War and terrorism in Jewish law

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TORTURE, TERRORISM, AND THE HALAKHAH

Jewish Law and the Elusive Balance Between Public Security and Human Rights

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Terrorism, defined as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,"[1] threatens the lives and safety of the people of all nations. In this paper, however, I want to focus upon the danger that terrorism poses to the nation as a state, an organized politico-legal structure. In particular, I am concerned with the nature of the response to terrorism adopted by democratic states such as the ones in which we live. Fundamental to our Western notion of liberal democracy is the principle of the rule of law,[2] which places clear and substantive limits upon the power of the state to enforce its will upon its citizens.[3] In particular, as a leading contemporary legal philosopher notes, "Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified."[4] Our societies accordingly cast a suspicious eye upon proposed policies that, while advertised as essential to safeguard public security, would result in increasing governmental intrusion upon the private realm. At the same time, the maintenance of public security is arguably the first and most basic responsibility of any government. The increasing frequency of terrorist actions against civilian populations has led many citizens of Western nations to demand the imposition of tough security measures that violate the liberties and civil protections that the law has traditionally guaranteed to the individual. The "danger" of which I speak, therefore, is twofold. On the one hand, the government's response to terrorism, if it is too forceful, can endanger the rule-of-law values that are an intrinsic element of our Western notions of democracy. Yet if that response is not forceful enough, the people may lose confidence in the government's power to protect them and replace it with a regime that promises security at the cost of the further suppression of individual freedoms. The question, then, is where to draw the line between public security and the rights of the individual, to achieve both these essential ends of government without sacrificing the one to the other. The search for this balance has become one of the most urgent tasks in contemporary law and politics.

At first glance, the *halakhah* would seem to offer little usable guidance on this subject. We are speaking, after all, of how modern, secular states might respond to the challenge of terrorism, and the *halakhah*, rooted as it is in ancient and medieval religious texts, is neither modern nor secular. It is well known, moreover, that individual "rights" and "liberties" are concepts foreign to the Jewish legal tradition, which tends instead to speak of the duties and obligations that the individual owes to God and Torah.[5] To the extent that the major halakhic compendia speak directly to the issue of national emergency, they grant extraordinary, virtually unlimited powers to the governmental authorities.[6] This surely does not aid us in the quest for "balance" between the conflicting requirements of individual freedom and national security. Still, the inquiry is a vital one that deserves our careful attention, for the following reasons:

1. Given that Judaism is a religious tradition that expresses itself largely through practice and observance, *halakhah* is absolutely central to any understanding of the Jewish experience. The intellectual and rhetorical discourse by which Jews have historically arrived at their understandings of correct practice – the answer to the question "what does Torah/God require that we do?" – is the language of Jewish law, crystallized in the halakhic literature. If, therefore, Jewish tradition offers teaching, guidance, and direction on issues of *political* practice, we are likely to discover that instruction by studying the halakhic sources. To put this another way, any authentic *Jewish* approach to questions of torture and terrorism, to the conflict between personal liberty and communal security, must be rooted in the halakhic literature and tradition.[7]

2. The fact that Jewish law speaks in terms of "duties" rather than of "rights" does not mean that the latter concept is entirely foreign to halakhic analysis. The existence of a legal duty can be said to establish a corresponding expectation (= "right") by others that the duty will be performed. For example, the obligation imposed upon a court to "do justice," to conduct its inquiry in accordance with clear rules of evidence and procedure, is tantamount to a "right" to due process of law. Similarly, although Jewish law does not know of a formal "right to privacy," it does define excessive prying into the domain of another person as a tort (*hezek re'iyah*, literally "damage caused

by seeing"), and it prohibits persons from engaging in verbal activity that damages the reputation of others (*lashon hara*; *rekhilut*; *hamotzi shem ra*), even though the latter may not be actionable in court.[8] From such details it would be possible to derive the existence of what, in practical terms, would amount to a right to privacy, a reasonable expectation that others will leave one alone in one's own domain or personal sphere of activity.[9] It is therefore appropriate to speak of civil and political "rights" in the *halakhah*, so long as we understand them as obligations to respect and to protect the vital interests of each individual.

3. Finally, this task is of special urgency to us as liberal Jews, particularly to those of us engaged in the study and development of liberal *halakhah*. Our task is to demonstrate in fact what we know to be true: that Jewish law is at bottom progressive and dynamic, "ethical in its very essence,"[10] a discourse that possesses sufficient resources to speak to every issue of religious practice in a sufficient and satisfying way. We are committed to the proposition that Jewish law *does* provide guidance on matters such as this and that this guidance can reflect the liberal and progressive values that characterize our vision of Judaism.[11]

What remains is to act on that commitment. The goal is to formulate an understanding of our ethical responsibilities to our nation and to the world community under the very difficult challenges posed by the growth of international terrorism. How does Jewish law, *as we understand it*, teach us to balance the conflicting demands of liberty and security? I don't pretend to offer here a systematic answer to that question. Much work, involving a thorough and precise study of the sources, remains to be done. This essay is intended rather as a decidedly preliminary sketch of one of the major issues.

That issue is torture, one of the most pressing and perplexing difficulties raised by the conflict I refer to here. It may happen -- how frequently is difficult to say, since governments understandably do not keep good records on this -- that security forces will arrest a person who may possess information deemed vital to public safety. Perhaps he is a member of a terrorist group; perhaps he has come into contact with the members of such a group. The police want the information that he has

or might have, but the only way to induce him to reveal that information is through the use of torture. That word, I stress at the outset, is by no means easy to define. As one scholar notes, although "torture" has been widely discussed in legal literature, these debates have not settled on a uniform definition, and many lawyers and judges have used the term *without* defining it.[12] It is clear, of course, that "torture" involves a measure of physical abuse. Modern Hebrew, which includes the writings of jurists and political theorists, translates the word as *`inu'i*, drawn from a Biblical Hebrew root that evokes the sense of physical affliction or suffering, whether imposed by an oppressor (*e.g.*, Exodus 1:11-12, Deuteronomy 26:6) or undertaken by an individual for religious reasons as act of contrition or self-denial (*e.g.*, Leviticus 16:29 and 31). But how *much* abuse is required in order for an action to qualify as "torture"? Most interrogation of criminal suspects takes place under conditions that cannot be described as pleasant, but we presumably do not consider interrogation on a prima facie level to be identical with torture. Moreover, investigators can employ any number of non-physical techniques, ranging from the making of threats against family members to the ceaseless playing of loud music, that easily fall under the category of mental or psychological abuse; are these to be considered torture? One international compact includes the infliction of non-physical suffering in its definition:[13]

> (t)he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Notice, in addition, that the above standard makes no effort to specify the intensity of inflicted suffering, whether physical or mental, necessary to qualify an act as torture. The critical aspect is the *intent* of the measures undertaken by law-enforcement officials. On the other hand, the title of another compact suggests that "torture" is substantively

distinct from "cruel, inhuman, or degrading" treatment, though it, too, does not attempt to offer a precise definition of its terms. This has led observers to conclude that the document should be read as "a living text, to be interpreted within the understandings current" in the societies that live by it.[14] This is a reasonable observation, one that reflects both the uncertainties surrounding our definitions as well as the moral urgency we ascribe to them. We may disagree among ourselves as to precisely which acts qualify as torture; at the same time, we know that there *is* such a thing as torture and that we must respond to it as a legal and moral issue.

For the purposes of this paper, perhaps the best I can do is to adopt the old "I can't define it but I know it when I see it" definition: "torture" is anything that would strike the reasonable observer as such. This, in fact, is the standard adopted by the United States Supreme Court in a landmark decision concerning the admissibility of evidence obtained by police through the violent and invasive abuse of the suspect: "The proceedings by which the conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience... They are methods too close to the rack and the screw to permit of constitutional differentiation."[15] Torture is real, in other words, so long as we are possessed of a moral sense that is capable of being offended. I would put the question, therefore, in the following way: does Jewish law permit the use of interrogative procedures that "shock the conscience" as a means of eliciting information that may prevent a planned terrorist attack and thus save innocent life?

I am fortunate not to be the first to consider this issue. This enables me to use as my starting point an article on the subject by Professor Itamar Warhaftig of the Bar Ilan University law faculty. A member of a distinguished Zionist rabbinical family, Professor Warhaftig is a prominent Orthodox scholar who has published widely in the field of *mishpat ivri*, the academic study of Jewish law. His article offers a sustained argument that *halakhah* permits the torture of security detainees suspected of involvement in terrorist activity. We are indebted to Professor Warhaftig for helping us to identify the relevant texts and for suggesting lines of thinking and analysis to help clarify the issues. At the same time, we shall see he takes an approach that liberal Jews – and, I think, not *only* liberal Jews – will find troubling and problematic. I therefore, intend to critique his work, but I hasten to add that I intend no disrespect thereby. As one who has come to this subject much more

recently than many others, including Professor Warhaftig, I recognize the value of their pioneering work; in that sense, I am a dwarf who stands on the shoulders of giants. Yet just as the dwarf for precisely that reason can see a bit farther than the giant is able to,[16] I think that it is appropriate for those of us who rely upon the work of our predecessors to openly and honestly state our disagreements with them. This is especially true for us, liberals whose outlook upon the Jewish legal heritage is bound to diverge from that of our Orthodox counterparts. At any rate, such critique and argument is the way in which *halakhah*, like every other intellectual discipline, grows and develops over time.

Torture: Warhaftig v. Barak. Professor Warhaftig's article[17] is itself a critique; his target is a 1999 decision by the Israel Supreme Court[18] on the application of torture against suspects accused of involvement in terrorist acts. The Court, sitting as the High Court of Justice, found that officers of Israel's General Security Service (GSS, or *Shabakh*) were not entitled under the law to employ methods of torture upon prisoners in their custody. The Court's opinion, authored by Chief Justice Aharon Barak, centers upon the authority of government agents to conduct "investigations" or "interrogations" (*chakirot*).[19] This authority is determined by legislation, both that enacted by the Knesset as well as international treaties and legal compacts to which Israel is a party. That legislation, which defines the permitted methods of "investigation," is formulated against the backdrop of a fundamental clash between two competing values or interests (*arakhim o interesim*): "on the one hand, the desire to uncover the truth, so as to achieve the public interest in the detection and prevention of crime; and on the other hand, the desire to protect the human dignity and liberty of the detainee." Neither of these values is absolute; a democratic society is committed to both, even though they conflict with each other. The rules of interrogation are thus the product of a balance between the two, a balance founded upon a proper combination of reasonableness, common sense (*hasekhel hayashar*), and decency. The rules must permit the security forces to wage an effective struggle against crime and terror. At the same time, rules that define and limit the scope of interrogation are essential to a democratic society; a violation of those rules is a violation not only of the dignity of the detainee but of the image of the society as a whole.[20] On this basis, the Court concluded that the law which authorizes GSS agents to conduct "interrogation" does not automatically permit them to utilize any and all means necessary to obtain the information they seek. Interrogation must be conducted according to

existing statutory guidelines, which explicitly include the Basic Law on Human Dignity and Freedom.[21] Thus, "interrogation" is restricted to procedures that are "reasonable" and that exclude such "cruel and inhuman" measures as sleep deprivation, shaking the prisoner, forcing him to crouch in the "frog" position, excessively tight handcuffing, and the like. Further, the Court denied to security forces the use of the so-called "necessity defense," the claim that the urgent need to protect the lives of innocent civilians warrants the use of otherwise illegal measures of interrogation. The Court did make a significant concession on this point: the "necessity defense" might succeed as an after-the-fact justification, shielding security agents from criminal liability if they do resort to torture. It cannot, however, serve as an *a priori* authorization for any and all measures of interrogation. "Interrogation," in principle, must be governed by the rules of law that protect the person and the essential humanity of the prisoner. The Court acknowledged that adherence to these rules may at times hinder the police in the performance of their duties; still, it is the "destiny" of a democratic regime to deny itself many of the weapons that its enemies will readily use against it. "A democracy must often fight its battles with one hand tied behind its back." Nonetheless, the recognition of the rule of law and of the liberty of the individual constitute an inherent element of a democracy's very concept of security, "strengthening its spirit... and enabling it to triumph over all its difficulties." And despite its evident sympathy with those who must fight on the front lines against terror, the Court has a duty to perform; "we are judges, and our fellow citizens demand that we function in accordance with the law." That law does not permit torture as a means of forcing prisoners to reveal information, even in the case of the "ticking time-bomb," when the detainee may possess knowledge of an imminent terrorist strike.[22] The Knesset, of course, as the supreme legislative authority, might alter the law. Yet even that alteration must take into account the requirements of the Basic Law that guarantees the human dignity and freedom of the citizens of the State of Israel.

Professor Warhaftig sharply attacks the Court's decision on the grounds of Jewish law: regardless of the correct interpretation of Israeli law,[23] the *halakhah*, he contends, would in principle allow security forces to utilize torture in order to force a suspect to reveal details of a planned terrorist attack.[24] He bases his argument upon the following grounds.[25]

1. Jewish law would define a detainee who is either plotting a

terrorist attack against human targets or possesses information about an impending attack as a *rodef*, a "pursuer" who poses an immediate threat of death to his intended victim. And "when one pursues another with intent to kill, every Jew is obligated to save the victim from the pursuer, even at the cost of the pursuer's life."[26] To this, Warhaftig applies a *kal vachomer* (*a forteriori*) argument: if it is permitted to kill the *rodef* in order to save his victim, then we are certainly authorized to take other measures short of killing, including torture, to achieve that purpose.

2. Warhaftig concedes that the law of *rodef*, strictly speaking, applies only to the situation of the "ticking time bomb," where the danger to life is certain and imminent. It does not apply to a case where it is uncertain that the suspect possesses information that will in fact lead to the prevention of a terrorist attack. We are permitted to kill the *rodef*, in other words, only when we know that this extreme act is the only way to save his intended victim(s). If this is so, then the warrant for torture of one who is *suspected* of being involved in or of having knowledge of a planned terrorist strike, which Warhaftig derives from the *rodef* principle, also falls. Nonetheless, we are still permitted to use torture, because "we are not dealing here with an innocent citizen" but with a silent participant in a planned act of terror, one who if he wished could spare himself the torture simply by revealing the information that in any case he is required to provide under the obligation to save life (*pikuach nefesh*) and to do justice (*dinim*).[27] And, as we shall see, Jewish law permits the coercion of individuals to force them to perform their obligations.

3. These are not normal times. We are at war against enemies who seek our destruction. And during a time of war (*sha`at milchamah*), it is permitted to kill the enemy without concern for such niceties as standard criminal investigative procedure.[28]

4. Jewish tradition commands us to respect the fundamental human dignity (*kevod haberiyot*) of all persons. Yet a terrorist, or for that matter a possible terrorist, possesses no "dignity" that we are charged to recognize. We are forbidden to trample upon the human dignity of the normal criminal suspect, who is under investigation for an act that he has already committed. This

detainee, by contrast, "is being tortured so that he not commit a transgression (*kedei shelo ya`aseh*)." It is entirely up to him to choose to reveal the information, and if he does so, he will not be tortured." He, through his silence, "is the cause of his own loss" (*ihu de'afsid anafsheh*).[29] He has chosen to be tortured, and we are not responsible for that choice.

5. Jewish law permits the *beit din* to coerce individuals under its jurisdiction to fulfill their legal responsibilities. In Rambam's words, the court may "contend with, curse, beat, and pull the hair" of anyone who refuses to hearken to the law's demands. "Likewise, he may bind a person's hands and feet, imprison him, and cast him to the ground." All these acts, of course, must be undertaken for "the sake of Heaven," and the dignity of the detainee must be respected even when harsh measures must be applied against him[30] Still, the language of the *Mishneh Torah* indicates that if torture is the only means by which to induce proper conduct, the judge is empowered to resort to this tool.

6. The Supreme Court's decision underscores the "ideological difference" that distinguishes Torah law from the fundamental assumptions of the Western legal tradition. "In Western culture, there are no sacred values; there is no purpose to life more important than life itself." That is to say, in Western culture there are no objective standards of truth, and in the absence of such standards, the law possesses no criteria by which to establish a preference for any one conception of truth over its rivals. The law therefore shies away from making substantive judgments on questions of value. The ultimate value is individual freedom and tolerance: every person may choose his own path of life, provided that he does not disturb his fellow citizen's right to do the same. These modernistic tendencies have lately been fortified by postmodern thought, which has raised subjectivity "to the highest heights." Concepts such as good and evil have become so thoroughly subjective that today, "in the secular society, it is difficult to speak of any act as 'evil' in an absolute sense." Even if "evil" did have an objective existence, the combined forces of deterministic psychology and Christian dogma (*i.e.*, the doctrine of original sin) absolve the individual of any real responsibility for his sinful actions. The goal of the law is *not* the eradication of evil – such a task lies beyond the conceptual framework of

> secular culture – but the purely utilitarian aim to protect society from the acts of antisocial persons. In contrast to all this, the Torah holds each of us responsible for our own actions and charges us as a society "to eradicate the evil from within your midst" (Deuteronomy 13:6 and elsewhere). "The eradication of evil is a religious and not merely social value... In our law, the killing of the *rodef* is not merely excused after the fact; it is an obligation, a divinely-imposed duty." With this in mind, it is absurd to speak of "rights" that protect the sinner against the just punishment that his own actions bring upon him.

Discussion. Professor Warhaftig's essay may or may not reflect a consensus opinion among Orthodox halakhists. It does, however, allow us to see how at least one highly regarded Orthodox academician approaches our subject on the basis of the halakhic tradition. Liberal halakhists are likely to find some serious problems with his position. I list some of them here.

First, as a matter of technical legal analysis, Warhaftig's critique is unfair to the Israel Supreme Court. As a law professor, he should know that the Court's duty is a judicial one: to interpret and apply the existing law, the law as it is rather than the law as the justices or anyone else might wish it to be. Procedures governing interrogations are fixed according to statute,[31] and the Court unanimously[32] found that the legislation makes no allowance for "cruel and inhuman" methods of interrogation. The Knesset, perhaps, should alter the law, but in the absence of any specific legislative act to that effect the justices can hardly be blamed for fulfilling their constitutional responsibility to act *as* justices and not as legislators.

Second, Warhaftig's determination that normal legal protections may be set aside during "time of war" does not distinguish Jewish law from the Western legal tradition. Most modern constitutional regimes make provisions for their governments to assume broad, even draconian enforcement powers during national emergencies;[33] the Torah offers the state no advantages that the secular law does not already guarantee it.[34] That the government of Israel has not decreed such an emergency during the present crisis may or may not constitute a mistake in political judgment. It does not, however, constitute a structural defect in the Israeli legal system or an indictment of modern Western law.

The third problem concerns one of Warhaftig's two major substantive halakhic points: his invocation of the *rodef* principle. At first glance, there is nothing unreasonable about this argument. A person in the process of carrying out a terrorist attack is unquestionably a "pursuer" in the eyes of Jewish law and, to borrow the Court's terminology, of "common sense." Few would object to a security guard's use of deadly force to stop a would-be suicide bomber from boarding a bus or entering a crowded restaurant, and even the "Western legal tradition," Warhaftig's *bête noire*, would not punish the guard for that timely life-saving action. The difficulty arises with the terrorist *suspect*, the one who possesses (or might possess) information about an impending attack to be carried out by others. As has been noted,[35] Warhaftig's classification of the suspect as a *rodef* is an evident *chidush*, a legal innovation. Until now, Jewish law has regarded the "pursuer" as the murderer himself, the one actively on the way to committing the crime. Warhaftig here would seem to expand the concept to include the person who could prevent the murder by revealing information leading to the arrest of the perpetrator but who refuses to do so. The implications of this expansion are far-reaching. Has murder now become a crime of *omission* as well as commission? Shall we follow this logic and define as a *rodef* anyone who refuses to act as a "good Samaritan," that is, one who is capable of fulfilling the *mitzvah* to save life but who chooses not to do so?[36] In response, Warhaftig insists that when the elements of *certainty* and *imminence* are present – that is, when we are certain that the suspect has knowledge of an imminent attack – "he qualifies as a *rodef* even by his failure to act." Yet having made this determination he immediately steps back from it: "At any rate, even if (the suspect) is not a true *rodef* (*rodef mamash*), it is still permissible to coerce him into fulfilling the commandment to save life." Since we are *all* commanded to save life, this formulation effectively removes the suspect from the category of "pursuer" and fixes his legal obligation as that of an ordinary citizen. Is Warhaftig, in spite of everything, uncomfortable in calling this suspect a *rodef*? If so, his discomfort is well-taken; one should be wary of expanding the *rodef* principle beyond its original, tightly circumscribed boundaries. We Jews have but recently discovered to our sorrow that such an expansion can happen all too easily, allowing fanatics to cite the principle as a justification for horrendous and shocking acts.[37] Legal commentators note the same tendency in the contemporary debate – *i.e.*, the debate within legal circles since the terrorist attacks of September 11, 2001 -- over the permissibility of torture by law-enforcement officials. Although governments may assure

us that their intention is to use torture only in strictly defined "ticking time bomb" cases, experience teaches that torture is never and cannot be restricted to such scenarios. The conceptual lines are too blurry; the analogies are too inviting; the call of "necessity" guarantees that torture will be applied in cases where other means of preventing an attack are available and even when we are not certain that the suspect possesses relevant information.[38] The *rodef* principle would work in a similar way, serving to justify the use of torture in a variety of cases where "we *think* the suspect possesses critical information, but we aren't sure." The mere *possibility* that the suspect might know something useful would in the eyes of many be a sufficient justification.[39] As one observer puts it:[40]

> Once self-defense is stretched beyond its carefully established, narrowly drawn borders, it becomes a doctrine without bounds. A self-defense argument could be raised to justify torturing a drug dealer who distributed contaminated drugs in order to find out where his drugs are headed. The argument would justify torturing an innocent child in order to compel information from his parent. Torture could be used on someone who likely knows the name or whereabouts of a serial killer. The self-defense rationale, ultimately, would have no limit. In sum, there is a recognizable difference between killing someone engaged in the act of murder, and torturing another person to gain information to prevent a murder.

Warhaftig fails to recognize that difference. Though he concedes that the concept of *rodef* does not truly apply to cases of uncertainty, he has no problem supporting the use of torture in such cases on the grounds that the suspect, even though it is not certain that he has information that can save lives, is a bad person who could easily halt the torture by telling us what we want to know. He is not a *rodef*, in other words, but we will still treat him as one. This circular argument is little more than a sleight-of-hand extension of the *rodef* principle to a situation that, as Warhaftig knows, lies outside its conceptual boundaries. To put it differently, the *rodef* principle is a slippery slope, and Warhaftig has already begun his slide.

The fourth consideration has to do with the other substantive halakhic point in Warhaftig's presentation: his assertion that Jewish law empowers the *beit din*, and by extension the legitimate authorities in a particular society, to employ physical coercion against a recalcitrant individual who refuses to fulfill his responsibilities under the Torah.[41]

The authorities possess this power largely because the individual against whom they exercise it is a bad person who does not "deserve" to be treated with dignity and who could easily escape his suffering by telling us what we wish to know.[42] I want to say something more about this below, but for now I would simply note that the sources Warhaftig cites do not speak of the "terrorist" and do not limit themselves to murderers. Rather, they grant the widest sort of discretion to the court to resort to the physical abuse of *anyone* under its jurisdiction, even the one "who is legally culpable for neither capital nor corporal punishment,"[43] whenever it determines that the public interest demands such action. True, this warrant for government officials to torture (if necessary) a person who refuses to observe the law is not without its limits and controls; the judge may use this power only "for the sake of Heaven" and must at all times respect the basic dignity of the individual whom he is flogging. Yet it is hardly necessary to point out that even the most vicious authoritarian or totalitarian regimes might believe that the torture they inflict upon their opponents is undertaken for good and proper cause, perhaps even for the "sake of Heaven"; moreover, as Warhaftig explicitly declares, the one who refuses to follow the dictates of the Torah possesses no "dignity" that we are required to respect. Here we arrive at yet another slippery slope or, more accurately, at the very end of a precipitous descent: if Warhaftig is correct that governments in fact possess these powers under a Toraitic conception of the maintenance of good social order, then there is no principled way to restrict their application to mass murderers and to those who aid them. Any person caught within the net of the police power, or for that matter anyone who might offend the authorities in some way, would be subject to such treatment, so long as those who inflict it were willing to justify their action on grounds of necessity. This virtually unlimited power of governmental coercion is surely not what we normally have in mind when we speak about the "rule of law."

Finally, Warhaftig underscores the "ideological difference" between traditional Judaism and Western law. This difference, as we shall see, is the pivotal element in Warhaftig's essay, the theoretical basis that upholds the entire structure of his halakhic argument. I want to consider it, in some detail, as an example of what contemporary jurists refer to as the governing "narratives" or "metanarratives" that undergird all legal systems, particular legal institutions, and specific acts of legal interpretation. It is helpful in this regard to compare Warhaftig's approach[44] to that of Chief Justice Barak in the Supreme Court opinion,

since Barak, too, encases his ruling within a web of "ideology" – or narrative – that I would contend is essential to his legal purpose.

Let's begin with Barak's opinion. In her study of the Supreme Court's jurisprudence in terrorism cases, Leora Bilsky has noted that the Court "does not limit its decision to legalistic reasoning but also provides a legitimizing narrative for its intervention."[45]

These narratives[46] can be described as 'narratives of contrast,' since the Court compares the terrorist on the one hand and the State of Israel on the other. On the basis of this contrast ('*we* are not like *them*') the Court justifies its refusal to uphold a policy that the security forces deem necessary in the fight against terror.. The limitations [on the use of force - MW] that the Court imposes, in other words, are presented as self-imposed limitations that underline the distinction between a democratic state and its enemies, who do not hesitate to use any means to further their goals.

Bilsky notes that, at the very outset of his opinion, Barak tells a story that establishes a moral contrast between the state of Israel and those who seek its destruction:[47]

> Ever since it was established, the State of Israel has been engaged in an unceasing struggle for its security—indeed, its very existence. Terrorist organizations have set Israel's annihilation as their goal. Terrorist acts and the general disruption of order are their means of choice. In employing such methods, these groups do not distinguish between civilian and military targets. They carry out terrorist attacks in which scores are murdered in public areas—public transportation, city squares and centers, theaters and coffee shops. They do not distinguish between men, women and children. They act out of cruelty and without mercy.
>
> Israel is locked in a life-and-death struggle with enemies who will stop at nothing to bring the state to its knees. Though this grim reality might in the public mind justify an equally brutal response by the security services, the Court urges the Israeli people to rise above their understandable fear and desire for vengeance. Evoking the "destiny" of the democratic state, the opinion reminds its readers that theirs is a society in which the

> exercise of official power is limited by the rule of law and a commitment to human rights. We define ourselves as a democracy; as such, we are a society that offers legal protections to the criminal suspect and that looks with suspicion upon every effort by our governmental authorities to exceed the legally-established limits of their power. This means that we are fundamentally different from our enemies. Our deepest ideals and commitments as a society oblige us to deny ourselves a tool of investigation that, however efficient it may be, stands in contradiction to our democratic ethos. This implies that our "no" to state-sponsored torture is not evidence of our weakness in the face of murderous violence but of our dedication to the rule of law. That dedication proves our moral superiority over our foes and will, in the end, guarantee our triumph and survival as a society.

What has Barak accomplished in telling this story? Is this exercise in narrative truly necessary to his judicial role? Some legal scholars, relying upon the traditional distinction between a court's decision strictly construed (the "holding") and everything else that the opinion coveys ("dicta"),[48] would dismiss the narrative sections of the opinion as superfluous to its main business, which is to declare that torture is prohibited under the current statutes governing interrogations. The decision stands by itself and does not need the narrative. The holding, and nothing but the holding, is law properly so called; all the rest is extraneous verbiage. Yet this view betrays a misunderstanding of the way that narrative functions in legal discourse. The stories told by litigants, lawyers, and judges provide explanation and context, purpose and coherence to the legal life and acts of a community. They are not to be considered as frills, as literary embellishments of the true substance of the law, but rather part of and parcel of law itself, the embodiment of the cultural, ideological, and at times theological commitments that make a community's legal thought possible and meaningful. As Robert Cover has memorably put it:[49]

> No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning... In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse, to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its

> demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience... The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide the resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.

We should bear in mind, too, that the opinion, the chief literary form of appellate court communication, has always been more than the mere statement of the holding, the legal bottom line. As a genre of judicial writing, the opinion serves as the argumentative exposition in support of the ruling. Its function is an essentially rhetorical one: to explain the decision, to offer reasons for it, to persuade the judge's intended audience to think about this particular question of law in this particular way and to think about themselves as the particular kind of community that the narrative describes or evokes.[50] This task can be performed *only* by means of a consciously employed judicial rhetoric in which the element of narrative figures prominently. At times, the goal of persuasion may be much more difficult to accomplish; in such instances, the narrative elements of this opinion will be expanded and developed accordingly. In the case before us, Barak wishes not only to issue his ruling but to "sell" it to a public that has good reason to question its wisdom. To restrict the investigative methods employed by the security forces might significantly hinder their efforts to foil terrorists. The decision leaves the Court open to the charge that it bears moral responsibility for the lives lost in the next terrorist attack, lives that might have been saved had the police been permitted to "coax" a detainee into revealing what he knew about it in advance of its occurrence. Barak's narrative is a two-fold response to this challenge. First, he openly acknowledges the horrific reality of terrorism, thereby validating the fears and concerns of the Israeli public and cementing a bond of fellow-feeling with his readers ("I am one of you; your experience is mine as well"). Second, he urges them to join him in putting that experience in its proper perspective. Let us not forget, Barak tells them, who we are. *We* are not terrorists. *We* are better than they are. *We* therefore must not sink to their level of violence. In so doing, he gives voice to the higher aspirations of Israel as a democratic society, calling upon his readers to live up to the admittedly exacting standards of justice and political morality that a liberal democratic community

proclaims as its ideal. It is only within the context of this narrative, which reminds the Israeli public of the deep commitments that characterize the nature of their polity, that Barak can hope to convince them that they have no choice but to accept the Court's ruling and its potentially grim implications. It cannot be too heavily emphasized, therefore, that the narrative is vital to the success and purpose of the opinion. It may be "dicta," but it is no less *law* for that.

In the same way, Professor Warhaftig's "ideological difference" is a contrast narrative: "we are not like them." In this case, "we"are the Jewish people, at least that segment of the Jewish people that is faithful to its ancient heritage, and "they" are the representatives of the modern Western world, who assume that their culture is moral superiority to one based upon traditional religious values. They have it all wrong; our culture is in fact morally superior to theirs. Theirs is a universe devoid of objective value, in which good and evil have no substantive existence, in which the highest calling is the satisfaction of one's own desires, while we live a life defined by clear standards of right and wrong in which our actions are governed by duty. The centrality of duty in the Jewish conception of morality enables Warhaftig to argue for the acceptability of torture, not only in the case of the "ticking time bomb" but even when the suspect is not truly a *rodef*. This, on its surface, is a difficult point for him to "sell" to his intended audience, among whom are any number of "modern" or "centrist" Orthodox readers who would presumably be disturbed at the specter of police powers normally associated with brutal totalitarian regimes. In order to succeed in his rhetorical purpose, he must galvanize them around the "higher aspirations" of Jewish tradition, especially its primary emphasis upon duty to others over the rights of the individual. We begin our moral thinking from that perspective; the moral life is possible only within a web of values based upon obligation. My overriding duty is to observe God's commandments, among which is the responsibility to save the life of one who is in danger. I have no "right" to refrain from that duty; accordingly, the community is empowered to coerce me by whatever means necessary into performing it. The halakhic permit of physical torture, which on its face would seem to violate the most elemental standards of human dignity, is in fact evidence of the Jewish tradition's moral superiority over Western culture. The point, of course, is that the narrative is absolutely central to Warhaftig's purpose. It is *only* on the basis of this narrative of contrast that he is able to construct a credible halakhic argument for torture. It is *only* when we tell *this* story about

ourselves, our community, and its relation to the world that we are likely to accept at face value the Maimonidean statement that the government authorities have the power to "contend with, curse, beat, and pull the hair" of any person who refuses to fulfill the obligations that the Torah imposes upon him. For Warhaftig, then, no less than for Barak, the contrast narrative is no "mere" story, extraneous to his substantive legal argument. His story *is* law, for in the absence of that story his legal argument would lose its coherence, its ultimate sense.

Liberal Halakhah: What Is Our Narrative? In both of these juristic writings, then, narrative plays a crucial and determining role. Without Barak's narrative rendition of the "distinction between a democratic state and its enemies," it would be reasonable for a court to conclude that the established police power to conduct "investigations" into criminal conduct would by its nature encompass a wide range of policies "that the security forces deem necessary in the fight against terror."[51] In the absence of Warhaftig's narrative, an observant Jew might well be persuaded that the *halakhah* forbids torture as an offense against human dignity (*kevod ha'adam* or *kevod haberiyot*). Each author seeks to demonstrate that "the law" says one thing or another about torture as a law-enforcement technique, but neither of them could accomplish his purpose without the narrative structure that he creates in his opinion. Thus, as we liberal halakhists come to consider our own responses to this question, we would do well to begin by inquiring into the narratives that we tell in the determination of our understanding of the *halakhah*. What sort of story do *we* tell about *our* conception of Jewish law?

The answer is not a simple one. On the one hand, it seems clear that we would reject Warhaftig's story out of hand; we liberals, after all, are proud citizens of the Western civilization that he attacks. Yet, however, uncomfortable we may be with his assault upon the social and political values of our culture, we are also Jews and, therefore, heirs to the same Torah that he reveres. We, too, speak the language of *mitzvah* and duty when we interpret our religious heritage to ourselves and others. Though our liberal theological discourse may exalt the doctrines of individual religious freedom and autonomy, as religious Jews we believe that good and evil are real categories and that individual autonomy does not entitle the individual to choose evil. When Warhaftig declares that in the eyes of Jewish law the suspect has no "right" to withhold information that would save lives, we agree with him: a person in this situation bears the moral *duty* to speak up, to perform the *mitzvah*

of *pikuach nefesh*, to refuse to act as an accessory to murder. We, therefore, cannot simply dismiss Warhaftig's narrative as the product of an obscurantist medieval mind. Nor, I think, can we liberals glibly assert that we would never countenance torture in *any* situation, no matter the cost to life and safety. Let us imagine a true "ticking time-bomb" case. The police have taken a suspect into custody. They are reasonably certain that he possesses information that could foil a terrorist strike that is planned for one hour from now. If he reveals those details, hundreds of lives will be saved, but the only way to convince him to talk is through the application of severe physical pressure. Are we absolutely confident that, were our opinion sought, we would not approve (or, at the very least, fail to protest) the use of torture in that situation? Even if we stubbornly insist that *we* would never say yes to torture, even in a "ticking time-bomb" situation, we might, nonetheless, concede that torture is *bound* to happen under extreme circumstances, even in the most liberal and civil-rights oriented societies. If such is the case, then realism might counsel that the issue is not how to do away with torture but how best to control and limit its occurrence. As Alan Dershowitz, who has written extensively on the subject, puts it:[52]

> I am generally against torture as a *normative* matter, and I would like to see its use minimized. I believe that at least moderate forms of non-lethal torture are *in fact* being used by the United States and some of its allies today.[53] I think that if we ever confronted an actual case of imminent mass terrorism that could be prevented by the infliction of torture we would use torture, (even lethal torture), and the public would favor its use. That is my empirical conclusion. It is either true or false, and time will probably tell.

Given that torture, to some extent, is inevitable in the face of the threat that terrorism poses to public safety, Dershowitz calls for the introduction of a "terrorism warrant," a legal device that would regularize the use of such methods of interrogation and subject them to judicial supervision. In the absence of such a warrant, he contends, torture will simply be driven underground, and security forces will resort to it in secret without any possibility of control by the courts.[54] A number of legal scholars have criticized Dershowitz over this position,[55] but others have gone beyond him, defending the torture of terrorism suspects and drafting legal arguments to permit it.[56] If lawyers in a liberal society that is ostensibly committed to the protection of human and civil rights

are capable of justifying torture, albeit under carefully delineated circumstances, as a weapon against terror, it is not unthinkable that some liberal rabbis, and certainly liberal rabbis working within the ancient discourse of Jewish law, would reach a similar conclusion.

Still, it is difficult to imagine that we liberal halakhists, with all our devotion to the language of Torah and *mitzvah*, would find in Professor Warhaftig's contrast narrative a convincing portrait of our relationship to Judaism and modernity. Indeed, we would see his story as an exceedingly one-sided view of the liberal political culture of the modern West.[57] It is true that some theorists identify liberalism with *libertarianism*, a rights-based ethic that proclaims the supreme value of the individual's right to choose among competing conceptions of the good. Under that conception, the self is prior to any ends that it might choose, so that the only "sacred" and inviolable good is the freedom of the individual to decide for herself just which of those ends to pursue.[58] This, of course, is how Warhaftig understands the moral thought of Western culture. There is, however, a competing approach: the "communitarian" view, which holds that the individual is always situated within a community, a tradition, or (to use the word that has figured prominently in this essay) a narrative that to a great extent constitutes the self and its identity. Where the libertarian proclaims the supremacy of the "unencumbered self" that stands outside of any particular conception of the good, the communitarian responds that we are never wholly separated from the aims and aspirations that characterize our group attachments. Our ethical thinking always takes place from within a web of common meanings and understandings that characterize particular traditions, serving as the starting points of ethical argument and enabling the members of the community that shares that story to arrive at substantive moral conclusions.[59] We liberal Jews exercise our ethical thinking within the context of just such a tradition. We, no less than our Orthodox brothers and sisters, engage in serious discourse over substantive moral values; our liberal Jewish ethical tradition, consequently, cannot be caricatured as a dogmatic commitment to freedom of choice as the exclusive or the only absolute moral value. To be sure, *our* tradition or narrative entails a deep and abiding commitment to the dignity – the *kavod* – of the individual human person. Yet this signifies our affirmation of human dignity as a necessary condition of the moral life: it is only through the acceptance of the concept of human and civil rights that moral values can be realized. We liberals can certainly agree that unrestricted personal freedom and the ceaseless pursuit of

selfish desires are not the goals to which morally sensitive people should aspire. We can and readily do declare that "morality" by any definition demands that the end of justice is the construction of a just *society*, a community founded upon mutual concern rather than upon the radical freedom to pursue one's personal satisfaction. But, we would also say (and we think recent history proves us correct) that a society that fails to safeguard the rights and liberties of the individual is a society that is in deepest sense *unjust*. To put this another way, in *our* world, the social, political, and moral universe that we have inhabited for the past two centuries, regimes that have subsumed the dignity of the individual to some "higher" purpose have tended to be the instigators of the most unspeakable atrocities that humankind has ever witnessed. *Our* narrative must therefore begin with the clear statement of contrast: "*we* are not like *them*."

I do not wish to be misunderstood. I do not consider Professor Warhaftig a friend of totalitarianism; I am certain that he would blanch at the thought. In today's world, however, the power to torture detainees, the remedy that he advocates, would not be administered by rabbinical authorities whom God would safeguard from error.[60] It would lie instead with officials whose authority flows not from divine inspiration but from a constitutional arrangement adopted by the people. In Western societies, that arrangement involves carefully specified limitations upon governmental power, particularly when the application of that power would transgress upon individual rights and human dignity. A warrant for torture, in other words, would exact a painfully high price from a liberal and democratic regime; it would call into question that regime's very legitimacy to govern in the name of its people.

Numerous legal scholars have noted this danger, sounding the warning in words too clear and chilling to be ignored. Particularly instructive are some responses to the report of the "Landau Commission," established in 1987 by the government of Israel to investigate the interrogation methods employed by the GSS. The commission found, among other things, that "the effective interrogation of terrorist suspects is impossible without the use of means of pressure... (which) should principally take the form of non-violent psychological pressure... However, when these do not attain their purpose, the exertion of a moderate measure of physical pressure cannot be avoided."[61] To this, Professor Yitzchak Zamir, a justice of the Israel Supreme Court, remarks:

> National security is not an end in itself... If in the cause of the struggle for survival we sacrifice the principles of liberty, justice, and peace on the altar of national security, no victory can be more than delusory. There is a form of survival that is not worth the effort.[62]

Others responded to the Landau Commission report as follows.

> [The] license to employ physical pressure in interrogation constitutes a victory for terror, which has succeeded in causing the State to stoop to quasi-terrorist methods. The belief that the ends justifies the means, the willingness to harm fundamental human values in order to attain a goal... are salient characteristics of terrorism... An ever-present danger faced by a state confronted by terrorism is that in the course of combating threats... its character as a law-abiding state will suffer.... When the state itself beats and extorts, it can no longer be said to rest upon foundations of morality and justice, but rather on force. When a state (employs) torture, it reduces the moral distance between a government act and a criminal act...[63]

> Since World War II, progress has been made internationally to mark the perpetrators of (torture as) outlaws... Any claim by a state that it is free to inflict pain and suffering upon a person when it finds the circumstances sufficiently exigent threatens to undermine that painfully won and still fragile consensus... Lost would be the opportunity to immediately condemn as outlaw any state engaging in these practices.[64]

> We would be curious to see the Israeli legislature – or any legislature of a country laying claim to legitimacy – attempt to draft such a "justification" [*i.e.*, for permitting physical pressure in the interrogation of suspects–MW] in its criminal code, even along the "moderate" lines drawn by the Commission in its Report. We are certain it would not display such arrogance. Such an act would constitute an affront to the fundamental values common to all civilized peoples and which cannot be bent.[65]

My point in bringing these quotations is not to claim that all decent people necessarily share this negative reaction to the Commission's findings. Former Chief Justice Moshe Landau and the

other members of his Commission could hardly be depicted as "indecent," and their conclusions reflect a serious and thoughtful effort to draw a balance between the rule of law and the need to protect the public.[66] My purpose, rather, is to suggest that these sentiments have a special resonance with us. I suspect that we liberal halakhists tend to recognize *our* story in the words of these critics of the Landau Commission report as well as in the words of Chief Justice Barak. In our narrative, the Torah does not stand in implacable opposition to modern culture; instead, it incorporates that culture's highest cultural achievements and moral insights. For this reason, we cannot accept an interpretation of Torah and *halakhah* that would sanction the imitation of the methods of the terrorists, that would allow us to act, in the name of "righteousness," in a manner that is "shocking to the conscience," destructive of the rule of law and of the very concept of human rights. Modernity, to be sure, has seen a great falling away from the path of religious discipline. Its emphasis upon the centrality of the individual is in many ways at odds, as Warhaftig notes, with traditional Jewish teaching. We are not blind to this reality. We frequently take our society to task for its materialism, for its addiction to a technology that often strangles human values, and for its numerous other shortcomings. Yet for all that, we liberals believe in *progress*. Modernity has deepened our understanding of the content of the halakhic principle *kevod haberiyot* and of the traditional notion that each one of us is created in the Divine image. These ideals were defined differently during Biblical, Talmudic, and Maimonidean times. Jews in those days told different stories about their world and about their place in it, and that world may not have been hospitable to the ideals of individual freedom, religious and intellectual pluralism and tolerance, and limited government. We liberals, however, cannot conceive of a moral universe that does not involve a commitment to these ideals. And as liberal *halakhists*, we cannot and do not interpret Torah and Jewish law in a way that lies separate and apart from them.

When we recognize these facts – that is, when we acknowledge that we always and inevitably interpret our law from within the structure of our narratives – we learn how to read those texts which, on their face, run counter to that structure. And this brings me to Warhaftig's citation from the *Mishneh Torah*, in which Rambam speaks of the *beit din*'s power to "contend with, curse, beat, and pull the hair" of a prisoner, not as a legally-specified punishment for a transgression that he has committed but as an inducement to him to behave properly. The text does seem to provide an unambiguous warrant for vigorous government

action (read: torture) in the name of morality. I do not claim that the text and the political value system it expresses are totally foreign to liberals. As I have noted, we are not averse to the notion of "duty" as a primary concept in the discourse of Jewish law. And if we believe in such a thing as "obligation," if we are prepared to define a particular act or course of behavior as a *mitzvah*, then we cannot be wholly unsympathetic to the prospect that officers of the law might exert coercive power to induce an individual to perform that which law or morality requires of him or her. I do claim, though, that our own communal narrative – that is, our understanding of ourselves and of the nature of our political community – requires that we deny such a grant of power to the governments of our time. That narrative requires that we read this text metaphorically and not as a literal expression of our aspirations for the world in which we live. By a metaphorical reading, I mean that we might see in this text an expression of Judaism's uncompromising demand for righteous conduct and its concomitant denial that the individual possesses a "right" to deny God and to choose evil. Such a reading would preserve the power and significance of this text and others like it in the world of Jewish thought; it would not, however, commit us to the literal application of Rambam's ruling as a warrant for torture.

We liberals, moreover, have no monopoly on this sort of metaphorical reading. Our Orthodox co-religionists do it as well. As an example, let us consider a legal issue quite similar to the one we are discussing here. I have in mind the law concerning the recalcitrant husband, the man who refuses to issue a divorce to his wife even when the *halakhah* would require that he do so. Since the law requires that a document of divorce (*get piturin*) must be issued of the husband's free will and consent,[67] he is by that very fact empowered, through his refusal to grant that consent, to render his wife an *agunah*, that is, to deny her the right to remarry. Yet the *halakhah* also provides that on certain grounds a rabbinical court may both require that a husband issue a divorce and coerce him, with whips if need be, to obey its decree.[68] Although this provision seems a logical absurdity – how, after all, can a person be coerced into doing something "of his own free will"?[69] – it is justified by the theory that this coercion is simply a means by which to subdue the husband's evil impulse, which is preventing him from acting upon his natural desire to adhere to the Torah and to the instructions of the Sages.[70] This theory was clearly developed as a positive response to an evident injustice and a clear abuse by a husband of the powers granted to him by the law. If administered energetically, it would likely offer as

effective remedy to the plight of many *agunot*. Nonetheless, the Orthodox rabbinical courts today do not utilize physical coercion as a means of inducing a husband to divorce his wife. Even in Israel, where state law empowers the *beit din* to exercise coercive power in such cases, that grant of power extends only to imprisonment of the husband, the revocation of his passport or driver's license and the imposition of other disabilities. The judges are not permitted to beat him, even though the halakhic sources would allow them to do just that.[71] Orthodox scholars tend to explain this stance on the grounds that physical coercion, when used inappropriately, might invalidate the husband's expressed statement of consent.[72] This explanation, however, raises more questions than it answers. What, after all, is the *essential* difference between physical coercion, which is prohibited under contemporary law and rabbinical practice, and non-physical coercion, which the law permits? Both sorts of inducement involve the exertion of unwanted and unpleasant pressure upon the husband as a means of forcing him to do something that in the absence of such measures he would not do. It would seem that a more elemental distinction is at work. Although the rabbinate is not opposed to coercion per se, it is disturbed by the specter of *physical* coercion. To put this in contemporary legal language: in the legal culture of a civilized society, the application of physical force as a means of compelling an individual to do the right thing is an act "that shocks the conscience." The authorities refrain from using it, even though they do allow themselves other forms of coercive pressure, and even though in doing so they deprive themselves of a powerful tool for the attainment of a just result, precisely because "we are better than that." They see themselves as representing a *just* society, and such a society is one that recoils from remedies of this sort. In other words, the law of physical coercion remains on the books, but we no longer act in accordance with its terms. The community's *narrative*, its understanding of the nature of its law and of the purposes it is meant to serve, denies the law its literal application.

All of this suggests that Jews no longer understand their world in accordance with the plain sense of that Maimonidean text; rabbis, including Orthodox rabbis, no longer accept torture as a force for social good, a legitimate instrument of government power. Our ancestors may have lived in a different world, one where the *beit din* wielded (at least in theory) virtually unlimited coercive power over disobedient citizens. For them, it may have been a foregone conclusion that the end, so long as it was required by the Torah, justified the application of violent means in order to secure it. In our day and age, we are loathe to vest this sort of

power in the hands of our political leaders. There may have been a time when the employment of a virtually unlimited range of coercive measures served the interests of justice; today, as I have indicated, the phenomenon is tightly associated in our minds with the most degraded and contemptible regimes on earth. None of this necessarily means that Maimonides was "wrong" in his interpretation of the *halakhah* and its Talmudic sources. It does mean, though, that the text, if it is to possess any sort of meaning, must be understood metaphorically, as a symbolic expression of the Torah's absolute demand upon us. But we Jews today do not understand that text, as our ancestors may have done, as a literal warrant for our governments to utilize physical abuse and even torture to compel individuals to toe the moral line. The difference between then and now lies not so much in the words of our halakhic texts but in the narratives with which we convey them, explain them, and provide them with their final justification.

Professor Warhaftig, of course, is entitled to disagree. He may wish to argue for the literal interpretation of Maimonides' ruling in order that it might serve to justify the use of torture against suspected terrorists. At the same time, however, he must concede that the text in its literal sense cannot be restricted to cases of terror and of *pikuach nefesh*. Indeed, Rambam's ruling authorizes the power of judicial coercion over *all* areas of the law and as a means of inducing proper conduct in *any* matter that the governing authorities think important. To apply this text literally, in other words, is to extend its reach to the entire range of human social behavior. Would Professor Warhaftig take the *halakhah* to such a point? Would he, in the name of Jewish law, grant to his government the power to bring coercive physical pressure upon any "wrongdoer" – tax evaders, deadbeat parents, habitual violators of traffic laws, individuals who do not contribute their fare share to *tzedakah* – to toe the moral line as defined by the dominant groups in the society? I do not think that he would want to live in that kind of repressive society. I believe that, were it up to him, he would limit the power of torture to cases where life is truly in danger. Yet the text upon which he relies makes no such limitation. Ultimately, I think that Professor Warhaftig would want us to read Rambam's ruling literally, yes, but only to a certain point. To justify such a novel strategy for interpreting the text, he would have to rely upon some theory of interpretation that is based upon our fundamental values, upon our notion of ourselves as an organized society. That theory would be a narrative, the sort of story that we tell about ourselves that instructs us as to the way we read and understand

our law.

Toward a Conclusion. For all these reasons, we who represent the ideal of "liberal" or "progressive" *halakhah* have sufficient cause to reject Professor Warhaftig's interpretation of Jewish law as it relates to torture. To return to the question of balance with which we began, we would say that while our governments must wage a tough and vigorous war against those who use terror to threaten human life and the social order, we cannot follow Warhaftig's claim that the Torah and the Jewish legal tradition authorize the government to use torture as a weapon in this war. The *halakhah*, as we understand it, demands that the government maintain its fidelity to the human dignity and the rule of law even in the midst of this struggle. *Our* narrative, the context from within which we do and must interpret the rules of our law, forbids us from mimicking the methods of those who would destroy us. To do so, even in the name of national security, would be to grant them the very victory that we wish to deny them.

And yet... there can be a difference, a profound one, between what we say in the name of our law and what we actually *do*, the way we conduct ourselves in the crucible of reality. I return to a question I raised above: with all our evident dedication to such liberal and progressive ideals as the inherent dignity of the human person and the rule of law, are we absolutely certain that Professor Warhaftig does not in some way give voice to our own sentiments? Even though we reject his arguments, a disturbing question remains: would we liberals *never* support our government's use of torture, no matter what the circumstances, even in a "ticking time-bomb" case? At the end of the day, after all our protestations that "we are not like *them*," I suspect that many of us, perhaps most of us, would rule for torture in such a situation. Even jurists and moralists who oppose torture on grounds of principle can acknowledge the existence of exceptions to the rule. At the very least, they will concede that government officials might well opt for torture and that they would see their action as justified no matter what the law says. If this is so, if good progressives like us cannot categorically rule out the resort to torture in every possible instance, then we might well ask: what good have we done? What value is there in our careful legal analysis and in our invocation of Jewish values if, when the chips are down, we would look past all of that and (in the words of Justice Barak) plead the defense of necessity?

That is a good question, and like all good questions it resists a facile answer. One line of response is suggested by the American jurist Seth F. Kreimer:[73]

> Faced with a threat of mass devastation that can be avoided only through torture, could an American official believe, as a matter of morality and public policy, that she should choose the path of the torturer as the lesser evil? On this question, I am prepared to concede that there is room for debate, as there is room for debate as to whether under extraordinary circumstances a public official should choose to violate any provision of the Constitution. But on the question of whether scholars or courts should announce before the fact that the Constitution permits torture, the answer seems clearer: ours is not a Constitution that condones such actions.

These words embody one of the core doctrines of the theory known as legal positivism, namely the sharp theoretical distinction between law and morality.[74] These two ways of thought, which deal with the regulation of human conduct, cover much the same ground; nonetheless, they are to be kept hermetically sealed one from the other. Kreimer believes firmly that the U. S. Constitution prohibits torture; nonetheless, he recognizes that a public official would feel enormous pressure, from both external sources as well as her own commitment to the protection of innocent life, to use torture in the situation described. His solution is to allow the official to act on moral grounds, to choose to disobey the law when compliance with the legal standard would lead to a morally indefensible result. That choice, though possibly a moral obligation, remains an *illegal* act; the law (in this case, the Constitution) recognizes no "higher" legal authority than its own rules and procedures.

In Jewish law, by contrast, the distinction between law and morals is not so clear and obvious.[75] To declare that the Torah, as we understand it, forbids torture is to make a statement of moral as well as legal force; by contrast, to say that an action is "moral" even though it violates the Torah creates a difficulty for those of us seeking to work within the parameters of Jewish law, however progressively we interpret it. Yet Professor Kreimer's approach might serve to underline for us the fundamental tension that we can perceive between the demands that Torah places upon us and our capacity to realize them in the harsh reality of life. Our existential dilemma is that we know what we are supposed

to do and yet we frequently seem to fall short of that standard. We usually explain this discrepancy on the grounds of human weakness or the evil impulse (*yetzer hara*), and we often console ourselves with the thought that "the Torah was not given to the angels."[76]* In this instance, however, the difficulty arises not from some moral fault or illicit desire but from our desire to "do the right thing": we perceive that in order to save the lives of countless individuals, we shall have to make a choice that conflict with our pronounced moral principles. One way to deal with this conundrum is to pronounce ourselves to be realists or pragmatists: "Such is the world in which we live. We cannot change human nature. Our only choice is to do the best we can in the situation that confronts us." Fine with me. However, we also proclaim ourselves to be *halakhists* and teachers of Judaism, and as such, we should be wary of allowing the "real" to blur our vision of the ideal. Our task is to remember that it is the Torah we are interpreting, and when we speak in the name of Torah, we must keep in mind that we bear the ultimate responsibility for the lessons that we teach in its name. What *we* might do when we confront the terrorists of our time is admittedly an open question. But that reality does not alter the fact that, from our perspective and to borrow Professor Kreimer's language, ours is not a Torah that condones torture. To know this will not necessarily rescue us from all moral difficulties. It does give us, however, a firm basis upon which to stand as we struggle with the moral challenges of our age. And that is no little thing.

Notes

1. *United States Code*, title 22, chapter 38, section 2656f (d).

2. I am not claiming that the concept of "rule of law" *originated* in the modern West. Indeed, the ancient Greeks are aware of "the ideal of the state whose authorities act in accordance with preexisting, known laws not arbitrarily or without regard to those laws," even if they do not enunciate the concept in explicit form. See J. M. Kelly, *A Short History of Western Legal Theory* (Oxford: Oxford University Press, 1992, 24-25. For the history and theoretical underpinnings of the concept see Brian Z. Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004). My point is that in the contemporary context, the "rule of law" is the major distinguishing characteristic between democratic and dictatorial political systems.

3. As one popular formulation would have it, "the government shall be ruled by the law and subject to it"; Joseph Raz, "The Rule of Law and Its Virtues," in R. L. Cunningham, *Liberty and the Rule of Law* (College Station: Texas A&M Press, 1979), 5. Raz does go on to say that the formulation is a tautology; a "government"

that is not subject to its own laws does not act as a government in any meaningful sense of that term. He suggests that the "rule of law" must include the observance of a number of specific principles that guarantee the openness of the law, the independence and supervisory role of the judiciary, and the placing of real limitations upon the police powers of the regime.

4. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986), 93. The late Israeli Supreme Court justice Haim Cohn argued that "the rule of law" rests upon three foundations: the subjugation of the political institutions of the state to the supervision of the law; the independence of the judges who interpret and apply the law; and the great deference paid to the life and the freedom of the individual citizen. See Cohn's *Hamishpat* (Jerusalem: Mosad Bialik, 1991), 143.

5. See Haim Cohn, *Human Rights in Jewish Law* (New York: Ktav, 1984), 17-18, as well as *Hamishpat*, 513. Still, as Cohn notes, the existence of a "right" can be inferred from a corresponding duty: the prohibition of homicide, for example, implies a right to life. See below in the text at notes 8 and 9.

6. See *Tur* and *Shulchan Arukh Choshen Mishpat* 2.

7. This is not to say that one cannot pursue an inquiry into Jewish political theory by means of other genres of thought and expression. Philosophers and social scientists, after all, study the history and development of political ideas from the vantage point of their own disciplines. My claim, rather, is that regardless of the discipline, a Jewish political theory must be derived from source materials that the Jews have historically regarded as authoritative on matters of practice and that these source materials are primarily halakhic ones. See, for example, Menachem Lorberbaum, *Politics and the Limits of Law* (Stanford: Stanford University Press, 2001) and Gerald Blidstein, *Ekronot medini'im bemishnat harambam* (Ramat Gan: Bar Ilan University, 2001).

8. *Yad, De`ot* 7:1-4. Note that "gossip" includes speaking about another person even if one's words happen to be true. *Lying* about another to his detriment is defined as *hotza'at shem ra*. The roots of this particular transgression stretch back to Deuteronomy 22:18-19, which prescribes corporal punishment and a monetary fine for one who files a false claim concerning his wife's lack of virginity upon marriage (*hotzi shem ra*). The Rabbis expanded the scope of this offense to include lying about any other person; see *B. Arakhin* 15a. This usage, it should be noted, is a colloquial one, a synonym for "negative gossip"; it is not strictly speaking a crime or a tort, and it carries no legal penalty. One wonders whether Jewish law, had it adjudicated such matters, would have developed a conception of slander or libel as an actionable offense in the same way that it developed a conception of copyright following the invention of printing. On that subject, see R. Solomon B. Freehof, *Contemporary Reform Responsa* (Cincinnati: Hebrew Union College Press, 1974), no. 55, and CCAR Responsa Committee, no. 5761.1, "Copyright and the Internet" (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=1&year=5761). The point here, at any rate, is that all sorts of gossip, whether the information conveyed is true or false, is prohibited by Jewish law.

9. On this issue, see CCAR Responsa Committee, "Privacy and the Disclosure of Personal Medical Information," no. 5756.2 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=2&year=5756), section 2.

10. Moshe Zemer, *Evolving Halakhah* (Woodstock, VT: Jewish Lights, 1999), xxii.

11. For an argument in support of the intellectual legitimacy of liberal *halakhah* (*i.e.*, that liberal *halakhah* is no less "halakhic" than its Orthodox counterpart), see my "Against Method," in Walter Jacob, ed., *Beyond the Letter of the Law* (Pittsburgh: Rodef Shalom Press, 2004), 17-77, in particular the final section, entitled "The Practice of Liberal *Halakhah*," at 55*ff*. The article is available as well at http://huc.edu/faculty/faculty/washofsky.shtml .

12. Marcy Strauss, "Torture," *New York Law School Law Review* 48 (2003-2004), 201-274.

13. United Nations Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (1984); check and see Part One, Article One. Office of the High Commissioner for Human Rights (OHCHR), http://193.194.138.190/html/menu3/b/h_cat39.htm .

14. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987). For a comprehensive discussion see M. Evans and R. Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998), 61-105.

15. *Rochin v. California*, 345 U.S. 165 (1952), at 172. In that case, police and physicians strapped a prisoner to a gurney, shoved a tube down his throat and forced him to vomit up some illegal pills he had swallowed. The pills served as evidence to secure his conviction, which was reversed by the Supreme Court.

16. The "dwarves standing on the shoulders of giants" proverb originates, in all probability, with the 12th-century scholastic philosopher Bernard of Chartres. The earliest use of the proverb by a Jewish writer is apparently found in a responsum by the 13th-century R. Yehoshua di Trani. On this, see Yisrael Ta-Shema, *Halakhah, minhag umetzi'ut be'ashkenaz 1100-1350* (Jerusalem: Magnes), 1996, 70-76. The concept is part of a wider and deeper intellectual debate during the Middle Ages over the proper relationship between the *rishonim* and the *acharonim* – the Jewish version of the conflict between *Antiqui et Moderni*, the philosophical conflict over the authority of the past and the right of contemporary scholars to differ with their illustrious predecessors. For a comprehensive study of the expression of this dispute in Jewish literature, see Avraham Melamed, *Al katfei `anakim* (Ramat Gan: Bar Ilan, 2003).

17. Itamar Warhaftig, "Chakirot hashaba"kh le'or hahalakhah," *Techumin* 20 (2000), 145-150.

18. Public Committee Against Torture in Israel v. The State of Israel and The General Security Service, HCJ 5100/94 (hereafter, *Public Committee*). The English text can be found online at the Supreme Court's search engine, http://elyon1.court.gov.il/eng/verdict/framesetSrch.html. For the Hebrew version, see at http://elyon1.court.gov.il/files/94/000/051/a09/94051000.a09.pdf .

19. See especially *Public Committee* (note 18, above), sections 33-37.

20. *Public Committee* (note 18, above), section 22.

21. *Chok yesod: kevod ha'adam vecheruto*, enacted by the Knesset in 1992 and revised in 1994; the text is available at http://elyon1.court.gov.il/heb/laws/adam.htm On the concept of the "Basic Laws" see David Kretzmer's chapter on constitutional law in A. Shapira, ed., *Introduction to the Law of Israel* (The Hague: Kluwer Law International, 1995), 39*ff.*

22. *Public Committee* (note 18, above), sections 39-40.

23. In particular, Warhaftig dismisses the Court's comments on the "necessity defense" as an affront to common sense: if "necessity" is sufficient to absolve the police of liability resulting from rough treatment of the prisoner during interrogation, why should it not be cited in advance as an *a priori* warrant for such tactics (Warhaftig, 145)? The professor seems to overlook the fact that fine distinctions of this sort are the mainstay of every legal system, including the *halakhah*, which frequently distinguishes between the standards of *lekhatchilah* and *bedi`avad*.

24. The Israeli courts are not bound by "Jewish law" or the *halakhah* but by the legislation and precedents of the Israeli legal system. Nonetheless, *mishpat ivri* scholars like Warhaftig have always been interested in charting the points of connection and contrast between Israeli law and Jewish law. This activity is motivated by a frankly ideological bent: the desire that Jewish law should become the legal foundation of the Jewish state or at least that the law of the state should be informed and guided by traditional Jewish legal principles. For a sympathetic overview of the *mishpat ivri* enterprise, see Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), especially volume four.

25. I number these points here for the sake of convenience; they are not so numbered in Warhaftig's essay.

26. Rambam, *Yad, Rotzeach* 1:6. See *M. Sanhedrin* 8:7 and *B. Sanhedrin* 73a, which learns the principle of *rodef* from Leviticus 19:16 ("do not stand idly by the blood of your fellow," suggesting a positive duty to rescue those in danger) and from Deuteronomy 22:26 (the law of the betrothed maiden "who has no rescuer" – if she *had* a rescuer, he would be permitted to rescue her with any necessary means at his disposal).

27. On *pikuach nefesh*, see the preceding note. "*Dinim,*" the obligation to establish courts of law to administer justice, is one of the seven "Noachide" laws to which all humankind is obliged; *B. Sanhedrin* 56b and *Yad, Melakhim* 9:14.

28. Warhaftig cites *Soferim* 15:7 (ed. Higger; 7:10 in the printed editions), which declares that "you may kill the best of the Gentiles during wartime." The text has clearly been emended according to the comment in *Tosafot Avodah Zarah* 26b, *s.v. velo moridin*, which cites the parallel in *Y. Kidushin* 4:11 (66b), in which the words "during wartime" are missing. That would imply that one is entitled to kill the Gentile at any and all times, presumably because as an idol worshiper he is culpable for death under the Noachide laws. The Babylonian Talmud (*Avodah Zarah* 26a), by contrast, rules that we are not to kill the Gentile, though we are under no obligation to rescue him from mortal danger. Maimonides (*Yad, Avodat Kokhavim* 10:1) applies this rule to a member of one of the "seven nations," the Canaanites who occupied the land that God promised to Israel. This would mean that the law does *not* apply to the Muslims with whom the state of Israel is currently at war. On the other hand, in *Yad, Rotzeach* 4:11, Rambam applies this rule to all "Gentiles" with whom we are at war. Warhaftig, who cites Rambam's two rulings (p. 147, n. 9), does not mention the contradiction between them.

29. Warhaftig acknowledges that this Talmudic principle applies generally to monetary matters (see *B. Ketubot* 2b, 56a, and 89b, among other places). Nonetheless, he asserts, it applies as well to our case.

30. See *Yad, Sanhedrin* 24:8-10. Rambam apparently derives this rule from *B. Sanhedrin* 46a, and see *Tur* and *Shulchan Arukh Choshen Mishpat* 2.

31. See *Public Committee* (note 18, above), section 18, for a listing of the specific legislative provisions.

32. Justice Y. Kedmi filed a concurring opinion. While he asserts that a state has the "natural right" (*zekhut tiv`it*) to protect itself and therefore should find a way to permit coercive interrogation tactics in the admittedly rare instance of the "ticking time bomb," he agrees with Chief Justice Barak and the other seven justices that the existing legislation does not authorize them.

33. "In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order – in favor of the government's ability to deal with conditions that threaten the national well-being"; William

Rehnquist, *All The Laws But One: Civil Liberties in Wartime* (New York: Vintage Books, 2000), 222.

34. This is not the place (and I am not the person) to conduct a discussion of the laws of war in modern society. I would simply mention, from among all the sources that could be cited, an article by John C. Yoo and James C. Ho, "The Status of Terrorists," *Virginia Journal of International Law* 44 (2003-2004), 207-228. The authors argue that captured Al Qaeda and Taliban fighters do not qualify for the status of prisoners of war under accepted international standards. If this argument is accepted – and the government of the United States has by all accounts accepted it -- it would strip the prisoners of numerous rights and subject them to rough treatment, though not necessarily torture. I present this material, not necessarily because I agree with Yoo and Ho, but in order to demonstrate the extent to which Western law permits a government to undertake extraordinary powers during wartime.

35. R. Yisrael Rosen, in Warhaftig (note 17, above), at 146, n. 3. Warhaftig responds below in that same note. Both Rosen and Warhaftig are editors of *Techumin*.

36. See note 26 and the sources related to Leviticus 19:16, as well as Aaron Kirschenbaum, "The 'Good Samaritan' and Jewish Law," *Diné Israel* 7 (1976), 7-86.

37. See Chaim Povarsky, "The Law of the Pursuer and the Assassination of Prime Minister Rabin," in E. A. Goldman, ed., *Jewish Law Association Studies*, vol. 9 (Atlanta: Scholars Press, 1997), 161-198.

38. For an excellent analysis of the problem see David Luban, "Liberalism, Torture, and the Ticking Bomb," *University of Virginia Law Review* 91 (2005), 1425-1461. From the efforts of the U.S. government to defend its conduct during the current "War on Terror," he concludes that "the liberal ideology of torture, which assumes that torture can be neatly confined to exceptional ticking-bomb cases and surgically severed from cruelty and tyranny, remains a dangerous delusion" (1461).

39. See Strauss (note 12, above), at 262-264: "But torture need not always be effective to be justified... While, undoubtedly, there is ample evidence that torture frequently yields false confessions, this concern is less significant when the purpose of an interrogation is to obtain information and not to secure a conviction... The possibility of even a germ of truth coming from the mouth of an otherwise silent conspirator, conceivably, might be worth the risk... Even if nine times out of ten, a tortured suspect would falsely confess to a crime, or lie to stop being tortured, if the one time truth prevails is the situation where a terrorist has hidden a nuclear bomb in a major city, torture could arguably be seen as effective."

40. Strauss (note 12, above), 260-261.

41. Warhaftig extends this concept of legal responsibility to the non-Jew, who as a "son of Noah" is required to act in accordance with the basic principles of justice (*dinim*); see above at note 27.

42. Warhaftig, at 148: *mi she`over `al hachok...ein lo kavod kelal*, and *"makin oto `ad shetetzei nafsho" (B. Ketubot 86a), shekhen beyado lehafsik et sivlo.*

43. *Yad, Sanhedrin* 24:4.

44. Warhaftig, of course, does not write a formal judicial opinion in *Techumin*, yet his article presents itself as the equivalent of one for all practical purposes: "This is how I would rule on the question at hand from the standpoint of Jewish law."

45. Leora Bilsky, "Suicidal Terror, Radical Evil, and the Distortion of Politics and Law," *Theoretical Inquiries in Law* Tel Aviv University Faculty of Law) 5 (2002), at 153-154. Bilsky is a member of the Tel Aviv University law faculty.

46. In addition to *Public Committee* (note 18, above), Bilsky refers here to *Ajuri v. IDF Commander in Judea and Samaria*, HCJ 7015/02, and *Anonymous Persons v. Minister of Defense*, Cr.A. 7048/97. In all three cases, Chief Justice Barak wrote the Court's opinion.

47. *Public Committee* (note 18, above), sec. 1.

48. See, in general, Mark Washofsky, "Taking Precedent Seriously: On *Halakhah* As A Rhetorical Practice," in Walter Jacob and Moshe Zemer, eds., *Re-examining Progressive Halakhah* (New York: Berghahn Books, 2002), 1-70; available at http://huc.edu/faculty/faculty/washofsky/takingprecedentseriously.pdf .

49. Robert Cover "*Nomos* and Narrative," *Harvard Law Review* 97 (1983), at 4-5 and 46. See also Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), 350-351: "political community...depends on the narratives by which people make sense of their condition and interpret the common life they share... without narrative there is no continuity between present and past, and therefore no responsibility, and therefore no possibility of acting together to govern ourselves." The subject of narrative jurisprudence is sufficiently complex that I hesitate to offer any discussion here beyond the sketchy indications in the text. For my most sustained effort to date, see Mark Washofsky, "Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision," *Pursuing the Text: Studies in Honor of Ben Zion Wacholder*, London, Sheffield Press, 1994, at 373-375. The reader might consult the collection edited by Peter Brooks and Paul Gewirtz, *Law's Stories: Narrative and Rhetoric in the Law*. New Haven: Yale University Press, 1996.

50. See, in general, James Boyd White, "What's An Opinion For?" *University of Chicago Law Review* 62 (1995), 1363-1369.

51. See the citation from Bilsky at note 45, above. One obvious way of arriving at this conclusion is the argument, advanced by Justice Kedmi in his concurring opinion (see note 32, above), that a state has a "natural right" to protect itself and its citizens. See as well the Landau Commission Report, cited below at note 61, which argues for the allowance of a moderate level of physical pressure in the interrogation of security detainees.

52. Alan M. Dershowitz, "The Torture Warrant: A Response to Professor Strauss," *New York Law School Law Review* 48 (2003), 275-294. The citation is at 277; the italics are in the original. For a more extended discussion see Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven: Yale University Press, 2002), 131-163.

53. Dershowitz goes on to cite numerous examples of the use of torture methods by the United States and its allies against terrorism suspects.

54. "While we abhor the detailed medieval codes and procedures on torture, we ought to recognize that the practice remains. By refusing to discuss torture, we do not make it go away; we drive it underground"; Oren Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience," *Minnesota Law Review* 88 (2003-2004), at 1554.

55. See Luban (note 38, above); Strauss (note 12, above); Seth F. Kreimer, "Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror," *University of Pennsylvania Journal of Constitutional Law* 6 (2003), 278-325; Jeremy Waldron, "Torture and Positive Law," *Columbia Law Review* 105 (2005), 1681-1750; John Kleinig, "Ticking Bombs and Torture Warrants," *Deakin Law Review* 10 (2005), 614-627. Jeffrey F. Addicott, "Into the Star Chamber: Does the United States Engage in the Use of Torture or Similar Illegal Practices in the War on Terror?" *Kentucky Law Journal* 92 (2003-2004), 849-912, seeks a balanced approach that recognizes the need to infringe on some civil liberties during a time of threat to national security but insists that torture be outlawed.

56. See Memorandum from John C. Yoo, Deputy Assistant Attorney General. U.S. Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (August 1, 2002), Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005), 172ff. Yoo is currently a professor at the University of California Law School. The head of the Office of Legal Counsel, who signed the memo, was Jay Bybee, now a judge on the Ninth Circuit U.S. Court of Appeals. See also Mirko Bagaric and Julie Clarke, "Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justifiable," *University of San Francisco Law Review* 39 (2004-2005), 581-616.

57. On the following discussion see Michael Sandel, ed., *Liberalism and Its Critics* (New York: NYU Press, 1984). I employ a somewhat different terminology than does Sandel. He uses the word "liberal" to denote the rights-based theory of ethics, founded upon Immanuel Kant's rejection of utilitarianism. The opposing point of

view, "communitarianism," is *not* "liberal" in Sandel's formulation. I apply the concept "liberal" more broadly to cover both approaches; thus, one might be a "libertarian liberal" or a "communitarian liberal."

58. For a powerful statement of this view see Isaiah Berlin, "Two Concepts of Liberty," in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118-172.

59. See especially Alisdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), 222: "A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition."

60. For the sake of illustration, see the comment of Nachmanides (Ramban) to Deuteronomy 17:11, "do not deviate from the word that they [*i.e.*, the supreme judicial authorities] tell you, neither to the right nor to the left." A frequent interpretation of the passage suggests that the duty to hearken to the judges' ruling applies "even should they tell you that the right (hand) is the left and the left is the right" (*Sifre Deuteronomy*, ch. 154 and Rashi to Deut. 17:11 – but compare *Y. Horayot* 45d, and see *Torah Temimah* to Deut. 17, n. 62). The penalty for public dissent from the judges' decision is death. Ramban explains the necessity for such a rule of strict obedience: namely, the need for uniformity of interpretation in the law. As for the obvious objection that the judges might be mistaken in their decision and, perhaps, condemn an innocent person to death, Ramban replies that since God's love will never forsake those who serve Him, "they will be preserved from error" (*cf.* Ps. 37:28). Shall we say the same for the appointed judges of our own day, let alone the security officials who would not be required to consult with judges prior to torturing a terrorist suspect?

61. "Commission of Inquiry Into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity," excerpted in *Israel Law Review* 23 (1989), 146-188. The citation is at 184.

62. Yitzchak Zamir, "Human Rights and National Security," *Israel Law Review* 23 (1989), 375-406. The citation is at 379-380.

63. Mordecai Kremnitzer, "The Landau Commission Report: Was the Security Service Subordinated to the Law, of the Law to the Needs of the Security Service?" *Israel Law Review* 23 (1989), 216-279. The passage cited is at 263- 264.

64. Sanford Kadish, "Torture, the State, and the Individual," *Israel Law Review* 23 (1989), 345-356. The citation is at 352.

65. S. Z. Feller, "Not Actual 'Necessity' But Possible 'Justification'," *Israel Law Review* 23 (1989), 201-215. The citation is at 213.

66. Indeed, several of the articles in volume 23 of the *Israel Law Review* devoted to the subject are supportive of the Commission's recommendations.

67. See *B. Gitin* 49b and *Yad, Gerushin* 1:2.

68. See, among other places, *M. Gitin* 9:8 and *B. Gitin* 88b.

69. The classic formulation, *kofin oto ad sheyomar rotzeh ani* ("we coerce him until he says 'I will do it willingly'"), is found in *M. Arakhin* 5:6.

70. *Yad, Gerushin* 2:20, Rambam's elaboration upon the Talmudic formulation "it is a *mitzvah* to heed the words of the Sages" (*B. Bava Batra* 48a and elsewhere). The idea in both texts is that the Jew's *true* desire is to adhere to the *mitzvot*, so that the judicially-imposed coercion simply enables him to overcome his weaknesses and realize that desire.

71. *Law Concerning the Jurisdiction of Rabbinical Courts (Marriage and Divorce)*, 1953, paragraph 6, as amended 2000. See Shelomo Daichovsky, "Akhifat gerushin," *Techumin* 25 (2005), 132-148.

72. The *halakhah* permits coercion of divorce only on certain carefully specified grounds. A divorce coerced for improper reasons is invalid (a *get me`useh*; see *B. Gitin* 88b; *Yad, Gerushin* 2:20; *Shulchan Arukh Even Ha`ezer* 134:7). Thus, the tendency among the *poskim* for centuries has been to avoid exerting physical pressure upon the husband. The classic statement is by Isserles, *Sulchan Arukh Even Ha`ezer* 154:21: "since there is a dispute among the authorities, it is best to rule strictly and not to coerce 'with whips', so that the *get* not be coerced in an invalid manner." He does, however, permit other forms of legal and moral pressure against the recalcitrant husband. One of the best treatments of the subject is Zorach Warhaftig (father of Itamar), "Kefi'at get lehalakhah ulema`aseh," *Shenaton hamishpat ha`ivri* 3-4 (1976-1977), 153-216; see especially at 157-159.

73. Kreimer, note 55, above, at 324-325.

74. The literature on legal positivism is immense. On the particular issue I raise here, see H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958), 593-629, reprinted in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 49-87. For a memorable formulation see Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10 (1897), 457-478.

75. This topic is too complex to discuss in any depth here. The complexities *are* discussed in Aharon Lichtenstein, "Does Jewish Tradition Recognize An Ethic Independent of Halakha?" in Marvin Fox, ed., *Modern Jewish Ethics* (Columbus: Ohio State University Press, 1975), 62-88.

76. *B. Berakhot* 25b and *Me`ilah* 14b.