5.
6. The complex disagreement between R. Joseph and Rava seems to be over the admissibility of "split testimony." That is, R. Joseph argues that the court may not admit testimony from a person who confesses to deliberate wrongdoing, whereas Rava argues that a person's testimony may be bifurcated; his self-incriminatory statement must be disregarded by the court—given the prohibition against self-incrimination, which Rava states as a general rule—while his testimony against his fellow wrongdoer may be admitted as evidence. Ironically, and perhaps cunningly, the court, according to Rava, admits a person's testimony against his co-conspirator by refusing his testimony against himself, through which he might have been declared a *rasha*; because he may only himself be convicted on the basis of two *extrinsic* witnesses, he may testify against his accomplice. Rashi ad. loc. BT Sanhedrin 25a and BT Yevamot 25a-25b.
7. The term '*nevelah*' is used to refer to an animal that died by some means other than proper ritual slaughter (*shekhita*).
8. Emphasis added. Elijah J. Schochet and Solomon Spiro, *Saul Lieberman: The Man and His Work*, Jewish Theological Seminary Press, 2005, pp. 209-210.
9. Emphasis added. Isaac Braz, "The Privilege Against Self-Incrimination in Anglo-American Law: The Influence of Jewish Law," *Jewish Law and Current Legal Problems*, ed. by Nahum Rakover, Library of Jewish Law, 1983, p. 163.
10. Aaron Kirschenbaum, *Self-Incrimination in Jewish Law*, Burning Book Press, 1970, p. 129.
11. Rosenberg and Rosenberg, *ibid.* p. 1041.
12. A second Supreme Court case elaborating on the Fifth Amendment also references the *halakhah*. See *Garrity v. New Jersey*, 385 U.S. 493 (1967).
13. As Justice William Rehnquist puts it in a recent majority opinion upholding *Miranda*: "A confession forced from the mind by the flattery of hope or the torture of fear comes in so questionable a shape... that no credit ought to be given to it, and therefore it is rejected." *Dickerson v. U.S.*, 428 at 433 (2000).



**Kvod Ha-Briot | כבוד הבריות****Human Dignity in Jewish Sources, Human Degradation in American Military Custody***Melissa Weintraub**This is an abbreviated version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).*

It was discovered that freedom in this land is not ours. It is the freedom of the occupying soldiers in doing what they like... abusing women, children, men, and the old men and women whom they arrested randomly and without guilt. No one can ask them what they are doing because they are protected by their freedom... No one can punish them, whether in our country or in their country. They expressed the freedom of rape, the freedom of nudity, and the freedom of humiliation.

—Sheik Mohammed Bashir, Friday prayers, Um al-Oura, Baghdad, June 11, 2004<sup>1</sup>

Anyone who shames his fellow in public, it is as if he spilled blood.

—Baba Metzia 58b

Treatment of prisoners in American military detention centers seems uniquely tailored to inflict shame and humiliation on detainees by exploiting the perceived cultural sensitivities and sexual taboos of Muslim, Arab men. While American forces have employed a host of physically and psychologically cruel, inhuman, and degrading techniques, this section will focus on those specific techniques that seem staged to take advantage of perceived Arab vulnerability to public humiliation, particularly of a sexual sort.<sup>2</sup> It will then explore the importance of human dignity in Jewish sources—a value so highly esteemed that it is granted legal trumping precedence in relation to many other religious obligations.

Of the widespread abuses of prisoners in American custody, the extreme sexual humiliation of Abu Ghraib is most well-known. Shortly after photographs from Abu Ghraib circulated around the world, the New York Times managed an interview with Hayder Sabbar Abd,<sup>3</sup> one of the men pictured masturbating beneath Pvt. England's tickled grin:

The seven men were all placed in hoods, he said, and the beating began. 'They beat our heads on the walls and the doors,' he said. 'I don't really know: I couldn't see.' He said his jaw had been broken, badly enough that he still has trouble eating. In all, he said, he believes that he received about 50 blows over about two hours.

'Then the interpreter told us to strip,' he said. 'We told him: You are Egyptian, and you are a Muslim. You know that as Muslims we can't do that.' When we refused to take off our clothes, they beat us and tore our clothes off with a blade.'

It was at this moment in the interview...that several pages of the photographs made public last week were produced... He quickly and unemotionally pointed out all his friends—Hussein, Ahmed, Hashim—naked, hooded, twisted around each other.

He also saw himself, as degraded as possible: naked, his hand on his genitals, a female soldier, identified in another report as Pvt. Lynndie England, pointing and smiling with a cigarette in her mouth. Mr. Abd said one of the soldiers had removed his hood, and the translator ordered him to masturbate while looking at Pvt. England...

'She was laughing, and she put her hands on her breasts,' Mr. Abd said. 'Of course, I couldn't do it. I told them that I couldn't, so they beat me in the stomach, and I fell to the ground. The translator said, 'Do it! Do it! It's better than being beaten.' I said, 'How can I do it? So I put my hand on my penis, just pretending.'

All the while, he said, the flash of the camera kept illuminating the dim room that once held prisoners of Mr. Hussein.<sup>4</sup>

President Bush and Secretary of Defense Rumsfeld condemned the outlandish excesses of the military police at Abu Ghraib as "disgraceful conduct by a few American troops, who dishonored our country and disregarded our values," the aberrational behavior of "a few bad apples" that "do not represent America."

But the abuses at Abu Ghraib, as revelations in the past year have clarified, represent extreme examples of practices pervasive in U.S. military facilities not only in Iraq, but also in Afghanistan and Guantánamo Bay, where many of the techniques seem to have been originally produced for export. Sexual humiliation has been ubiquitous, directed at al Qaeda operatives and Iraqi prisoners-of-war, "high-level" suspects and innocent civilians mistakenly picked up in round ups off the street.<sup>5</sup>

In February 2005, the Pentagon confirmed leaked accounts that female interrogators repeatedly tried to "break" devout Muslim detainees at the U.S. prison camp in Guantánamo Bay through provocative sexual touching and suggestion—wearing skimpy clothing like miniskirts and lacy, thong underwear, making sexually explicit comments, and rubbing their bodies up against them.<sup>6</sup> *In July 2005, the Army released Lt. Gen. Randall M. Schmidt's report of his investigation into abuses at Guantánamo, which concludes that "stripping detainees, forcing one to wear women's lingerie and wiping red ink on a detainee and telling him it was menstrual blood" are all "authorized approaches called 'ego down' or 'futility,' which are used to make the interrogation subject question his sense of personal worth or the value of resisting."*

Sexual humiliation, while executed differently in different contexts—translated into a myriad of permutations by different soldiers, units, bases, and commanding officers—seems to pervade the various American “theaters of operation,” from Iraq to Afghanistan to Guantánamo Bay. Against the backdrop of this ubiquitous degradation—and the official admission that some of it is authorized—the Abu Ghraib scandal appears less like the sadistic acts of a few perverted rogues, and more like variations on a theme within a well-known script.

There is evidence for higher-level accountability, although, as journalist Philip Carter points out, it is unsurprising that we have no “smoking gun” leading directly down the chain of command from Secretary of Defense Rumsfeld to Pvt. Lynndie England.<sup>8</sup> Given the secrecy and legal finagling that have surrounded Army interrogation practices since September 11, 2001, it is nearly impossible to form a clear and comprehensive picture of which specific techniques are and aren’t authorized, and for which populations. Leaked memos, however, reveal that high-level government officials—including President Bush and Secretary Rumsfeld, on the advisories of their legal counsel—paved the way for the abuses outlined above, and knew about, tolerated, and even encouraged such treatment.<sup>9</sup> There is also evidence that the highest levels of the Pentagon authorized techniques including forced nudity, beatings, sensory bombardment and deprivation, and “stress positions,” as evidenced by numerous documents now available to the public. While the Administration has repeatedly denied inhumane treatment of detainees, its counsel has gone to great lengths to grant legal immunity to interrogators using coercive treatment that pushes against, if not crosses, the threshold of pain “severe” enough to be called torture, by any definition. As one memo issued by the Justice Department’s Office of Legal Counsel in 2002 asserts: “The criminal statute penalizes only the most egregious conduct... *only the worst forms of cruel, inhuman, or degrading treatment or punishment.*”<sup>10</sup>

Furthermore, while most of the interrogation procedures used by the American military are “old hat” procedures once employed by the KGB and the British in Northern Ireland, forced nudity and sexual humiliation appear to be an innovation of America’s own making...

The U.S. military seems to have launched a deliberate program of breaking down prisoners by violating their most deeply held religious beliefs and cultural norms, as perceived. The humiliating and dehumanizing acts documented in Abu Ghraib, Bagram, and Guantánamo would be deplorable in any culture, and seem aimed at the heart of a traditional religious culture greatly concerned with the preservation of sexual modesty and honor.

Whether this program has resulted in “actionable intelligence” is disputed. That it has resulted in unspeakable trauma is not. Women at Abu Ghraib have allegedly passed messages to their families imploring them to smuggle in poison to end their lives, or insisting they be killed immediately after release from prison to spare their families from shame. The Red Cross has observed rampant personality disturbances and suicidal tendencies in Guantánamo and Abu Ghraib, “symptoms [that] appeared to have been caused by the methods and duration of interrogation.” In Guantánamo alone, there were more than 460 acts of self-harm, many of them suicide attempts, between 2003 and 2004.<sup>11</sup>

From paraded nudity to feigned menstrual blood, the U.S. military has used a variety of cruel and degrading techniques in its detention facilities throughout the world, a seemingly purposeful assault on the religious culture and dignity of those at its mercy. The remainder of this section will explore the overarching value of human dignity in Jewish sources, a value so sacred to the rabbis that they grant it power to predominate over all of their other enactments.

### ■ ***Bselem Elohim*: Human Dignity Derives from Divine Origins of Human Being**

Traditional Jewish literature employs the term *kvod ha-briot* (the dignity of created beings), alluding to the Creator as the source of human dignity and grounding the requirement to protect human dignity in the divine origins of the human being. From its foundations, our tradition grants consummate value to the human being, as in the first chapter of the Book of Genesis: ‘*Naaseh adam b’tsalmenu*,’ ‘Let us make the human being in Our image’ (Gen. 1:26). Both humiliation of the living and dishonoring of the dead are conceived of as direct affronts to God.

Both biblically and post-biblically, the word *kavod* itself harbors multiple meanings. In some contexts, the tradition demands special *kavod* for designated groups of people: the king; scholars and the elderly; one’s parents (*kibud av v’em*) and community (*kvod ha-tsiibur*). The term *kvod ha-briot*—on the other hand—signals a form of unqualified, universal respect for human beings as such, intrinsic to their existence as human beings, whether old or young, sick or healthy, *tzadik* (righteous person) or *rasha* (criminal), independent of social status, identity, or context.

A classic midrash expresses the theological underpinnings of this foundational value:

Ben Azzai says: ‘This is the record of Adam’s line’ is the foremost principle in the Torah. R. Akiva says: ‘Love your fellow as yourself’ (Lev. 19:18), this is the greatest principle of the Torah. You should not say: Because I have been dishonored, let my fellow man be dishonored along with me.... R. Tanhuma explained: If you do so, know whom you are dishonoring—‘He made him in

the likeness of God.' (Gen. 5:1) (Breishit Rabbah 24 (end). Cf. Sifra, Kedoshim 2:4, JT Ned. 9:4).

R. Tanhuma presents the theological presupposition of R. Akiva's linchpin moral imperative: God is at stake in human relations, harmed and violated through acts of cruelty and degradation, even in retaliation or self-defense. He also presents a practical implication of his directive: *one must not shame and insult another human being, created in God's likeness, for to do so is to shame and insult God.*

*Halakhic* sources, meanwhile, concur that *kvod ha-briot* is one of the overarching values of Jewish tradition; marginal disagreement consists only in the scope of its trumping priority where it clashes with other commandments and values.

### ■ *Kvod Ha-Briot Doheh Lo Ta'aseh: The Halakhic Priority of Human Dignity*

The power of human dignity (*kvod ha-briot*) to displace other *mitzvot* is a recurrent principle in Jewish law. A passage in BT Brakhot states the general rule:

Come and hear. 'Great is human dignity, since it overrides a negative precept of the Torah'. Why should it? Let us apply the rule, 'There is no wisdom nor understanding nor counsel against the Lord?' [this verse was applied earlier in the text to illustrate that divine honor takes precedence over human honor, and so one cannot desecrate God's commandments publicly]— Rab b. Shaba explained the dictum in the presence of R. Kahana to refer to the negative precept of 'thou shalt not deviate' [Deut. 17:11; that is, the rule that human dignity takes precedence relates only to Rabbinic and not Torah precepts]... but where a person's dignity is concerned the Rabbis permitted [such deviation] (BT Berakhot 19b).

In this classic text of the Babylonian Talmud (*Bavli*), the Rabbis rule that their own decrees—in contradistinction to Biblical precepts—may be superseded by considerations of human dignity. The parallel text in the Jerusalem Talmud (*Yerushalmi*) presents the opinion of R. Zeira that even Torah commandments are temporarily overridden where they conflict with human dignity (JT Kilayim 9:1). The *Yerushalmi's* seemingly more expansive application of the principle is nonetheless limited to cases in which the dignity of the public (*kvod ha-rabbim*) is threatened—as in cases of public nudity or burial of the dead; the *Bavli's* more restrictive application of the principle, on the other hand, is specifically singular (*kvodo*) and universal (*kvod ha-briot*), and clearly applies to the dignity of each individual person.

The *Bavli*, furthermore, broadens the application of the principle to include *positive* and/or *civil* Torah precepts. In other words, human dignity prevails in monetary matters and in cases in which transgression of a biblical commandment would require *abstention* rather than active violation (*shev ve'al ta'aseh*; literally "sit and do nothing").<sup>12</sup> ...

The *Bavli* gives several illustrative examples of the principle of *kvod ha-briot doheh al ta'aseh*:

Rabbah son of R. Shila asked R. Hisda: Is it permissible to carry [stones to wipe oneself] up to the roof [after one has gone to the bathroom]? Human dignity is very important, he replied, and it supersedes a negative injunction of the Torah (BT Shabbat 81a-b).

One is permitted to carry a stone into a toilet to clean oneself, thereby violating the rabbinic prohibition against carrying an object excluded from use on Shabbat. Even in a context of total privacy, absent public awareness, shame may be averted through an active transgression, for human dignity predominates over rabbinic commandments.

As the Meiri summarizes:

*Kvod ha-briot* is very highly prized; there is no principle that is more highly prized. The rabbis laid down a cardinal rule: great is human dignity, which overrides any negative, rabbinic commandment, permitting its violation even by an active measure... The Torah [moreover] widens [the applicability of] the [overriding] principle of *kvod ha-briot* even to commandments written in the Torah, for example, in cases of *shev ve'al ta'aseh* [nullification by abstention from action] (Meiri, Bet Habehirah, Berakhot 19b).

The trumping priority of human dignity is not unlimited. According to all authorities, one may not transgress a *negative, Biblical* command in a *non-monetary* matter where it clashes with human dignity; one may not murder or even wear 'mixed species' (linen and wool together) in order to avoid violations to human dignity...

Despite these caveats, the rabbis ruled that the positive obligation to honor other human beings, and the negative injunction to avoid humiliating or contemptuous behavior, takes precedence over all other rabbinic verdicts, and many Torah commandments as well. The rabbis elevate human dignity to such paramount importance that they grant it priority over their own authority.

### ■ *Hamalbin Pnei Heviro b'Rabim: The Sin of Public Humiliation*

Rabbinic culture denounces public shaming and humiliation and considers it a grave sin, worthy of uprooting one's place in the world to come, even when done with good intentions, let alone when malicious or deliberate. The Talmud teaches that shaming is akin to murder, the equivalent of shedding blood, an irreparable wrong more serious than a monetary wrong because it injures another's very personhood rather than his replaceable property.

R. Yohanan said in the name of R. Shimon b. Yohai, "Verbal wronging is a more serious [transgression] than monetary wronging, since with the former it is written, "You shall fear God." R. Eleazar says, "This one affects his person, while that one affects his possessions." R. Shmuel bar Nachmani said, "For this one restoration is possible, while for that one restoration is impossible."

A Tanna recited before R. Nahman b. Isaac: "He who publicly shames his fellow is as though he shed blood." ...He who publicly puts his neighbor to shame has no portion in the world to come." ...It is better for a man to throw himself into a fiery furnace than to put his fellow to shame publicly (BT Baba Metzia 58b-59a; cf. M. Avot 3:15, BT Sanhedrin 99a and 107a.)

The Talmud prohibits one from shaming another regardless of the wrongs in his past...

### ■ *Boshet: Judicial Redress for Shame*

"*Boshet*" is the judicial manifestation of the recognition that shame inflicts unique injury, over and above any physical harm caused to a person. In a personal injury case, Jewish tort law mandates additional compensation for humiliation on top of damages for pain, medical expenses, loss of time, and depreciation in labor capacity (M. Baba Kama 8:1; BT Baba Kama 83b-84a)...

Even the person of absolute lowest social status in Talmudic society—the non-Jewish slave whose labor and body belong to another—possesses intrinsic dignity and must be compensated for encroachments upon it (M. Baba Kama 8:3).<sup>13</sup> We are to honor others regardless of whether they demonstrate self-respect; our obligation to treat others with dignity is not conditional on what sort of person stands before us (M. Baba Kama 8:6).

### ■ *Human Dignity of the Criminal Offender and Prisoner*

In his explanation for the different penalties assessed for stealing an ox and a sheep, R. Yohanan b. Zakkai assumes that an offender possesses dignity, even at the moment of committing a crime:

The Holy One blessed be He is mindful of the dignity of humankind. For [stealing] an ox, which walks on its [own] feet, the payment is fivefold; for [stealing] a sheep, which has to be carried on one's shoulders, the payment is fourfold (BT Baba Kama 79b).

As Rashi explains, "The thief [who carries a sheep] on his shoulders has [already] demeaned himself, and so the Holy One blessed be He lightens his fine" (ad loc.). The criminal's self-debasement lightens rather than stiffens his penalty, for the law recognizes dignity and prohibits encroachments upon it, even when a person has himself disavowed it. Elsewhere the Talmud makes clear that a person may not be degraded in public even though he may be suspected of having sinned (BT Menahot 99b, BT Baba Metzia 58b). The offender's dignity stands independent of his personal attributes or actions, intrinsic to his humanity.

The rabbis were also concerned about the public humiliation involved in arrest, before a person—presumed innocent—had been convicted through a fair trial: "R. Yossi said to him, 'Now do they seize someone in the marketplace and disgrace him?'" (JT Sanhedrin 7:10). The *Yerushalmi* justifies arrest only once strict evidentiary criteria have been met; that is, the court already possesses the names of two testifying witnesses who directly witnessed the accused committing the crime, even if the witnesses have not yet appeared in court.

The Rambam likewise stresses human dignity after describing the extensive punitive powers of the court, perhaps recognizing the temptation to violate dignity in the penal context:

Whatever [the judge] does should be for the sake of Heaven, and human dignity should not be light in his eyes, since it overrides a Rabbinic prohibition. This applies with even greater force to the honor of the children of Abraham, Isaac, and Jacob, who adhere to the true Law. He should be careful not to do anything to injure their dignity. His sole concern should be to enhance the glory of God, for whoever dishonors the Torah is himself dishonored by men, and whoever honors the Torah is himself honored by men. To honor the Torah means to follow its statutes and laws (Rambam, Hilkhot Sanhedrin 24:10).

The Rambam claims that it is *all the more* important to honor the dignity of Jewish detainees, meaning it is important to honor the dignity of non-Jewish detainees as well. Rambam reminds agents of the law that those who have committed crimes and are condemned to

imprisonment merit freedom from degradation; the Court must take care not to injure the dignity of those at their mercy, for the honor of both God and Torah is at stake.

### ■ **Conclusion: Human Dignity in Contemporary International and Israeli Law**

In the wake of the Holocaust, the injunction to protect human dignity has been codified as a value worthy of protection by international law (Article 12, Universal Declaration of Human Rights). Perhaps in response to the same historical event, both Germany and Israel have enshrined human dignity as the core, foundational value of their law: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state... There shall be no violation of the life, body, or dignity of any person as such.”<sup>14</sup>

The Israeli Supreme Court offers several examples of applying the abstract concept of *kvod ha-briot* to contemporary, concrete situations, including the rights and dignity of prisoners. Citing *kvod ha-briot* as developed in the *halakhah*, the Israeli High Court has determined that prisoners must be provided with all of their basic human needs, physical, religious, and cultural, and treated like civilized people; they must be provided with sleep in a proper bed, food and drink, eating utensils, etc.<sup>15</sup> Unlike in the United States, prisoners are considered citizens who can vote even while behind bars. As President of the Supreme Court A. Barak writes:

*Imprisonment requires, by its nature, denial of freedom, but this denial does not justify, by its nature, violation of human dignity. Imprisonment that protects the human dignity of the prisoner is possible. The prison’s walls do not have to separate between the prisoner and humanity... A prison is forbidden to become a concentration camp, and the prison cell is forbidden to become a cage. With all the problems inherent in this, a cultured society must ensure the minimum humane standards of imprisonment (emphasis added).*<sup>16</sup>

Finally, the Israeli High Court has applied the principle of *kvod ha-briot*, as reflected in both the *halakhah* and the Israeli Basic Law, to our exact case. *In a landmark ruling in 1999, Israel eradicated torture and other cruel, inhuman, and degrading treatment on grounds of human dignity—including the methods currently employed by the U.S.*<sup>17</sup> Some of the applicants before the court had been directly involved in hostile activities—including developing Hamas’ infrastructure, planning kidnappings of Israeli soldiers, and assisting in suicide bombings—and the General Security Services claimed that information revealed in their interrogations had helped thwart other serious attacks. *Nonetheless, the court categorically prohibited use of physical coercion in interrogations*, while leaving intact a “necessity” defense that could *post facto* pardon a specific interrogator from criminal liability in a true “ticking bomb” situation.

[We conclude that] a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever. There is a prohibition on the use of “brutal or inhuman means” in the course of an investigation (F.H. 3081/91 *Kozli v. The State of Israel*, 35(4) P.D. 441 at 446). Human dignity also includes the dignity of the suspect being interrogated. (Compare H.C. 355/59 *Catlan v. Prison Security Services*, 34(3) P.D. 293 at 298 and C.A.4463/94 *Golan v. Prison Security Services*, 50(4) P.D. 136). This conclusion is in perfect accord with (various) International Law treaties—to which Israel is a signatory—which prohibit the use of torture, “cruel, inhuman treatment” and “degrading treatment”... These prohibitions are “absolute.” There are no exceptions to them and there is no room for balancing. *Indeed, violence directed at a suspect’s body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can potentially lead to the investigator being held criminally liable* (emphasis added).

Following centuries of Jewish law, the Israeli High Court affirmed the crowning significance of human dignity, a value that underlies and encapsulates the entire law and serves as its litmus test. On the basis of this principle, the Israeli Court ruled to do away with the specific interrogation methods currently employed by the U.S. in detention facilities throughout the world, even in interrogations of detainees suspected of direct involvement in terror organizations. The Court determined that were the law to permit torture—the ultimate violation of human dignity—it would betray its own *raison d’être*.

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## NOTES

1. Cited in Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror*, New York Review Books, p. 26.
2. As Brian Whitaker points out, in attempting to manipulate detainees through sexual humiliation, the American military relies on sweeping, racist generalizations about "Arabs," from Morocco to the Gulf. While to some extent the military's sexual stereotypes about the "Arab" world are inaccurate and essentializing, the point is that the military seems to be deliberately aiming to violate Muslim and Arab cultural and sexual norms. See Brian Whitaker, "It's best use is as a doorstop," *The Guardian*, May 24, 2004, <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,1223525,00.html>
3. "Iraqi Recounts Hours of Abuse by US Troops," *New York Times*, May 5, 2004, p. A1. Mr. Abd told the *New York Times* that he had been arrested in June 2003, when he had tried to leave a taxi he was riding in near a military checkpoint. This was seen as suspicious behavior, compounded by the fact that he had served for eighteen years in the Iraqi army. Before, during, and after his time at Abu Ghraib, he was never charged with a crime. "The truth is we were not terrorists. We were not insurgents. We were just ordinary people."
4. Several other detainee accounts, each more nightmarish than the next, are available at "Sworn Statements by Abu Ghraib detainees," <http://www.washingtonpost.com/wp-srv/world/iraq/abughraib/swornstatements042104.html>, and reproduced in Danner, *ibid.*, pp. 226-248.
5. The International Committee of the Red Cross report, produced shortly before the Abu Ghraib scandal, reports that: "Certain military intelligence officers told the ICRC that in their estimate between 70-90 percent of persons deprived of their liberty in Iraq had been arrested by mistake." More recent official estimates drop that figure to two-thirds, with estimates of "mistaken identities" at Guantánamo hovering around 40 percent.
7. "Detainees Accuse Female Interrogators: Pentagon Inquiry is Said to Confirm Muslims' Accounts of Sexual Tactics at Guantánamo," *Washington Post*, Feb. 10, 2005, p. A01. <http://www.washingtonpost.com/wp-dyn/articles/A12431-2005Feb9.html>
8. General Schmidt emphasizes that he did not find all of the F.B.I.'s accusations substantiated, including food and water deprivation. However, he also stresses that many of the techniques criticized by the F.B.I. were in fact authorized ways of undermining detainees' sense of personal worth. See "Report Discredits F.B.I. Claims of Abuse at Guantánamo Bay," *New York Times*, July 14, 2005.
9. Philip Carter, "The Road to Abu Ghraib," *Washington Monthly*, Nov. 2004. <http://www.washingtonmonthly.com/features/2004/0411.carter.html>
10. See the Bybee memo (2002), available at: <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. This memo was revised in 2004; the revised version is available at <http://www.usdoj.gov/olc/dagmemo.pdf>. Marty Lederman analyzes the differences between the two memos at <http://www.acsblog.org/international-affairs-623-marty-lederman-on-understanding-the-olc-torture-memos-part-i.html>. For thorough summaries of issues of accountability for current practices in American detention, see articles by constitutional lawyer Marty Lederman, who served as Attorney-Advisor in the Justice Dept.'s Office of Legal Counsel until 2002 (He was still there when Bybee's 2002 memo was issued but claims that he knew nothing about the memo and is not disclosing confidential information to which he was privy at the OLC). Two of his articles are available at: <http://balkin.blogspot.com/2005/01/heather-mac-donalds-few-bad-apples.html> and <http://balkin.blogspot.com/2005/01/white-house-dissembles-on-torture-and.html>.
11. See Bybee memo, *ibid.*
12. See "Mass Suicide Attempts at Gitmo," *Associated Press*, Jan. 24, 2005, available at: <http://www.cbsnews.com/stories/2004/11/30/terror/main658327.shtml>
13. See Magen Avraham to Orah Hayyim 13(8) end.
14. R. Yehuda disagrees, arguing that the proof-text for monetary compensation—"When men strive together, man and his brother" (Deut. 25:11)—doesn't include a Canaanite slave, since he may not enter into an assembly of Israelites and therefore there is no brotherhood with him. The sages hold that a Canaanite slave is included in "a man and his brother," and the Talmud states explicitly that the law is in accordance with the sages and not with R. Yehuda. See BT Baba Kama 88a and BT Sanhedrin 86a.
15. "Basic Law: Human Dignity and Liberty," passed by the Knesset, Adar Bet 12, 5752 (March 17, 1992) and published in *Sefer Ha-Chukkim* 1391, March 25, 1992. Available at: [http://www.mysraelsource.com/content/human\\_dignity\\_liberty](http://www.mysraelsource.com/content/human_dignity_liberty)
16. "It is firmly entrenched in our law that the fundamental rights of man 'survive' also behind prison walls, and are granted to the prisoner (and the detainee) also in his prison cell." See PPA 4463/94, *Golan v. Prison Service*, PD 50(4) 136, at 152-153. Cf. the comments of Vice-President of the Supreme Court, Haim Cohen: "It is the right of a person in Israel who is sentenced to imprisonment (or who is lawfully detained) to be incarcerated in conditions that allow him to live a cultured life." HCJ 221/80, *Darwish v. Prisons Service*, *ibid.*, at 538. Cf. Menahum Elon, "Human Dignity and Freedom in Jewish Heritage," *Human Dignity and Freedom in the Jewish Heritage*, The Presidential Residence, 1995, p. 26 (Hebrew).
17. HCJ 540/84-546, *Yosef et al. v. Director of the Central Prison in Judea and Samaria*, PD 40 (1) 567 at 572-573.
18. Btselem—the Israeli Center for Human Rights in the Occupied Territories—published a report in 1998 detailing the methods used by the GSS prior to 1999 as well as stories of prisoners who underwent interrogation. The 1999 Supreme Court case includes two applicants directly involved in terrorist activities, perhaps as a way of forcing the issue of whether coercive interrogations are permitted. The Btselem report argues, however, that most cases in which "ticking bomb" justifications were invoked before the Supreme Court were later found to be unsubstantiated. The report follows several stories of detainees who were interrogated with a "ticking bomb" justification and never indicted for any criminal offense (pp. 31-32). The full text of the report is available at: [http://www.btselem.org/English/Publications/Summaries/199802\\_Routine\\_Torture.asp](http://www.btselem.org/English/Publications/Summaries/199802_Routine_Torture.asp)



## But Does Torture Save Lives? Torture, *Pikuakh Nefesh*, and the *Rodef* Defense | רודף/פיקוח נפש

Melissa Weintraub

*This is an abbreviated version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).*

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

—Thomas Friedman<sup>1</sup>

...your own sword has devoured your prophets, like a destroying lion. (Jeremiah 2:30)

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

But even in anxious times like these, torture arouses unique disgust from most corners of the democratic world, retaining its place on a brief list of moral “nevers.” In international law, torture joins genocide and slavery as acts categorically deplored and outlawed, regardless of political circumstances....

One proverbial example tugs at the absolutist prohibition against torture. Known as the “ticking bomb” case, it presents some version of the following hypothetical: a captured fanatic has set a hidden nuclear device in the heart of a major metropolis, set to go off within hours. The authorities are certain that the prisoner in their hands is the perpetrator whose knowledge could avert the catastrophe and spare thousands of innocents, even a whole nation, and the non-violent devices of their most expert interrogators have not yielded enough information to locate and deactivate the bomb. Should we really, ask the thinkers who present this scenario, damn thousands rather than suspend our moral commitments?

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

What instruction does Judaism provide about balancing the need for self-defense with other Jewish values? This section will focus on the “*rodef*” principle and conditions for its application, the classic Jewish statement of pre-emptive self-defense and defense-of-others.

### ■ **A Few Caveats: The Paucity of Jewish Sources on War**

...Given the historical realities of the Jewish people during previous eras of *halakhic* development, it is not surprising that there is a much more extensive treatment of the proper parameters for self-defense and defense-of-others in the sources on *rodef* than in those dealing with war proper. It is the assumption of this piece that to develop Judaism’s positions on “battlefield ethics” issues, we must extrapolate from general principles of Jewish ethics and apply them to the military situation, particularly the laws of *rodef* and self-defense...

This section begins with an appreciation of the difficult and rudimentary nature of applying traditional *halakhic* principles to contemporary military concerns, and an acknowledgement that others might read these sources differently.

### ■ **Pikuakh Nefesh: The Sanctity and Preservation of Life in Judaism**

Judaism prizes nothing more than human life. The *halakhah* privileges the preservation of life above all other enactments, outside of murder, idolatry, and sexual crime (eg. adultery or incest). One *must* transgress ritual laws—including stringent Biblical laws like those governing *kashrut*, Shabbat, and Yom Kippur—rather than imperil human life (BT Yoma 82a, 85b). The law grants tremendous latitude in determining the degree of actual threat, recognizing that taking the time to assess whether a situation is in fact dangerous could result in death that might otherwise be averted (BT Shabbat 129a; Shulhan Arukh, Orah Hayim 328:2, 328:13).

### ■ **Self-Defense and Rodef: Im Ba L’Horgakh, Hashkem L’Horgo**

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

Based on a Biblical case of a thief invading a private home at night (Ex. 22:1-2), Jewish law lays out a general principle of self-defense: “The Torah decreed, ‘If he comes to kill you, kill him first’” (Sanhedrin 72a; cf. BT Berakhot 58a and 62b).

Jewish law obligates one to act to preserve the lives of others as well as one’s own life.<sup>2</sup> Third-party bystanders must attempt to save other innocent people from life-threatening danger, based on the verse: “Neither shall you stand idly by the blood of your neighbor” (M. Sanhedrin 8:7; BT Sanhedrin 73ff; Rambam Hilkhhot Rotzeah 1:6-16; Shulhan Arukh, Hoshen Mishpat 425:1-2)...

While the original *rodef* rule applied only to perpetrators *directly* responsible for *capital* crimes, later applications extend the principle to cases of indirect harm and non-capital crimes (Piskei haRosh, Baba Kama 3:13; Shulkhan Arukh, Hoshen Mishpat 388:9 ff; Rema, Shulkhan Arukh, Hoshen Mishpat 425:1)...

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

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

- **Spontaneity rather than premeditation.** The *rodef* defense applies only to a spontaneous act in a moment of unavoidable urgency, when life is in immediate danger...
- **Difference of opinion over required degree of certainty.** In a situation of imminent threat, most say that one may respond to one’s fear without full knowledge of the facts; but evidence must be strong, if not incontrovertible, that the aggressor poses a danger in the present moment.<sup>3</sup>

The analogues to self-defense and *rodef* in American law similarly require that force be used against a threat that is imminent, immediate, and certain.<sup>4</sup>

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

Jewish law generally does not permit one to save oneself or others by killing other innocents. In such cases, another principle applies: “One life may not be given priority over another” (M. Ohalot 7:6, Rambam, Hilkhhot Rotzeah 1:9 and Hilkhhot Yesodei Ha-Torah 5:5, 5:7).

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

Incest and murder [may not be practiced to save one’s life] ... How do we know this of murder?—It is common sense. Even as one who came before Raba and said to him, ‘The governor of my town has ordered me, “Go and kill so and so; if not, I will kill you”’. He answered him, ‘Let him rather kill you than that you should commit murder; why do you think your blood is redder? Perhaps his blood is redder’ (Sanhedrin 74a; cf. BT Pesahim 25b). “Who says your life is more beloved by God than his? Perhaps his life is more beloved.” (Rashi, Pesahim 25b)

Later authorities apply this principle to all cases in which one can find no way to avoid endangering oneself without committing violence against another innocent person; the law generally forbids one from doing so.

According to many authorities, not only are we prohibited from sacrificing an innocent life to protect our own; we are prohibited from surrendering a single innocent life even to protect a whole community. The foundational “one vs. many” text appears in the *Tosefta*, presenting a dilemma in which oppressors ask for a person to be delivered to death, threatening that otherwise the entire group in which he has sought refuge will be killed (T. Terumot 7:20). The *Tosefta* states unequivocally, “all must be killed rather than surrendering even one” ... Authorities agree that *a community may not save itself by killing a single innocent individual unless that individual will die in any event.*

The *rodef* defense may not be invoked to justify harming any third-party innocent, even one who has committed crimes in the past. In the moment of direct violent attack or other indirect, grave, deliberate harm (e.g. the informer), the idea that “one life may not be given priority over another” no longer applies. After the imminent danger has passed, the principle of the equal worth of human lives pertains again in full force.

••••

• **Who is “innocent?” Combatants, civilians, and collective punishment.**

Judaism, as a general rule, rejects collective punishment, based on the verse: “The fathers shall not be put to death for the children and the children shall not be put to death for the fathers; every man shall be put to death for his own sin” (Deut. 24:16)... The tradition not only rejects collective punishment on the part of human agents, but also challenges instances of divine collective punishment, notably Abraham’s famous intercession on behalf of the people of Sodom...

In each biblical incident of seeming collective punishment for the sins of individuals—the story of Shechem is the primary example, but there are a handful of others<sup>5</sup>—commentators scramble to either find some direct blameworthiness on the part of those punished, read their way out of the punishment’s application to the innocent, or express their perplexity at the punishment’s injustice. *The rabbis sustain the prohibition against collective punishment as a fundamental, unwavering principle despite its apparent tension with several biblical passages.*

Some of the methods used to resolve these biblical contradictions, however, have been used by a few contemporary authorities to argue that punishment may be extended to an entire society where that society does not enforce a legal system, harbors wrongdoers, or passively colludes in crime by withholding information.<sup>6</sup> Others go so far as to argue—in part through recourse to an obscure text in *Masekhet Sofrim* (15:7)<sup>7</sup>—that during wartime (*sha’at milhama*) the principle banning collective punishment is suspended altogether, and all members of the “enemy” society are considered “pursuers” by default rather than innocent bystanders.<sup>8</sup>

Jewish law, as already noted, does not extensively treat the subject of “battlefield ethics” nor give much guidance about how to distinguish combatants from civilians. Nonetheless, many sources reject the indiscriminate logic of these recent *halakhic* opinions even in the context of war, and reflect, rather, the judicious scruples reflected in the *rodef* literature...

Several laws recognize and attempt to limit suffering and destruction to “enemy” populations ... Ramban comments: “God commanded us that when we lay siege to a city that we leave one of the sides without a siege so as to give them a place to flee to. *It is from this commandment that we learn to deal with compassion even with our enemies even at time of war.*”<sup>9</sup> ...

On an *aggadic* level, Jewish tradition expresses a general abhorrence of resort to violence (BT Sanhedrin 108a, Mid. Tanhuma, Lekh Lekha 7) and anxiety about participating in bloodshed even in the context of legitimate armed conflict, realizing that too often innocent people get caught in the crossfire: “Abraham was filled with misgiving, thinking to himself, Maybe there was a righteous or God-fearing man among those troops which I slew” (Gen. Rabb. 44:4; cf. Gen. Rabb. 76:2 and Mid. Tanhuma, Lekh Lekha 19).

Does Jewish law recognize a category of the “innocent civilian”? The prohibition against collective punishment and the restrictions on siege warfare—as well as *midrashim* renouncing violence, particularly towards innocent bystanders—present a stream of thought that would answer “yes.” On the other hand, some of the exegesis about biblical stories that stand in tension with the prohibition against collective punishment—and a few other texts that generalize about “killing the best of the non-Jews” during times of war—present a stream of thought that might answer “no.”

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

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

Abaye said: This applies where she could have been saved at the cost of one of the limbs [of the violator] and agrees with R. Jonathan b. Saul. For it has been taught: If one was pursuing his fellow to slay him, and he could have been saved by maiming a limb [of the pursuer] but did not thus save himself [killing him instead], he is executed on his account (BT Sanhedrin 74a).

In one of the few cases in which the Israeli Supreme Court invoked the concept of *rodef*, the Court applied the limiting condition of minimum possible harm. So too, American law mandates that force used in self-defense or defense of others be “necessary to defend” or “necessary to prevent” specified harms. A defendant may not exceed “the reasonable means which were necessary to protect himself.”<sup>10</sup>

In sum, Jewish law shares with American and Israeli secular law the principle that no undue force may be justified in the name of self-

defense, and no force whatsoever may be justified once imminent danger has passed. Threat may not be inferred from past conduct, but must be visible and urgent in the present moment. No force may hurt innocent bystanders, and no more force may be used than is required to save particular victims from immediate harm. The morally problematic *rodef* defense is restricted to the smallest possible number of cases, as a last resort.

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

#### 1) *Imminence, spontaneity, and certainty.*

##### • **Imminence and spontaneity.**

Most, if not all, of the thousands of detainees in American detention centers are not on the verge of committing an imminent, serious crime, directly or indirectly.

The *rodef* defense would apply to a *true* ticking bomb case should one ever occur. The *rodef* principle might release an interrogator from liability if he were to resort to torture spontaneously in a moment in which he had probable cause to believe the prisoner before him was a perpetrator with knowledge that could save lives in immediate danger. But it would not permit authorizing physically coercive techniques in advance or applying them across the board in a deliberate and routine way to detainees held over extended periods of time, even if many of these detainees had once but were not currently posing a threat to American lives. It would not permit “torture” or “cruel, inhuman, and degrading treatment” to be anyone’s training or job description in the military. Nor would it allow torture to be used as a punishment, reprisal, or intimidation tactic.

In 1999 the Israeli Supreme Court *categorically declared that physically coercive techniques are not authorized by Israeli law*. In 1987, a judicial commission of inquiry headed by former Supreme Court Justice Moshe Landau had reported that “moderate physical pressure” was defensible in cases in which an interrogator “committed an act that was immediately necessary” to save lives from grave harm.

The Israeli Supreme Court ruled that neither the government nor the security services could establish directives authorizing the use of physical coercion *in advance*, but only as an “ad hoc...improvisation” responding to an urgent moment at hand. They also ruled that the GSS could not develop physical means of interrogation before the fact, but individual interrogators could resort to force in response to concrete situations of necessity, *post factum*.

The Court ruled that the “necessity” defense may serve as a way of pardoning a specific interrogator from liability, but has no other normative value. The defense might mitigate the penalty incurred by the investigator, but would not excuse the torture itself. The court specified that “the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, *provided the danger is certain to materialize and there is no alternative means of preventing its materialization*...”

This standard of imminence is similar to that demanded by the *rodef* defense in Jewish law. The Court provided an exceptional, narrow “out” from an otherwise absolute prohibition against torture and “cruel, inhuman, and degrading treatment.”...

Accounts of practices in American facilities suggest that “cruel, inhuman, and degrading treatment,” or “torture lite,” is the norm rather than the exception, a part of detention culture and broad policy, applied to large numbers of detainees who almost certainly lack specific knowledge about future attacks. Current U.S. practices would not satisfy the criterion of imminent peril required by the *rodef* defense.

##### • **Certainty.**

Even from a purely pragmatic point of view, the factual claim that torture saves lives is not substantiated. There are as many convincing arguments that torture endangers American lives, both of troops and civilians, as that it protects American lives.

Those who argue that torture “works” suggest that it provides vital information that can help avert deadly attacks. *Many of torture’s success stories, however, appear more tenuous upon further probing*. Career interrogators claim that little valuable information was revealed to them through physical coercion. As John Langbein, who has researched the rise and fall of torture in the European criminal justice system, asserts: “History’s most important lesson is that it has not been possible to make coercion compatible with truth.”<sup>11</sup>

*There are, moreover, forceful arguments that resort to torture and other cruel and degrading treatment hinders rather than serves a war effort whose success depends on securing the loyalty of the people among whom it struggles*. The Ansar al-Islam terror network in Iraq, for example, an al Qaeda affiliate, prints pictures from Abu Ghraib in its recruiting literature. “An operation that crushes a cell but alienates an entire population of innocent bystanders is not a success. It is a failure.”<sup>12</sup>

Former Secretary of State Colin Powell and other career military professionals believe that America's detention practices have placed current and future generations of U.S. soldiers at risk by sending a message of glibness about international law, not only to U.S. military personnel, but also to other governments and militaries throughout the world.

Finally, there is the argument that torture, even if it could in fact save our bodies, would in the meantime corrode our souls, as citizens of liberal democracies and as conscientious human beings. Democracies are brought to their knees by terrorism not in military defeat, but in yielding their own ideals through overreactions (Argentina, Colombia, the "Red Scare" in America, etc.). Terrorism tends to menace democratic states most by weakening their own constitutional and ethical commitments.

### 2) *Harm to third-party innocents.*

The "ticking bomb" hypothetical relies on the notion that the person being tortured is not a mere suspect; he is a confirmed perpetrator. In real life, however, interrogators rarely know that they have the "right" person before them, particularly when detainees have been gathered in broad round-ups and granted few due process protections.

As of 2003, the International Committee of the Red Cross estimated that between 70-90 percent of those held in Abu Ghraib were there "by mistake;" more recent official inquiries have dropped the estimate to two-thirds. At Guantánamo, official reports have estimated that 40 percent of detainees never belonged there.<sup>13</sup> 85 percent of those captured at Bagram in Afghanistan have since been released without any charges or evidence of terror links.<sup>14</sup> There have been reports of routine physical and psychological ill-treatment and abuse at each of these facilities.

From the perspective of Judaism, even if torture were proven to save lives, the *rodef* defense would not permit violence against innocents on the basis of a net saving of life; the imperative to preserve our own lives does not allow us to sacrifice the lives of other innocents. The lives of U.S. military detainees are as valuable as our lives; they too are imprinted with the divine image, their blood as red as ours.

### 3) *Minimum possible harm.*

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

*The particular interrogation methods currently authorized and employed in U.S. detention induce severe enough pain—especially when used in combination and with frequency—to be determined torture by both the U.N. Committee against Torture and the European Commission of Human Rights.*

Furthermore, rather than causing minimal possible harm, there is evidence that the U.S. is inflicting as much pain as it can get away with without being charged for war crimes.

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

These practices are not separate and distinct categories of acts, but rather lie in an unbroken continuum. In practice, it is all too easy for cruel treatment to slide into torture. This is so for many reasons. The body becomes inured to pain, which prompts interrogators to ratchet up the pressure. Interrogators in the real world vie to be the one to 'break' the prisoner, rather than leave the glory to the next shift. Once an official has internalized permission to treat someone with cruelty, as a matter of human nature it becomes difficult to gauge what is then too cruel.<sup>15</sup>

*... Even were U.S. interrogators to restrict themselves to those methods currently authorized by the Pentagon, however, they would violate the standards set by the U.N. Committee Against Torture—which oversees the Convention Against Torture, a treaty to which America is a signatory—as well as the minimum possible harm standard of the rodef principle.*

• **Alternatives to torture.**

Many military interrogators argue that physical coercion is neither effective nor necessary, for prisoners cooperate most readily when their confidence has been earned...<sup>16</sup> Physical coercion, once standard fare in domestic police interrogations, has all but disappeared in the American police precinct... The Supreme Court has ruled that successful law enforcement and crime investigation does not demand physical violence, and may be achieved through “persistent cross-questioning,” “patience,” “self-assurance,” “entreaty,” and “cajolery.”<sup>17</sup>

Torture would not be permitted according to the *rodef* principle’s minimum possible harm standard, given that alternative, effective means are available to gather intelligence to protect American lives.

■ **Conclusion: The Rodef Defense Does Not Permit Routine Torture**

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

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

The *rodef* defense would allow the killing of a suicide bomber strapped with explosives and might allow ad hoc physical coercion in a true “ticking bomb” case, but in all other cases would support international law’s absolute prohibition against torture and “cruel, inhuman, and degrading treatment.”

...By abstracting to the philosophical plane, the “ticking bomb” hypothetical allows us to overlook the thousands of real victims being tortured and degraded in U.S. custody, few of them “ticking bombs” by any definition, and all too many of them innocent of any crime or threat to American lives.

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

I challenge you—answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death only one tiny creature—that little child beating its breast with its fist, for instance—and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me, and tell the truth.

Jewish law joins Dostoevski’s Alyosha in answering with a soft but audible “no.” We are not to adopt the sort of “collateral damage” logic that would justify horror to the few for the sake of the well-being of the many; we may not destroy innocent lives—entire, infinite worlds—so that we may live more securely. We may not “set aside one life for another,” for Judaism reminds us that our blood is no redder than that of other human beings, equally beloved by God.

This is a shortened version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).

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## NOTES

1. "Just Shut it Down," *New York Times*, May 27, 2005.
2. As Chaim Povarsky elaborates, these two principles (*rodef* and self-defense) are not originally connected. The burglar, however, whom one may kill in self-defense, is designated as "*k'rodef*" (like a *rodef*) in *halakhic* sources. For an extensive discussion of the relation between these two principles, see Povarsky's "The Law of the Pursuer and the Assassination of Prime Minister Rabin," *Jewish Law Association Studies IX*, ed. by E. A. Goodman, Scholars Press, 1997.
3. See Resp. Maharam bar Barukh, cited in Mordekhai, Baba Kama 196 and Moshe Feinstein, *Iggerot Moshe*, Hoshen Mishpat II:69, sec. 2. For a summary of different views on the degree of certainty required for *rodef* to apply, see J. David Bleich, "Jewish Law and the State's Authority to Punish Crime," *Contemporary Halakhic Problems IV*, Ktav Publishing House, 1995, pp. 84-86.
4. See Rav Meir Batiste, "Collective Punishment," *Crossroads: Halacha and the Modern World*, Vol. V, Zomet Institute, 1999, *ibid.* for others.
5. Batiste, *ibid.* p. 250.
6. The text reads: "R. Shimon b. Yohai taught: Kill the best of the non-Jews in times of war; crush the brain of the best of serpents. The most worthy of women indulges in witchcraft. Happy is he who does the will of the Omnipresent." The text includes many other broad generalizations not seen as having *halakhic* implications by later authorities: "A man should not teach his son to be an ass-driver, sailor, coachman, shepherd, or shopkeeper, because these occupations are robbery. R. Yehuda, however, quoting [Abba Guria] said: Ass-drivers are mostly wicked, but sailors are mostly pious. The best of physicians are [destined] for Hell and the most worthy of butchers is Amalek's partner. Bastards are mostly keen-witted, slaves are mostly arrogant," etc.
7. See Moshe Zemer, *Evolving Halakhah: A Progressive Approach to Traditional Jewish Law*, Jewish Lights Publishing, 1999, pp. 206-210.
8. Ramban, *Hasahot haRamban L'Sefer Ha-Mitzvot*, Positive Commandment 5.
9. Mark C. Alexander, "Religiously Motivated Murder: The Rabin Assassination and Abortion Clinic Killings," *Arizona Law Review*, Winter 1997, p. 1190 and n. 155.
10. John H. Langbein, "The Legal History of Torture," *Torture: A Collection*, *ibid.* p. 101.
11. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror*, Princeton University Press, 2004, p. 82.
12. Joseph Lelyveld, "Interrogating Ourselves," *New York Times Magazine*, June 12, 2005.
13. Tim Golden, "Army Faltered in Investigating Detainee Abuse," *New York Times*, May 22, 2005.
14. Dinah Pokempner, Dep. Gen. Counsel of Human Rights Watch, personal correspondence, Feb. 2005.
15. For a list of Army, FBI, and CIA agents who stress the inefficacy of torture, see: <http://www.amnestyusa.org/stoptorture/officersquotes.html>.
16. *Miranda v. Arizona* 384 US 436 (1966) and *Culombe v. Connecticut*.

## **The Heart of a Stranger: Jewish Historical Memory of Torture | כי גרים הייתם**

Melissa Weintraub

*This is an abbreviated version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).*

You shall not oppress a stranger, for you know the heart of the stranger, having yourselves been strangers in the land of Egypt.  
—Ex. 23:9

‘You were strangers in the land of Egypt’ reminds us that we have experienced the great suffering that one in a foreign land feels. By remembering the pain which we ourselves have undergone, from which God, in His mercy, delivered us, our compassion will be stirred up towards every man in this plight.

—*Sefer Ha-Hinukh* 431

### **We know the heart of the stranger.**

From the Bible on, the prohibition against oppressing others is founded on our own historical memories of persecution: “Do not oppress him in your land when you are stronger than him. Remember, you were strangers like him” (ibn Ezra on Ex. 22:20). Every day, as we recite the *Shema*, we recall our experience as defenseless victims in Egypt, and God’s redeeming role in our liberation. Every day we recall that our cries were heard—our people born out of slavery—so that we too might respond to the cry of suffering in the world around us.<sup>1</sup>

The Talmud highlights that the prohibition against oppressing the stranger recurs no less than thirty-six times in the Torah, more than any other commandment, including the injunction to keep the Sabbath, refrain from forbidden foods, and love God (Baba Metzia 59b).<sup>2</sup>

*While we cannot draw equivalencies between our suffering—its unique depths and horrors—and the suffering of any other people, past or present, we can, in remembering our humiliations, weave empathy from pain.* We know, from the inside, what it can mean to be abandoned to powerful governments with lofty aspirations. We know what it can mean to be dehumanized, blamed, and punished collectively for the misdeeds, real and imagined, of the few.

*When torture is explicitly named in Jewish texts, it is from the vantage point of the victim.* From the Roman Empire to the Crusades to the Holocaust, Jews have been the victims of torture and religious persecution. The Geneva Conventions—which ban torture as a war crime—were drafted and adopted by the nations of the world in response to the atrocities of Nazi Germany. As Jews, we have a special sensitivity to the immorality and costs of torture.

### **Eleh Ezkera: These I remember.**

Every *Yom Kippur* during the “martyrology” service, we mourn for the violent torture and execution of ten of our greatest teachers under the Roman occupation. R. Akiva, R. Hananiah b. Teradyon, R. Yishmael, R. Shimon ben Gamliel, and all those who have followed in their wake throughout history, condemned for adhering to their faith.

Wherever I stand, I hear rattling:  
*My brothers in chains, in chambers of the stricken.*  
*They pierce the walls and burst the silence*  
*Through the generations their echoes cry out.*  
*In torture camps, in pits of the dead.*<sup>3</sup>

Why do we remember? To protest ongoing innocent bloodshed and human cruelty, and to honor those who have defended the victims in every age. To urge the One who delivered us from Egypt to help us deliver all those persecuted today. To ask that mercy might prevail and our lives take part in bringing the world’s torments to an end.

### **We remember the martyrdom of the sages.**

The Second and Fourth Books of Maccabees recount the torture and martyrdom of Hannah’s seven sons as well as the High Priest Eleazar under Antiochus IV:

*“I will... leave behind me a noble example to the young how to die willingly and nobly on behalf of our revered and holy laws.”*  
*With these words [Eleazar] stepped forward at once to the instrument of torture... Under the strokes of torture, he groaned out:*  
*“The Lord who has holy knowledge understands that, although I might have been freed from death, I endure cruel pains in my body from scourging and suffer this gladly in my soul, because I fear Him. (2 Macc. 6:6, 6:18-30, and 7; cf. Lam R. 1:16 and BT Gittin 57b).*

The Talmud recalls the gory horrors withstood by R. Akiva and R. Hananiah b. Teradyon, attributed to the Hadrianic persecutions; R. Akiva's flesh torn from his body with iron combs (BT Brachot 61b), R Hananiah b. Teradyon set on fire, enwrapped in a Torah scroll and bundles of branches, wet wool placed over his chest to prolong his agony (BT Avodah Zarah 17b).<sup>4</sup>

We remember Hannah and her seven sons, R. Akiva, R. Hananiah b. Teradyon—the paradigmatic martyrs of Jewish memory, tortured unto death.

***We remember the torments of Crusader Europe.***

The *u'netaneh tokef*, according to legend, was incorporated into our High Holiday liturgy after an incident of torture involving R. Amnon of Mainz, a rabbi of the tenth century who was brutally tortured and maimed after refusing to convert. On Rosh Hashanah, he was carried to the synagogue, where he led the congregation in reciting *u'netaneh tokef* and then promptly died. A century later, the legend goes, he appeared to Rabbi Kalonymus ben Meshullam in a dream and asked that this prayer be recited each year during the Yamim Noraim. The story and poem were popularized, given their martyrological associations, among Jews suffering through the violence of the Crusades.

The Crusader period saw the advent of blood libels and the condemnation of entire communities to torture and death; in 1171, the false accusation that a Jewish man had murdered a Christian child induced the Count of Blois to enchain and imprison all of the local Jews, then torture fifty men and women and burn them at the stake.

*We are tormented and ill-treated,  
And dragged to die upon the scaffold,  
We cling to You with growing fervor.*<sup>5</sup>

A *Tosafot* commentary on BT Avodah Zarah 18a, roughly contemporary with the Crusades, expresses the darkness of the times in the question it addresses; one may override the prohibition against suicide, avows Rebbenu Tam, when subjected to unbearable torture as a pressure to convert.

We remember those accused falsely and those condemned for others' wrongdoing, those who lived in constant fear and those forced to make impossible choices, those who submitted to and those who resisted tyranny with their lives.

***We remember the tortures of the Inquisition.***

During the Spanish Inquisition, Jewish women—particularly *conversos* and crypto-Jews—were the primary targets and victims of torture. We remember Maria and Isabel Lopez, accused of abstaining from pork and wearing festive clothes on the Jewish Sabbath. The Lopez family was subjected to a form of water torture called the "*escalera*," in which defendants were bound naked to a scaffold with their feet over their heads and their faces covered with headpieces. Victims experienced a sense of suffocation when water was poured over their faces and pressure progressively increased through tightened ropes:

*And the said Lord inquisitors ordered the said Maria Lopez to be taken to the torture chamber and to be undressed and to be placed on the rack of torment and to be tied with some hemp ropes. She was undressed and placed on the said rack and tied with the said ropes and was required and admonished by the said Lord Inquisitors to tell the truth: who were those persons whom she had seen commit those heretical crimes of which she is accused? Because the intention of your Graces is none other than to know the entire truth, and if she dies during torture or receives an injury to any limb, it will be her fault and not that of your Graces... The order was made to pour water with a pitcher [that contains up to four pints] and [to put] something additional upon her face on top of the silk headdress that she had on her face. It was ordered for the ropes to be tightened with a tourniquet and it was tightened with two tourniquets.*<sup>6</sup>

The meticulous Inquisition records document the subsequent torture of Maria's daughter Isabel before her eyes, two and a half jars of water poured down her throat while the ropes were tightened and Isabel cried out for help, vowing that she had already told the truth and had nothing more to confess.

Other accounts record the shame of women forced to undress before their inquisitors, asking to be blindfolded so as not to have to see themselves naked and exposed. The scribe records a woman crying out as her clothes were removed: "the affront is much worse to fear than the pain...so it is for the innocent and the guilty alike."<sup>7</sup>

We remember all those women and men tormented for "withholding evidence," those who refused to "procure information" and those who had none to give, those who confessed and those who didn't, those who were condemned and those who were absolved after with-

standing untold agony and debasement.

***We remember the unspeakable persecution of the Holocaust.***

We remember not only the gas chambers and the mass graves, but also the assaults on dignity and precious religious commitments: the presentation of pork on Yom Kippur to starving inmates; the shaving of beards; the sexual violation and rape of women and men. We remember the humiliation and disgust of those forced to stew in their own excrement, refused access to latrines and toilet paper: "Urine and excreta poured down the prisoners' legs, and by nightfall the excrement, which had frozen to our limbs, gave off its stench... we were really no longer human beings in the accepted sense. Not even animals, but putrefying corpses moving on two legs."<sup>8</sup> Alexander Donat notes that he and his fellow inmates insisted on washing themselves with their coffee in the morning, no matter their hunger or thirst, for to not do so "was the first step to the grave. It was almost an iron law: those who failed to wash every day soon died."<sup>9</sup>

We remember not only the slaughter, but also the daily cruelties, the crushing of self-respect, the attacks on religious faith, the robbing of humanity.

***We remember mass suspicion and collective punishment throughout the centuries.***

*Two or three Jews were in charge of the king's mint, and it was discovered that the coins were flawed. The king was greatly incensed and his wrath burned to the extent that he wished to expel all the Jews from his kingdom. After great efforts, a compromise was struck with the king, whereby he would refrain from expelling the Jews in exchange for a thousand gold pieces. This levy which the king imposed upon the Jews was pure theft... for [is it reasonable that] because of the mistake of two or three Jews, the king should be angered with all the Jews and expel them forcibly from his land unless they pay him several thousand gold pieces!? It was regarding a case like this that our patriarch Abraham of blessed memory said to the Holy One, blessed be He, "Far be it from You to do such a thing." And [so said] our master Moses of blessed memory, "Shall one man sin, and You will be angry with all the community?" And the old Aramaic adage rightly asks: "Tuvia chata v'Zigud nagad!?" (Tuvia sinned and Zigud was lashed!?). If so, this levy is pure theft (Rivash, Responsa Rivash HaHadashot 9).<sup>10</sup>*

Our texts record the pretexts used to punish the innocent and righteous alongside the guilty. We remember Jews blamed for the death of Jesus, the blood of Christian children, the revolutionary upsurge, the economic crisis.

We honor all the Jews, throughout the ages, who were scorned and demonized, mortified and tortured, deemed suspicious and punished en masse.

***We remember, and our memories renew our empathy.***

Torture heralds the breakdown of empathy—the failure to see the one tortured as a human being.<sup>11</sup>

But we Jews cannot afford to live without empathy. For we know the person beaten and degraded could be us, our families, our loved ones, the members of our communities. And the One who heard our cries in Egypt commanded that our alienation and tears become a wellspring of compassion for all who suffer.

We remember the *escalara*, the water tortures of the Inquisition, and we cry out that "waterboarding" is an approved method of the C.I.A.—suspects strapped to a board, turned upside down, and immersed in a wet towel to simulate the feeling of drowning until they lose consciousness.

We remember R. Hananiah b. Teradyon burning inside his Torah scroll, the stripping of women during the Inquisition, the forced eating of pork and shearing of beards in the Holocaust, and we cry out that authorized treatment in U.S. military detention includes stripping traditional Muslim men naked, forcibly shaving their beards, dressing them in lingerie, and subjecting them to various other forms of sexual humiliation. We mourn that the Qur'an has been desecrated in Guantánamo.<sup>12</sup> We cry out, imagining our traditional family members and forefathers stripped, shaved, smeared with menstrual blood, and rubbed with the breasts of female interrogators dressed in lacy thongs.

We remember Jews forced to work in labor camps with feces and urine streaming down their legs, and we cry out that detainees in Guantánamo have been subjected to forced enemas and found stewing in their own excrement for 18-24 hours,<sup>13</sup> and that detainees in Abu Ghraib have been smeared with feces, forced to drink from toilet bowls, forced to stir pots of feces and urine, and left to soil themselves.

We remember Jews throughout the ages, rounded up, tortured, and killed for the suspected crimes of the few, and we cry out at the

indiscriminate round-ups that have condemned thousands of innocent people to detention and cruel and degrading treatment at the hands of American armed forces.<sup>14</sup> We cry out against guilt by association, fathers being put to death for the sins of their children, the innocent swept away with the guilty.

We cry out because the psychological shields of the untouched majority—denial ('it's not really happening'), minimization ('it's not really so bad'), justification ('it must be done'), and dehumanization ('they must deserve it')—have been used, all too often, against our people as well.

We cry out because the heart of the stranger is our own heart, the humiliation of the stranger our own humiliation, and the persecution of the stranger our own persecution.

We cry out and commit ourselves to action to ensure that no one under our government's jurisdiction be made to suffer torments like those our ancestors endured.

This is a shortened version of this article. The full text can be found at [www.rhr-na.org](http://www.rhr-na.org).

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## NOTES

1. This introduction is drawn in part from material in Nehama Leibowitz, *Studies in Shemot*, pp. 1-11 and 379-389.
2. One of the two verbs used biblically to refer to oppression—both of us in Egypt, and of the stranger amongst us—is the verb used in contemporary Hebrew to refer to torture (*inui*).
3. *Mahzor Hadash*, Prayer Book Press, 1977, p. 732.
4. For descriptions of torture of Jews in the Roman criminal justice system, see Saul Lieberman, "Roman Legal Institutions in Early Rabbinics and in the *Acta Martyrum*," in *Texts and Studies*, Ktav, 1974, pp. 112-177.
5. Yehudah ben Kalonymus, 1<sup>st</sup> crusade, Speyer, Germany.
6. Renee Levine Melammed, *Heretics or Daughters of Israel: The Crypto-Jewish Women of Castille*, Oxford University Press, 2001, pp. 136-137.
7. Angel Alcalá, "Maria de Cazalla: The Grievous Price of Victory," *Women in the Inquisition*, ed. by Mary E. Giles, John Hopkins Press, 1999, p. 113.
8. Reska Weiss, *Journey Through Hell*, Vallentine, Mitchell, 1961, p. 211.
9. Alexander Donat, *The Holocaust Kingdom*, Holt, Rinehart, and Winston, 1965, p. 173. Cf. Terence Des Pres, *The Survivor: An Anatomy of Life in the Death Camps*, Oxford University Press, 1976, ch. 3.
10. Cited in Rav Meir Batiste, "Collective Punishment," *Crossroads: Halacha and the Modern World*, Vol. V, Zomet Institute, 1999, pp. 233-234.
11. Studies of bystanders suggest that dehumanization tends to accompany feelings of powerlessness to help. When subjects believe they have control over the fate of a victim, they describe the victim in much more positive terms; when they believe they have no control they tend to disparage the victim. John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture*, New York, 2000, p. 251.
12. See Dan Eggen and Josh White, "Inmates Alleged Koran Abuse, FBI Papers Cite Complaints as Early as 2002," *Washington Post*, May 26, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/25/AR2005052501395.html> and Roland Watson, "US Admits Guard Soiled Koran at Guantanamo," *Times Online*, at <http://www.timesonline.co.uk/article/0,,11069-1641152,00.html>
13. See Josh White, "U.S. is Found Lacking in Detainee Care Plans," *Washington Post*, July 9, 2005, at <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/08/AR2005070802184.html> and Carol Leonnig, "Further Detainee Abuse Alleged," *Washington Post*, Dec. 26, 2004, at <http://www.washingtonpost.com/wp-dyn/articles/A25962-2004Dec25.html>
14. The International Committee of the Red Cross report, produced shortly before the Abu Ghraib scandal, reports that "Certain military intelligence officers told the ICRC that in their estimate between 70-90 percent of persons deprived of their liberty in Iraq had been arrested by mistake." More recent official estimates drop that figure to two-thirds, while estimates of "mistaken identities" at at Guantánamo hover around 40 percent.

## SECTION TWO: LITURGICAL AND EDUCATIONAL RESOURCES

**Jonah & Eleh Ezkerah:  
A Yom Kippur Sermon on Empathy & Compassion**

Rabbi Edward Feld

As the setting sun begins to change the very nature of the light that allows us to see the world and as the skies threaten to become blood red, at that moment, when fear and awe and joy commingle with tiredness and hunger, we are asked to read the book of Jonah. Dusk is that between time, when our hearts and minds intermingle the rationalism of daylight with the emotion and imaginings of the night. It is at the moment when rationality can be tempered by the promptings of the heart that we are taught the lesson of compassion.

Jonah, the prophet, has been sent to Nineveh to call those people to repent. Nineveh is the capital of Babylonia, the kingdom that will destroy Israel, but Jonah, the Jewish prophet, is called to speak to these Gentiles, to call them to repentance. He is physically forced to overcome his reluctance to do so, and even after having accomplished his task, regrets what he has done. And so God teaches him the lesson of compassion—Jonah sees the carob tree that has shaded him dry up. He cries for protection. God says, “You cry for a carob tree, can you not cry for the rest of the creation?” Jonah cries for himself, for his own loss of that which shaded him, that which gave him comfort, and he is made to see that the pain he feels is a pain that permeates the world, and that he, and we, like him, are called upon to alleviate pain.

The *Yom Kippur* liturgy is shot through with images of martyrdom, with remembrances of the sufferings of our people. Scholars tell us that for the last thousand years, the traditional *selihah*, the prayer of forgiveness, has always included an *akedah*, a form of poetry which rehearses the martyrdom of our people. But aside from these individual poems, at the height of the day, we storm heaven with the tale of the cruel deaths of the rabbis of the generation of Rabbi Akiva who were martyred by the Romans. Among them were Rabbi Eliezer ben Hyrcanus who was wrapped in a Torah scroll and burnt at the stake, and Rabbi Akiva himself whose flesh was torn from his body and sold in the marketplace.

Jews often tell the story of Rabbi Amnon of Mayence, the legendary author of the beloved *u’netanah tokef* prayer, who had his hands and feet cut off by the local bishop, but refused to abjure his faith. Unable to use any of his limbs, he was carried to the lectern, recited this prayer he had composed, which declares that it is God who decides who shall live and who shall die, whereupon he breathed his last breath.

We are a people who can catalogue the forms of human mistreatment. We have been victims of torture and abuse. We know what it means to be accused of all sorts of sins and have no defense. We know what it is to be captured, imprisoned, forced to confess to sins we have not committed. We know what it is to submit to arbitrary authority. In its place we have preached the rule of law – and have been accused by our enemies of being legalistic; we have preached the dignity of every human being, and have been persecuted for it.

And on *Yom Kippur* after having recalled our own suffering, after having said, “These I remember...,” we are asked to adopt the lesson of compassion: to learn that our own fate is not all that matters, but the fate of the people of Nineveh, the people who would be our enemies.

What we experience on *Yom Kippur* is what it means to be deprived of water and food, of the daily requirements of nourishment and cleanliness. How frail we find our own bodies. How easy it is to bring us down. How easy it is at this moment to imagine the fear of being locked in a cold jail cell, alone. How deprivations of water or food can seem excruciating. And there are the indignities and sufferings we do not experience ourselves on *Yom Kippur* but which in this hour we can easily imagine: How lowly we are brought when we soil ourselves, perhaps daily. What it means to be beaten, to feel the loss of the use of a limb. How hard it is to live with pain. What it means to lose one’s dignity, to be made sport of.

So what do we do this *Yom Kippur*, a *Yom Kippur* in which we have learned that we belong to a country that has engaged in these activities? What do we do having learned that in our name, people in our custody have been beaten, humiliated, physically and spiritually harmed, and some even killed?

Jonah doesn’t get it. He does not want to deal with the people of Nineveh, he wants to run away. The last thing in the world he wants to do is be a prophet.

And that’s probably us as well. We don’t want to take this one on. We don’t want to believe that our country has soiled itself, that we need to collectively engage in an act of repentance, that we must do all we can to insure that we treat every human being, even our



enemy, with dignity. Nineveh gets it. The king and all his countrymen, upon hearing Jonah's words, immediately and without any prevarication admit to their wrongdoing. But Jonah has to be taught, has to be instructed.

Many here might say the situation is too complicated to put forth easy answers. These horrors may have been committed but they were done so for the sake of a good: extracting information, critical information needed to defeat terrorism. Some mistakes could have been made. Some people who oughtn't to have been were arrested, some of our people went too far. But we, who sit in the pews, ought not to be directing the war effort. The decisions at the front are always complicated and the people in charge are not evil, but instead are democratic leaders.

Jonah can seem like a simple story, something out of a storybook for children—the story of the man in the belly of the whale. But sometimes it takes simple truths to instruct us. And those simple truths are not easily held on to, because as adults we've learned to see the world as a complicated place; we celebrate our ability to see two sides of every issue.

And yet today we've been instructed in some simple truths. We've been instructed about the frailty of the human body, of how we can feel sorry for ourselves, less so for our neighbor and perhaps not sorry at all for those supposed to be our enemies. We've been reminded how each of us sins, personally and collectively.

But today we've been instructed with the teaching of compassion. We've been taught that the reason we experience the sufferings of *Yom Kippur*, the sufferings of today, is to be able to understand what we do to our enemies. We've been taught that our own experience of suffering should rouse us to the consciousness of the suffering of others, of the suffering we inflict on others, of the humanity of Nineveh.

We Jews know what it means to be the object of collective hatred. We know what it means to be suspected of being a third column, of being imprisoned and tortured simply because we are Jews, or because some government wants to extract something, material goods, information from Jews who will report on the Jewish community. We know what it means to be tortured by the Inquisition so that the church could discover other Jews who had betrayed their new Christian faith. We know what it means to be suspected and accused without trial and with no possibility of defense. We know what it means to suffer under the whim of governments—governments who are always self-justifying.

Jonah calls us back—from our defensiveness, from our building up of walls to separate ourselves off, from our failure to see that everyone is created in the image of God, even our enemy, and that therefore there are fundamental human rights which apply to everyone.

Jonah is sent to Nineveh to call them to repentance. Ultimately, it is he who is asked to repent.

## ***Eleh Ezkerah* | אלה אזכרה**

Rabbi Sheila Peltz Weinberg,  
drawn from the work of Melissa Weintraub

These are the things I will remember  
And my soul is melting with sorrow

In the time of the Romans, Rabbi Ishmael and Rabban Shimon ben Gamaliel were the first to be taken to the place of execution, where each desired to precede the other in being slain and thus be spared the sight of seeing his friend suffer. When Rabbi Ishmael was flayed, suffering with great fortitude, he wept only when his tormentors reached the place of his Tefillin.

From Guantanamo Bay to the Bagram holding facility in Afghanistan, detainees have been stripped, left naked in isolation, hooded, beaten, kicked, shackled in humiliating and physically painful positions for hours on end, spat at, urinated upon, deprived of food and sleep for days, exposed to extremes of hot and cold, bombarded with painfully bright lights and loud violent music, and threatened with dogs. Many have been interrogated in sexually suggestive and abusive ways.

And this I would prefer to forget, but must remember on this holy day.

R'Hananya ben Teradyon was wrapped in the Torah from which he had been teaching and placed on a pyre of green brushwood, and his chest was drenched with water to prolong the agony. His disciples, watching the flames dancing over their beloved teacher, asked, "Master, what do you see?" He replied: "I see parchment burning, while the letters of the Torah soar upward." His disciples then advised him to open his mouth that the fire might enter and sooner put an end to his sufferings; but he refused to do so saying, "It is best that he who has given life should also take it away; no one may hasten his own death." The executioner removed the wet sponge, fanned the flame, thus accelerating the end, and then plunged himself into the fire.

And on this holy day we would like to forget and we are charging ourselves to remember:

And their Holy Scriptures were desecrated.  
And our souls melt with sorrow.

As it is written in the Talmud, "How do you know that your blood is redder? Maybe his blood is redder."

And we affirm that the abolition of torture, like slavery, is the measure of a free and ethical society.

And we remember on this day the crowning principle of Jewish law is human dignity.

And today we see the parchment burning while the letters of the Torah soar upward.

On this Holy Day,  
Remember us O Lord  
Open our hearts to love you and love your creatures  
Remind us that only by remembering that your love fills all your creatures  
Can we come near to You.

## For the sin of torture by Americans...

### *An Al Cheit* | על חטא

Rabbi Simkha Y. Weintraub, LMSW

*For all these we seek t'shuvah;  
We will not stand idly by.*

For the sin of torture by Americans  
against detainees in Iraq, Afghanistan, and Guantanamo Bay, Cuba:

- for sensory deprivation
- for isolation
- for detention in damp, frigid cells
- for denying sleep
- for withholding water
- for suspending people by their wrists, hands cuffed behind their backs
- for forced nudity and sexual exploitation
- for punching, slapping and kicking
- for beating with a broom handle and chair
- for breaking chemical lights and pouring phosphoric liquid on bodies
- for using dogs to instill fear
- for threatening violence and death
- for threatening to harm or kill family members
- for mocking religious beliefs and degrading sacred texts
- for all forms of physical, emotional, psychological and spiritual torture

*For all these we seek t'shuvah;  
We will not stand idly by.*

Please note: All of the above abuses have been documented by human rights groups. They have been committed by Americans in the name of Americans and the United States of America.

## Is This Statement For You? Six Questions to Clarify Your Position Regarding U.S.-Sponsored Torture

Rabbi Margaret Holub

***“We therefore urge that the United States of America and all members of this Administration adopt a policy which states in unequivocal terms that the use of any tactics of physical abuse, the deprivation of food, water, sleep, disorientation, or purposive humiliation of a prisoner is prohibited.”***<sup>f</sup>

*—from the Rabbinic Letter against Torture and Other Cruel, Inhuman and Degrading Treatment of Detainees Under United States Jurisdiction*

It's not easy to think clearly about torture. It is easy to feel strongly about it—torture is frightening and upsetting. We live in frightening times in which acts we never imagined now feel necessary. But when people start to think through the implications of different positions about U.S. policy concerning torture, what feels clear at the outset sometimes gets murky and confusing and therefore paralyzing. It is important to be clear about where you stand. Each of the following six reflections is intended to isolate a specific issue that people sometimes find confusing when they think about U.S.-sponsored torture.

**1. Which means of coercion are torture?** “Torture and other cruel, inhumane and degrading treatment” can mean a lot of things. The Secretary of Defense has said recently that only acts which cause pain equivalent to that which would be experienced with major organ failure or death rise to the definition of torture. We hear acts of coercion described as “moderate physical pressure” or “torture lite.” I have listed some specific practices in what I think to be an escalating order of severity. All of the following methods are being used against U.S. detainees. **Please rearrange as you see fit and then draw a line at the point beyond which means of coercion can be defined as torture.**

- Shouting, profanity, insults
- Sleep deprivation for an extended period
- Hooding
- Sexual humiliation, including stripping and simulated sexual acts
- Threats against family members
- Being forced into painful physical positions for extended periods of time
- Battery
- “Waterboarding”—partial asphyxiation, inducing the sensation of drowning
- Electric shocks to the genitals
- Dismemberment or other extreme wounding

**2. How effective does torture need to be?** There are many practical claims, pro and con, about the effectiveness of torture. For just one example, opponents of torture point out that people under duress are likely to say anything that will end their torment, thus the information gained will be of questionable value. One might condone the use of torture if it is likely to generate crucial, lifesaving information but oppose the use of torture if it is unlikely to work.

**What percentage of effectiveness would you need to be assured of to support the use of torture? That is, if you knew that torture would yield useful and important information 50% of the time, and 50% of the time a person would be tortured and not offer up usable information, would you condone the use of torture? 20% of the time? 10% of the time?**

**3. How many bystanders are you willing to put through coercive interrogation to get results?** It is difficult to know, before using torture, who in a population has needed knowledge and who doesn't. Many people may need to be tortured to winnow out the one individual who has usable information. We are aware that the United States has detained several thousand individuals with very little assurance that any specific one or another of them has information to offer in the first place. **Again an Occam's razor kind of question: what ratio of innocent bystanders are you willing to see tortured to reach one person who has important information? Would you be willing to torture twenty people to get to one informant? Ten? Three? Two?**

**4. Are some ends more compelling than others?** The scenario most often raised to justify torture is the so-called “ticking bomb” situation in which a specific individual in custody is known to be withholding information which could immediately save many innocent people. A hypothetical example: a terrorist has planted a bomb in one of a hundred New York City grammar schools, set to go off at 1:00 PM. It is noon, and you are quite certain that you have in your custody the person who knows where the bomb is. One might justify the torture of this one person to save a school full of children. In reality, situations like these have hardly ever been known to happen. We

know that detainees under U.S. authority are tortured or subjected to cruel treatment for many reasons. Again, I offer a spectrum, ranked according to my own thinking. At one end of the spectrum would be those rare cases of severe, imminent harm to multiple uninvolved bystanders. At the other end I would put torture in service of intelligence or security goals which are extremely vague, so that detainees would suffer for almost no good to the public. **Where would you locate a point beyond which the ends simply don't justify causing any significant suffering at all?**

- Preventing imminent mass death of uninvolved civilians
- Protecting political leaders from injury or assassination
- Locating known terrorists, even absent an immediate threat
- Gathering general information about threats, such as names of insurgents or sources of weapons or funding for attacks on U.S. personnel
- Intimidating a population to discourage acts of terror or sabotage
- Retaliation for being the enemy in war

**5. Should there be legal pressures on the interrogator deciding whether or not to torture?** During the Holocaust, German Protestant theologian Dietrich Bonhoeffer became convinced that the only ethical action vis-à-vis Hitler was to assassinate him. He participated in a plot to do so, which failed. Bonhoeffer was hung for his part in the conspiracy. This is an example of an individual accepting the most extreme personal consequence because he believes that it is in the public good to violate the law of the land.

In 1999 the Israeli Supreme Court unequivocally abolished the use of torture and other coercive means of interrogation. But the Justices acknowledged that a situation could conceivably arise in which the public good was so clear that an individual might choose to torture regardless of the prohibition. In this instance that individual could, after the fact, be tried and offer a "necessity defense." The Gonzales and Bybee memos in this country have specifically legalized forms of torture and coercive interrogation, so that there is no inhibition facing the interrogator. **Again, let's look at a spectrum here. How would you write U.S. policy?**

- Torture and coercive interrogation are absolutely illegal under any circumstances whatsoever. An individual who chooses to commit acts of torture is guilty and liable for punishment regardless of what good might result from the act of torture.
- Torture and coercive interrogation are illegal under all circumstances. In the extraordinary instance of a "ticking bomb" scenario, an individual may choose to act against the law and will have the opportunity, after the fact, to seek exculpation. In this instance the torturer acts knowing that he or she may be found guilty.
- Torture and coercive interrogation are legal, and there is no consequence for the torturer.

**6. What are the social impacts of torture policy?** Laws and policies have ripples far beyond their immediate target. So, for example, some people fear that legalizing euthanasia for the terminally ill may indirectly help to create a social climate in which people with chronic illnesses and disabilities are considered expendable. This might lead to cuts in funding for social programs for the ill, to violence against the disabled and to a general sense of the expendability of all sorts of fragile people, animals, ecosystems and so on. Others speculate that legalizing euthanasia for the terminally ill might ratify the value of personal autonomy, which would have consequences for many kinds of personal lifestyle choices, leading to more freedom and greater efforts at tolerance of diversity. It is worth reflecting on what is offered to our social climate by legalizing torture. **What are the larger messages of such a set of policies? What will the ripples be? What does this kind of policy communicate to our own younger generation? How does it affect our standing in the world community? What will be the effect in twenty years? In a hundred?**

Review your answers to the above questions and then answer the following: **Can you imagine any case in which the legalization of torture might be acceptable? If so, what kinds of law and policy would need to be in place to insure that permission to torture is restricted to the instances you specify?**

**Now review the *Rabbinic Letter against Torture*. Can you sign it in good conscience?**

*Many thanks to Dr. Karen Lebacqz for helping me to clarify these issues and to Jarah Greenfield, Suzanne Lampert and Barbara Brenner for their review and suggestions. Mistakes, of course, are my own.*

## Rodef: The Question of Self-Defense & the "Ticking Bomb" | תלמוד תורה

The concept of a *rodef* (pursuer) is defined in Talmud Bavli Masechet Sanhedrin 72a, as "one who pursues after another person with intent to kill him." The Mishnah teaches that this *rodef* is one of three types of pursuers whom you may "save by means of their own lives" i.e., you must kill this *rodef* to prevent him from murdering another person.<sup>i</sup>

### ■ Source 1: Shemot 22:1-2 (JPS translation)

If the thief is seized while tunneling, and he is beaten to death, there is no bloodguilt in his case. If the sun has risen on him, there is bloodguilt in that case. He must make restitution; if he lacks the means, he shall be sold for his theft.

אם במחותרת ימצא הגנב והכה ומת אין לו דמים:  
אם זרחה השמש עליו דמים לו שלם ישלם אם אין לו  
ונמכר בגנבתו.

1. Why does the Torah assign no bloodguilt in the first case, while it does assign bloodguilt in the second case, "if the sun has risen on him?"

### ■ Source 2: BT Sanhedrin 72a

Raba said, "What is the reason for the law of breaking in? Because there is a presumption that a person does not hold back from defending his property; therefore this one [the thief] must have reasoned in advance, 'If I go there, he [the owner] will oppose me and prevent me; but if he does I will kill him.' Hence the Torah decreed, 'If he comes to kill you, kill him first.'"

אמר רבא: מאי טעמא דמחותרת - חזקה אין אדם  
מעמיד עצמו על ממונו. והאי מימר אמר: אי אזילנא  
- קאי לאפאי ולא שביק לי, ואי קאי לאפאי -  
קטלינא ליה. והתורה אמרה: אם בא להורגך -  
השכם להורגו.

1. How does the Gemara move from a case of property to a matter of life and death in order to justify an act of killing in self-defense<sup>ii</sup>?
2. The *rodef* defense applies to a spontaneous act in a moment of unavoidable urgency. How may other factors (timing, certainty, etc.) affect whether one could regard the intruder as a *rodef*?
3. Do you think this text applies to the case of the "ticking bomb"? If so, how? If not, why not?

### ■ Source 3: BT Sanhedrin 57a & 74a<sup>iii</sup>

For it has been taught: Rabbi Yonatan ben Shaul said, "If one was pursuing his fellow to slay him, and [the pursued] could have saved him by maiming [the pursuer's] limb but did not thus save himself [killing the pursuer instead], [the pursued] is executed on [the pursuer's] account.

דתניא, רבי יונתן בן שאול אומר: רודף שהיה רודף  
אחר חבריו להורגו, ויכול להצילו באחד מאבריו ולא  
הציל - נהרג עליו.

1. In what manner does the Gemara set the basis for minimal possible harm as it applies to the *rodef* and self-defense?
2. How does the argument for minimal possible harm relate to the use of torture?

### ■ Source 4: Tosefta Terumot (Lieberman) 7:20

If a group of people were told by non-Jews, "Give us one of your group and we will kill him, and if not, we will kill you all," they should all be killed rather than surrendering even one soul of Israel. However, if they designated a specific person in the manner that Sheva ben Bichri was designated, they should surrender him to them rather than that all of them be killed.

סיעה של בני אדם שאמרו להם גוים תנו לנו אחד  
מכם ונהרגוהו ואם לאו הרי אנו הורגין את כולכם  
יהרגו כולן ואל ימסרו להן נפש אחת מישראל אבל  
אם ייחדוהו להם כגון שייחדו לשבע בן בכרי יתנו  
להן ואל יהרגו כולן.

1. In what manner does the Tosefta set out the prohibition against the killing of innocents? What is the reasoning behind the case of handing over Sheva ben Bichri?
2. How does this scenario apply to our contemporary situation? How might it apply to the case of the suspected "ticking bomb"?



■ **Source 5: Supreme Court of Israel, *Public Committee against Torture vs. Israel*, September 1999**

“The ‘necessity’ defense cannot constitute the basis for rules regarding an interrogation. It cannot constitute a source of authority on which the individual investigator can rely for the purpose of applying physical means in an investigation...”

“Granting... investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect’s dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch. This is required by the principle of the separation of powers and the rule of law, under our understanding of democracy...”

“This decision opened with a description of the difficult reality in which Israel finds herself. We conclude this judgment by revisiting that harsh reality. We are aware that this decision does make it easier to deal with that reality. This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”

1. How does the decision of the Supreme Court of Israel regarding the “necessity” defense impact the use of torture in the case of the “ticking bomb”?
2. What, if any, lessons are there for U.S. policy-makers in the decision of the Supreme Court of Israel?

■ **Source 6: “Tortured Reasoning,” *Torture: A Collection*, p.257, by Alan Dershowitz**

“I am opposed to torture as a normative matter, but I know it is taking place today and know that it would be employed if we ever experienced an imminent threat of mass casualty biological, chemical, or nuclear terrorism. If I am correct, then it is important to ask the following question: if torture is being or will be practiced, is it worse to close our eyes to it and tolerate its use by low-level law enforcement officials without accountability, or instead to bring it to the surface by requiring that a warrant of some kind be required as a precondition to the infliction of any type of torture under any circumstances?”

1. What are the pros and cons of the concept of Dershowitz’s “torture warrant”?

■ **Source 7: “Five Errors in the Reasoning of Alan Dershowitz,” *Torture: A Collection*, p.282, by Elaine Scarry**

“Anyone, we are told, who had the choice between on the one hand torturing and saving-the-city and on the other hand not torturing and not saving-the-city would be likely to choose the first. That may be. But so, too, anyone confronted with the choice between on the one hand saving-the-city and being herself imprisoned or on the other hand not saving-the-city and not being imprisoned, would almost certainly also choose the first. That is, torturing should be perceived with the same acute aversion with which one’s own legal culpability and one’s own death are perceived; and while it is possible that a jury would exonerate someone in this situation, it does not follow that any such guarantee should be provided before the fact.”

1. How would creating legal policy around the “acute aversion” to torture impact the “ticking bomb” scenario? How would it impact ethical and societal values concerning the use of torture?
2. Which opinion do you side with, that of Dershowitz or Scarry? Why?

■ **Source 8: U.S. Supreme Court, *Hamdi v. Rumsfeld*, June 2004**

“[A]s critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”

1. How would you expand upon the U.S. Supreme Court decision using what you have learned from the traditional texts and contemporary sources we have studied?

—Compiled by Rabbi Brian Walt & Jarah Greenfield

NOTES

*i* According to Mishnah Sanhedrin 8:7, the *rodef* is saved by means of his own life with the understanding that it is better for him to die innocent than to die guilty of the sin of murder, even though killing a person before he commits a crime runs contrary to normal law. The Talmud later interprets the Mishnah as saving the victim by means of the *rodef*’s life, rather than saving the *rodef* from sin by means of his own life.

*ii* The *rodef* and the burglar are distinct cases; however, *halakhic* sources designate the burglar, whom one may kill in self-defense, as “*k’rodef*” (like a *rodef*).

*iii* This passage can also be read as having a third party who would be executed for exceeding minimal possible harm in saving a potential victim from a *rodef*.

# Rabbinic Letter against Torture and Other Cruel, Degrading & Inhuman Treatment

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Dear President Bush and Members of Congress,

On behalf of Rabbis for Human Rights North America, we write out of a deep sense of concern about the erosion of America's longstanding commitment that torture is absolutely reprehensible.

All of us have been shocked by the published pictures of the behavior of some American soldiers at Abu Ghraib. We applaud the fact that this administration is prosecuting some of the worst offenders there as well as several soldiers who were responsible for the deaths of Afghani prisoners under their protection in that other theater of war.

What is most disturbing, though, is that the documents that have been made public as these cases move forward demonstrate that the use of torture has been approved at the highest levels of the Administration, that commanders in the field have permitted much of this behavior, that directives from the Department of Defense appear to advocate the use of torture, and that even today the position of the Administration is that the members of Al-Qaeda and other terrorist groups are not covered by the provisions of the Geneva Convention. Recent reports from the Red Cross and from FBI agents, for example, raise new concerns about American treatment of detainees at Guantanamo.

We are not addressing the technical legal arguments that characterize this discussion. Rather, we want to express our moral concerns about the human situation - concerns that stem from the heart of America's values, the essence of democracy, and the soul of Jewish tradition.

We understand that the most fundamental ethical principle, which results from our belief in God as Creator of the world and Parent of all humanity, is that every human being is seen as reflecting the Image of God. Torture shatters and defiles God's Image. The purpose of torture is to remove a person's pride, humiliate them, or make their lives so painful that they say or do whatever the interrogator wants. Torture 'works' by attempting to deprive a human being of will, spirit, and personal dignity. The humanity of the perpetrators is inevitably compromised by the use of torture.

Jewish tradition calls for humane treatment even of one's adversaries. In the Book of Exodus (23:4), the Bible teaches, "When you encounter an enemy's ox or donkey, you must take it back to him." Here the religious test is, strikingly, not how one would treat a friend, but how one relates to one's enemy.

Classical Rabbinic texts are rigorous in prohibiting acts of humiliation. In Jewish tort law, an additional penalty is assessed against one who has physically injured another person when it is found that the victim also suffered, humiliation (*boshet*), while being wounded. Even verbal humiliation is said to be the equivalent of shedding blood. We are particularly appalled by the infliction of sexual humiliation on prisoners under United States custody. Jewish tradition upholds a high standard of personal modesty. Indeed the Bible's term for prohibited sexual behavior is to "uncover the nakedness" of another. However, even non-sexual acts that overpower a person and attempt to break their will and diminish their dignity are acts of humiliation that Jewish tradition abhors. It is significant that nowhere in the 3000-year long corpus of Jewish law is there any allowance for acts of physical coercion in interrogations.

Consider the ruling of the Supreme Court of Israel, which outlawed the use of torture in interrogations, despite the fact that terrorist organizations have Israel's annihilation as their expressed goal, carry out attacks that murder scores of men, women, and children, and do not distinguish between civilian and military targets. Despite this constant reality of cruelty and merciless savagery, the Supreme Court of Israel found no reason why tactics other than face-to-face interrogation should be allowed against any prisoner. After the fact, if/when an interrogator is charged with a violation, he is permitted to raise a defense of necessity - i.e., his actions were necessary to prevent an imminent attack endangering human life; but no permission is given before the fact, even in a country facing life-threatening terror.

At the conclusion of their decision, the Israeli jurists acknowledge that forswearing inhumane means such as torture, even for honorable ends, "...is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the rule of law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."

We therefore plead, first of all, that the United States of America and all members of this Administration adopt a policy which states in unequivocal terms that the use of any tactics of physical abuse, the deprivation of food, water, sleep, disorientation, or purposive humiliation of a prisoner is prohibited. This must be a basic understanding for the treatment of any captive, whether or not he or she originates from a country or belongs to a group that is a signatory to the Geneva conventions.

Secondly, we note that in the trial of Specialist Charles A. Graner, Jr., his defense lawyers have argued that he was simply following the lessons he had learned in civilian life as a prison guard. It is shocking to think that the prelude to Abu Ghraib may have been the treatment of our people in our own prisons. The demonstration of the administration's commitment to human dignity must begin at home, to insure that the same principles of human dignity we are urging the administration to adopt regarding foreign captives be equally applied to American prison inmates. Otherwise, we become what we claim to abhor.

As Jewish leaders representing all the movements of our Jewish community, in consonance with world consensus and with the teachings of Jewish tradition in every age, we call for complete repudiation and prohibition of torture for any purpose, in any instance. Furthermore we call for full investigation of all allegations of torture committed in settings under United States control and for proper legal sanctions to be applied against individuals who are found to have committed acts of torture.

We call on you as leaders of our country to ensure that the United States ban the use of torture in any and every setting under United States jurisdiction. We look forward to hearing your views on this question and hope that you will provide much needed moral leadership for our nation.

With blessings of Shalom,  
Rabbi Gerry Serotta, *with over 500 rabbis (see list on following page)*

# Notes



## About T'ruah

T'ruah: The Rabbinic Call for Human Rights brings a rabbinic voice to the most pressing human rights concerns of our time.

We mobilize 1800 rabbis and cantors, along with our communities, to bring the wisdom of the Jewish tradition and the power of the Jewish community to the sacred work of protecting the human rights and dignity of all people in the United States and Canada, and in Israel and the occupied Palestinian territories.

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