CASE 3

THE CONDUCT OF WAR
Case Study

A. Individual Conduct

Jason is a Jewish American soldier in his second year of army service. He is stationed in a foreign country in which the U.S. is engaged in military operations. He is 20 years old.

When Jason enlisted, he took an oath to obey the orders of his superiors, whom he respects for their experience in the battlefield. However, Jason is fearful—for his life and for his future career, even though he thinks that, by and large, his superiors know best how to preserve them both.

At the same time, Jason knows that the United States is a signatory to the Geneva Conventions, which establish internationally-recognized rules of war, but he is not very clear as to what they entail. He also has a sense that there are moral duties in all aspects of life, including war, that transcend international and military law. These include showing as much respect as possible for the value of life, even when facing an enemy on the battlefield, in accordance with the Jewish doctrine that each person is created in the image of God and deserves to be treated with dignity.

In light of international law, Jewish values, and the ethics that apply to military service, what would you advise Jason to do if the sergeant of his squad instructs him to do any of the following?

- break into a home in search of militants
- shoot anyone who comes out of a particular home
- throw a hand grenade at a school because militants are reported to be inside
- rape women in order to intimidate the enemy
- kill family members of militants to force them to come forward
- kill family members of militants, even if those being sought are dead
- torture suspects in order to get information from them
- torture suspects in order to humiliate and/or intimidate them
B. Military Conduct
If your country is engaged in war, should your military have the right to:

- engage in torture in order to elicit potentially life-saving information about an enemy’s activities or plans?
- engage in targeted killings of leaders or members of enemy nations or organizations?
- take hostages with the intent of exchanging them for prisoners?
- engage in targeted bombing of military sites, even if it involves “collateral damage”?

Would your response to any of the situations mentioned above change if your country was responding to terrorist attacks instead of fighting in a declared war? What if war has not been explicitly declared against a country, but there are military operations taking place there, as in the Korean conflict in the 1950s or in Iraq in the 2000s?

C. Non-Battlefield Conduct
In early 1948, prior to the formal establishment of the State of Israel, but during the time that the British were withdrawing, 35 Hebrew University students were sent to try to hold on to the Jewish settlement of Gush Etzion, southeast of Jerusalem. On their way, they met an old Arab shepherd. Because of his age and their need to move swiftly, they could not take him hostage; but they feared that if they did not kill him, he would alert the Arabs in the region that they were coming. Ultimately, they did not kill him, and he did alert the Arabs about them. As a result, all 35 were killed. Should they have killed the shepherd?

D. Nuclear/Chemical Weapons
Was it right for President Truman to order that atomic bombs be dropped on Hiroshima and Nagasaki in 1945 in order to end the war with Japan, saving the lives of possibly hundreds of thousands of American troops, but at the expense of Japanese civilians? Would it be any different if World War II happened today and our President ordered chemical weapons to be used against the Japanese? What is the difference, if any, between using chemical or nuclear weapons and using conventional bombs or missiles?
7. When laying siege to a city, one does not surround it on all four sides, but only on three sides, and one leaves a place for those who escape and those who run for their lives.

8. One does not chop down fruit-bearing trees outside the city, and one does not deny them water so that they wither, as it is written (Deuteronomy 20:19): “Do not destroy its trees.”

4. Sifra on Deuteronomy 20:10, Parashat Shoftim 199

“When you approach a town to attack it”—and not to make it suffer starvation or thirst and not to make it die the death of sicknesses.

5. Deuteronomy 21:10–14

When you take the field against your enemies, and the Lord your God delivers them into your power and you take some of them captive, and you see among the captives a beautiful woman and you desire her and would take her to wife, you shall bring her into your house, and she shall trim her hair, pare her nails, and discard her captive’s garb. She shall spend a month’s time in your house lamenting her father and mother; after that you may come to [bed with] her and take her sexually, and she shall be your wife. Then, should you no longer want her, you must release her outright. You must not sell her for money: since you had your will of her, you must not enslave her.

6. Maimonides, Mishneh Torah, Laws of Wars and Kings, 8:1–2

1. Soldiers who enter foreign territory and capture it and take spoils may eat meat [that is not ritually slaughtered] and pork if they are hungry and do not find anything to eat other than these forbidden foods, and they may drink [non-kosher] wine. From the Oral Tradition we learn: “And houses filled with all good things” (Deuteronomy 8:1), pork and the like.

2. Similarly, a soldier [may] sexually take a gentle woman (ordinarily forbidden to a Jewish man) if his lust overcomes him. However, he may not sexually take her and leave, but rather he must bring her to his home, as it is written: “And you see among the captives a beautiful woman.” And he may not sexually take her again until he marries her.

7. Babylonian Talmud, Shabbat 151b

Rabban Gamliel son of Rabbi says: Whoever shows mercy to people, Heaven has mercy on him. And whoever does not show mercy to people, Heaven does not have mercy on him.

8. Rabbi Yonah Gerondi (Spain, 13th century), Sha‘arei Teshuvah 3:37, quoting Yalkut Shimoni 1 Samuel 121, Midrash Shoher Tov on Psalms 7

Whoever becomes merciful on the cruel ends up becoming cruel to the merciful.

Contemporary Sources

Compiled by Steven Edelman-Blank

The Conduct of War


1–58. The Army’s culture promotes certain norms of conduct. For example, discipline is central to its professional identity. Soldiers, who manage violence under the stress and ambiguity of combat, require the highest level of individual and organizational discipline. Likewise, because Soldiers must face the violence of combat, they require the stiffening of discipline to help them do their duty ...

1–59. Army norms of conduct also demand adherence to the laws, treaties, and conventions governing the conduct of war to which the United States is a party. The law of war seeks both to legitimize and limit the use of military force and prevent employing violence unnecessarily or inhumanely. For Soldiers, this is more than a legal rule; it is an American value. For Americans, each individual has worth. Each is a person endowed with unalienable rights.

2. Ethics, Doctrine of the Israel Defense Forces. Available at http://dover.idf.il/IDF/English/about/doctrine/ethics.htm

Purity of Arms—The IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to
the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.


According to Israeli colonel Meir Pa'il, the “purity of arms” doctrine is able to maintain the moral stature of the soldier without seriously compromising his fighting capacity ... There is a consistent thread weaving its way through Jewish ethical thought from biblical ordinance to modern practice as noted by ancient as well as medieval and modern observers. Just because an army is legitimately repelling an aggressor does not allow it recklessly to violate civilian life. A just war does not justify unjust acts.


As we grew angrier, we stopped being human beings. You start out shouting, but by this time, we were all just machines for killing. Everyone’s face is set in a snarl, and there's a deep growl coming from your belly. You want to kill and kill. You grow like an animal, you know—no, worse than an animal. Things were happening ... I can’t tell you about them. Once, one of our NCO's gave a drink of water to a prisoner. The Jordanian drank and then pulled a knife and slit the NCO’s throat, like a chicken. Things like that. We killed the prisoner; you can’t blame us. But you've got to understand what things like that did to us. We hated and hated. And all the time we were thinking what they would do to us and our families if they got us, and we were going along thinking, you're out for loot, are you? You'd rape my wife, my sister ...

We didn’t touch the civilians, though. You just don’t think of civilians in the same way as soldiers. The soldiers, though, that’s different. They don't seem like men to you. You don't think that they are people with families. You think all of the time of your own family, but they are just insects to be killed. Until afterwards, when you realize that they had families too ... 


Jewish law has no “real” restrictions on the conduct of the Jewish army during wartime, so long as the actions being performed are all authorized by the command structure of the military in order to fulfill a valid and authorized goal and do not violate international treaties. Sadly enough, it might turn out that most of these unpleasant activities we have considered might have to become tools in this quite gruesome *danse macabre* to which the long term consequences of defeat are too great to ponder. This is true both in the Jewish homeland and our beloved America ...

Essentially Jewish law completely rejects the notion of a “siege” as that term is understood by military tacticians and contemporary articulators of international law. Modern international law generally assumes that in a situation where the commander of a besieged place expel[s] the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure to drive them back as to hasten the surrender.” Secular law and morals allow the use of the civilians as pawns in the siege. The Jewish tradition prohibited that and mandated that non-combatants who wished to flee must be allowed to flee the scene of the battle ... 

This approach solves another difficult problem according to Jewish law: the role of the “innocent” civilian in combat. Since the Jewish tradition accepts that civilians (and soldiers who are surrendering) are always entitled to flee from the scene of the battle, it would logically follow that all who remain voluntarily are classified as combatants, since the opportunity to leave is continuously present.

To whitewash our deeds simply by maintaining our innocence is to defy God, who hears the cry of the guiltless killed in Vietnam. Jeremiah expressed it (2:14–15): “On your shirt is found the life-blood of guiltless poor. Yet in spite of all these things, you say: ‘I am honest.’ Behold I will bring you to judgment for saying: ‘I have not sinned.’”

To offer easy forgiveness would be not only self-complacency but self-abasement. Easy forgiveness implies that an individual who has shot and killed men, women, and children is devoid of responsibility. Yet the individual’s moral responsibility is the heart of the dignity of man. At a time of increasing dehumanization and mechanization of human existence, such an attitude would be a mortal blow to the humanity of man.

Note: Heschel wrote this essay in response to the conviction of Captain William Calley for his involvement in the My Lai Massacre.


Each individual possesses a conscience which, to a greater or lesser degree serves to restrain the unimpeded flow of impulses destructive to others. But when he merges his person into an organizational structure, a new creature replaces autonomous man, unhindered by the limitations of individual morality, freed of humane inhibition, mindful only of the sanctions of authority.

What is the limit of such obedience? At many points we attempted to establish a boundary. Cries from the victim were inserted; they were not good enough. The victim claimed heart trouble; subjects still shocked him on command. The victim pleaded to be let free, and his answers no longer registered on the signal box; subjects continued to shock him. At the outset we had not conceived that such drastic procedures would be needed to generate disobedience, and each step was added only as the ineffectiveness of the earlier techniques became clear …

The results, as seen and felt in the laboratory, are to this author disturbing. They raise the possibility that human nature or—more specifically—the kind of character produced in American democratic society, cannot be counted on to insulate its citizens from brutality and inhumane treatment at the direction of malevolent authority. A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.

Note: This is the result of a famous experiment at Harvard University in which Milgram used students to demonstrate how people succumb to the pressures of authority.

Non-Battlefield Conduct


It cannot be denied that assassination has a great deal of intuitive appeal. It satisfies the need to strike back and to exact just punishment, long overdue and unattainable in any other way. Assassination is a source of pride, demonstrating Jewish military prowess as targets are picked off by the most imaginative means possible: booby-trapped cell phones, rigged automobiles, and rocket and tank attacks executed with almost pinpoint accuracy. Many claim that assassination prevents imminent terror attacks and serves as a powerful deterrent, giving potential terrorists pause while convincing Palestinian locals to distance themselves from terrorists. Finally, it is said, assassination accomplishes all this with minimal civilian casualties.

Assassination sounds like the perfect military tactic—and it would be, but for the fact that all these assumptions are naive, wrong, and entirely misguided. Assassination instead erodes the basis for any future peace negotiations, deters no one, and precipitates a violent, vicious, and almost insane desire for revenge.

Nuclear/Chemical Weapons


The parallels between conventional warfare and nuclear combat are relatively straightforward. In both cases, national differences spill over [into] the realm of diplomacy and politics. Both involve killing members
of the other society and, to some extent, attempting to minimize the damage suffered by enemy attacks. That is where the parallel ends. Beyond that, warfare serves a radically different purpose than does a nuclear exchange, and the kind of thinking involved in conventional warfare is very different from the type of planning necessary, and from the goals attainable through a nuclear conflict.

Albert Einstein once said that “I do not know what weapons will be used in the next war, but the one after that will be fought with bows and arrows.” Even though his statement grossly underestimates the effect of an all-out nuclear war, it points to an important direction—toward the recognition that any proportionality of response is completely lost in a nuclear conflict. This is destruction without meaningful limits. That unlimited quality of warfare itself poses severe violations of the halakhot of warfare ...

Responses

To Keep Our Honor Clean

Seth M. Milstein

JUSTIFICATIONS FOR war may be supported or undermined by the behavior of a nation's military (and other armed agents), which showcases the best or the worst of a nation's character on the harshest of stages. Soldiers are representatives of their nation and its foreign policy. In the realms of diplomacy, strategic communications, and public affairs, nothing speaks louder and more eloquently for a country than the actions of its armed services. How a nation wages war and how its soldiers conduct themselves, both in and out of combat, directly reflect both the ideals that nation stands for and the reasons why it opts to engage in war.

War: What Is It Good For?

It was around seven in the morning on March 20, 2003, when I was awakened by a jet engine roaring from north to south over my tent in Kuwait, just south of the Iraqi border. I had gotten to sleep a little after 4 a.m., following another long and painstaking night of planning for the invasion of Iraq that we all knew was imminent. The roar of the jet sounded awfully low, not at all like the sound of American airplanes, which occasionally flew overhead at very high altitudes. A thought crossed my still-fuzzy mind: “Either that’s a Coalition airplane in big trouble, or …” I got fully dressed, faster than I had ever done since Officer Candidate School many years previously, and I ran out of my small tent with my gas mask in one hand and my M-16 in the other.

I faced a group of young Marines pointing at the sky. A staff sergeant in the group was smiling as he said, “There go our tomahawks (missiles) on their way to Al-Faw (Peninsula, in southeast Iraq).”

I speared him with a look. I am not a morning person under the best of circumstances, and having my sleep cut short by an Iraqi missile, to start what promised to be the first of many very long days, did not help matters at
all. I said, "Explain to me why missiles launched off ships would do a guided tour of the Kuwaiti desert on their way to coastal targets."

He paled as he blurted, "Sir, you mean we were just ..."

"I cut him off, "Yes, we've been fired on. Gents, we're officially at war with Iraq."

War is an act of statecraft, where controlled violence is used to achieve national objectives. When statesmen and diplomats say, "Do (or don't do) this ... or else," war is the most extreme "or else" available. As it is inherently wasteful, war is not an option to be considered lightly. War implies a degree of due process and reflects the character and spirit of the nation waging it. Democracies tend to be slow to go to war, except in times of crisis or when facing an imminent existential threat, but they tend to fight aggressively once public will is mobilized.

Nations need disciplined soldiers who apply no more and no less violence than necessary to meet strategic objectives. With effective discipline, soldiers learn to fight and to stop fighting as ordered, while using means that are consonant with the national character and support a military operation's overarching objectives. If the military uses means that are not congruent with national character, this undermines the legitimacy of an otherwise justifiable war. For example, while the first essential task in the United States National Security Strategy is to "champion aspirations for human dignity," nothing could be more incompatible with that strategy than the horrible, repugnant, and atypical conduct of a handful of U.S. soldiers at Abu Ghraib prison in 2004.

A common misconception is that the sixth of the Ten Commandments states, "You shall not kill." The Hebrew Scripture more correctly translates the commandment as, "You shall not murder." Thus, killing, while not a trivial matter, is justifiable as an act of statecraft, subject to due process and born of necessity. Due process is subject to a nation's governance, while necessity is framed by national and international politics. On an individual or a national level, self-defense can create the necessity for a violent, potentially deadly response. The absence of due process and necessity delegitimizes acts of violence, making killing, even by governments, murder.


"Purity of Arms"

The infantry fighting vehicle (IFV) crashed through the living room wall. About a dozen like it were deployed in a perimeter around the house. To most untrained observers, an IFV is frequently mistaken for a tank, but it differs from a tank in that instead of carrying vast numbers of shells for a large main gun, the hull has space for a squad of infantrymen. This IFV carried eight commandoes, who were already emerging from the rear hatch before pieces of the crashed wall had fallen off the vehicle's front slope armor. It took only seconds to find the master bedroom, confirm the identity of the surviving head of the Ba'ath party in Az Zubayr, Iraq from a photo, and drag him out of his bed, back to the IFV. The rear hatch had hardly closed when the IFV driver gunned the engine and drove through the wall on the other side of the house, back out onto the streets of Az Zubayr, which were otherwise quiet at three in the morning. The IFV turned sharply and joined the rest of the company, whose vehicles had collapsed the perimeter and formed into a single column lining the street. The vehicles roared away in a neat line, leaving the stunned townspeople to wonder who had hit with a combination of force and precision that Saddam Hussein's minions had never shown.

A key concept in the thinking of the Israel Defense Forces (IDF), reflecting the character of the State of Israel, is Prime Minister David Ben-Gurion's doctrine of tohar ha-neshen, literally "purity of arms." Not surprisingly, and very similarly, American troops have two overarching guidelines for use of force: discrimination and proportionality. To wit, efforts must be made to engage only appropriate targets, and to do so with a reasonable level of force. These subjective criteria are further defined by rules of engagement, intended to spell out those circumstances meriting the use of force, as well as appropriate levels of force. Discipline and leadership ensure that these moral and legal rules are respected and that suitable tactics are employed within the designated framework. For instance, deliberately targeting non-combatants and using excessive force are not acceptable.

Yet, the "purity of arms" doctrine does not rule out offensive action, as offense and defense are complementary and cannot be separated: imposing one's will upon the enemy is offensive, while resisting the
enemy's imposition of its own will is defensive. Being attacked first is not a necessary justification for defensive action. Preemptive action can be justified as self-defense if it is a response to a reasonable apprehension of imminent danger from a credible threat. Warfare varies with scale; an offensive action taken by a state is rather different from an offensive act committed by an individual soldier. Yet, there is no inherent contradiction in a national defense strategy that involves offensive military action. This is certainly the case for the United States, and also for Israel, where historically the blessings and curses of geography have repeatedly resulted in the need for preemptive action.

"Purity of arms" has become a more relevant principle as military technology has developed. As technology has increased the lethality and reach of weaponry, the "precision revolution" has given militaries a greater ability to attack legitimate targets while isolating surrounding populations from the destructive effects of such attacks more than ever before. Therefore, technological developments oftentimes allow military commanders to employ tactics that, while effective, are not deadly. This offers nations and their armed forces more options than just killing or doing nothing.

Today's unprecedented media coverage and its influence, post-engagement transparency about battlefield tactics, and use of propaganda by media-savvy enemies make it vitally important that countries are clear about their military intentions and policy, and ensure that their soldiers are acting in accordance with that policy. A guiding doctrine such as "purity of arms" provides the essential framework. The intrinsically political and increasingly public nature of war and its effects require that nations act on principle when engaged in military campaigns.

Innocents are, regrettably, sometimes caught in the crossfire or harmed by unpredictable consequences of warfare. Some argue that it is acceptable to use overwhelming force with little regard for collateral damage either to demonstrate resolve or to communicate in terms the enemy will understand. Such arguments, while pleasing at a visceral level, ignore that the means a nation uses to achieve a military goal reflect its national character. For instance, when the State of Israel was established, Ben-Gurion's *tohar ha-neshek* doctrine reflected the hope that the new nation would eventually make peace with its Arab antagonists, but trading atrocities in the name of military expediency does not help accomplish that strategic goal. Similarly, America's Founding Fathers were not in favor of inflicting gratuitous suffering on the masses, and the spirit of the United States Constitution does not condone genocide or wanton killing. Resorting to heavy-handed and thuggish tactics flies in the face of the values that characterized the founding of the United States, such as freedom from oppression and tyranny.

**Ethics and the Individual Soldier**

Three sergeants, each leading a reconnaissance team of four to six men, detailed their plans to observe a site believed to be the meeting place for four known terrorist cell leaders. Each man on this mission was to carry upward of 120 pounds of equipment and stealthily walk at least six kilometers from where a helicopter would drop him off, making speed and extraneous movement problematic.

"What if you are compromised while infiltrating your observation sites?" someone asked.

"We will silently kill individual terrorists and continue the mission, so long as they have been unable to report our presence," replied one sergeant.

"What if you are compromised by an elderly shepherd? He's not a terrorist."

"We'll tie him up, leave him in a shaded spot, and continue the mission," answered another sergeant.

"What if it's a little girl out picking mushrooms? Won't her family be concerned if she's gone for too long and come looking for her?"

"We'll hold her quietly to buy a few hours, to either exfiltrate or complete the mission, then let her go," was the answer.

What does this incident reveal about the young and impressionable infantryman? He is taught to engage targets with as much discrimination as possible while judging what constitutes reasonable force. He has rules of engagement for each conflict (often written by lawyers for lawyers and frequently unclear to others) that provide further guidance on discerning acceptable targets and on related considerations, such as criteria for escalation of force. Discipline is a constant, whether it is imposed by his superiors or from within. The soldier is always accountable for himself and for the equipment and personnel in his charge. Regardless of the reasons leading to the war in which he is engaged or the nature of that war, his work environment is stressful, chaotic, and uncertain. He may be killed or injured by explosions or by being
showered with fast-moving objects at any time, and he experiences the full gamut of human interactions with people whose language, culture, and circumstances are most likely unfamiliar to him. He spends much of his time dirty, sleep-deprived, hungry, in unpleasant climates, and under the constant physical strain of carrying and running with heavy equipment.

American military tradition imposes yet another burden on those in service: the obligation to disobey morally reprehensible or downright illegal orders. Although commanders may order their subordinates into potentially deadly situations, they may not order them to murder or rape noncombatants, to torture or kill prisoners, or to commit other atrocities. Commanders issuing such orders can expect refusal. Upholding the character of the United States, American military personnel swear first and foremost to “support and defend the Constitution,” rather than to obey any political party, or even the armed forces itself. This differentiates America’s troops from those of most other nations, and it demands a high standard of ethics and judgment from the individual soldier. Although a soldier may not be an expert on international law and the conventions to which the United States is a party, if one’s moral compass and common sense lead to the conclusion that he or she is being ordered to commit an atrocity, the soldier has a duty not to comply.

Given these underlying principles, the United States Armed Services have a tremendous responsibility for recruiting, training, and leading a certain caliber of soldier: recruits need to start with a strong moral compass, the wherewithal to assimilate what constitutes lawful and ethical practices, and the initiative to seek greater knowledge of those practices as they move into higher ranks and positions of greater responsibility. Commanders have an obligation to provide rules of engagement that are as clear-cut as possible and to conduct rigorous training that prepares soldiers to make hard choices under the inevitably stressful conditions of combat. Whenever possible, explaining the commander’s intent and the reasons behind the rules enables better decision-making by subordinates.

Providing education about what constitutes unlawful or unethical behavior by talking out difficult scenarios under noncombat conditions is no less important. The classic example of such an exercise is figuring out what to do in a situation where a clandestine patrol is compromised by a noncombatant. This presents a challenge with no good solutions, but wrong answers aplenty for soldiers to think through. Ideally, commanders should also employ tactics to minimize the occurrence of real-life situations that force subordinates into ethical dilemmas. While this might be extremely difficult to achieve, the alternative is demonstrated in numerous cases where, given a range of tactical options, commanders have chosen poorly and left subordinates in terrible situations, forced to choose between bad and worse options on their own.

Thus, fielding a fighting force that is both effective and ethical is a tall order. The expectations of American officers are high, and every officer’s commission decrees that the nation is “reposing special trust and confidence” in them. Perhaps the hardest responsibility for officers, aside from overseeing the moral readiness of their charges and giving lawful orders, is providing oversight and appropriate disciplinary action when mistakes inevitably occur. In combat situations, where information is never perfect, bad decisions can be made in the heat of battle with tragic results. The chain of command needs to investigate such cases

3. The full oath for commissioned officers is: “I, (name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign or domestic, that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservations or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter. So help me God.” The full oath for enlisted men is: “I, (name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.”

4. The full wording on an American officer’s commission reads: “To all whom these presents, greetings: Know ye that, reposing special trust and confidence in the patriotism, valor, fidelity, and abilities of (name) I do appoint this officer a (rank) in the (component of armed services) to rank as such from (date). This officer will therefore carefully and diligently discharge the duties of the office to which appointed by doing and performing all manner of things thereunto belonging. And I do strictly charge and require those officers and other personnel of lesser rank to render such obedience as is due an officer of this grade and position. And this officer is to observe and follow orders and directions, from time to time, as may be given by the President of the United States of America, or other superior officers acting in accordance with the laws of the United States of America. This commission is to continue in force during the pleasure of the President of the United States of America under the provisions of those public laws relating to officers of the Armed Forces of the United States of America and the component thereof in which this appointment is made.” Department of Defense Form 1 (1426) (Washington, DC: Department of Defense, September 1999).
and determine if the implicated personnel were properly considering the information that they knew at the time, incorporating it into their analysis of the mission, and acting according to their moral compass. Hindsight may not be perfect, but justice demands consideration both of what the decision maker knew when he or she made a particular choice and of his or her intentions.

If a misguided moral compass or a craving for momentary emotional satisfaction overcomes discipline in some individuals, then officials have a duty to their nation and their army to deal with the culprits. The military is no place for sadists or bigots to live out their perverse fantasies—certainly not under the auspices of a national flag. It is needless to stoop to moral bankruptcy to inspire fear in enemies when legal means are plentiful. Soldiers need to be moral, disciplined individuals who can subordinate their natural emotions, such as hatred, fear, and outrage, and their cravings for vengeance, so that they may carry out their assigned responsibilities. Only then are they fit to be the agents a nation counts on to apply measured violence in accordance with the principles for which their country stands.

Ticking Bombs, Torture, Targeted Killing, and Other Ethical Failures

On August 7, 1998, members of the Egyptian Islamic Jihad, a terrorist group associated with al-Qaeda, detonated truck bombs at the American embassies in Kenya and Tanzania, killing hundreds of civilians. This was the first time that Osama bin Laden came to the attention of the American public. On August 20, the U.S. Navy’s 5th Fleet fired Tomahawk cruise missiles at al-Qaeda training camps in Afghanistan in an attempt to kill bin Laden and several of his closest associates. This effort proved to be a double failure: aside from missing bin Laden completely, the attack gave him a whole new level of legitimacy with his followers and potential friends. Until then, costly Tomahawk missiles had only been fired at military targets belonging to nations at odds with the United States. In the eyes of his admirers, firing the cruise missiles at bin Laden gave the relatively unknown terrorist leader prestige equal to that of an enemy nation of the U.S.

The infantryman at war lives under constant threat of violent death or dismemberment or of seeing these things happen to his buddies. For him, this is like constantly living in a “ticking bomb” scenario. According to such a scenario, a “ticking bomb” is hidden in a major metropolis and heroic action is needed to stop it. Similarly, there is always a threat of imminent lethal violence on the battlefield, and the infantryman must take decisive action to defend himself and his fellow soldiers. Yet, he is also morally bound not to torture or kill every single civilian he meets, any of whom might have knowledge of the next attack. Military ethics and discipline also forbid him from torturing prisoners in his charge or engaging in other atrocities. The possibility of death or injury is a daily personal drama for thousands in a war zone, yet the need to stay within the bounds of ethical soldiering keeps the infantryman from giving in to his worst instincts. Those values for which a nation stands must remain more important than short-term expedience. It is hypocritical not to apply the ideals that soldiers are obliged to honor to the U.S. itself, even under circumstances of less imminent threat. Not asking citizens and the government to uphold these same ideals of due process, discriminate and proportionate use of force, and an aversion to oppressive and tyrannical methods, makes a complete sham of national character.

Torture is a truly effective tool for a police state. All but those with the strongest resolve will confess to anything, sign any document, and implicate anybody if they think it will get their tormentors to stop. As a means of gathering intelligence, however, torture is suspect at best, because those being interrogated will tell their questioners whatever they think they want to hear, factual or otherwise, to stop their own suffering. As with so many moral shortcuts, torture is quick, easy, and ultimately does not garner the same results as the slower approach to interrogation, which uses clever and sophisticated, but non-violent techniques. A Nazi Luftwaffe interrogator, Hanns Joachim Scharff, often called the greatest interrogator on record, used a technique that involved speaking with captive Allied aviators and outwitting them to obtain information without even threatening violence.

By contrast, targeted killing, the precise elimination of a known and legitimate target, is almost the epitome of following the self-defense concept of tokar ha-neshek or the American precepts of discrimination and proportionality. A targeted killing is nothing more than a specialized ambush. A famous example is the interception and shooting down of Admiral Isoroku Yamamoto’s airplane on April 18, 1943. Killing a specific enemy by circumventing his or her defenses protects lives. In

contrast, a comprehensive, protracted engagement that might (or might not) kill the enemy target risks the lives of participating soldiers, as well as those of civilians and other bystanders.

This raises the basic question of what constitutes justifiable killing and points to the need for due process before employing force as statecraft. A soldier must establish that his target is, in fact, the one intended for destruction by making reasonable efforts to verify the identity of the target before attacking. Sending a large force to saturate an area risks greater numbers of casualties and more collateral damage, making it harder to justify than engaging a legitimate target with precision and control. Unless there is a strategic imperative that favors a particular method (and there are often sound reasons to consider alternative means of engagement to precise firepower), targeted killing is the more ethical military option.

**Conclusion**

The actions of a nation’s armed forces illustrate that nation’s values. An army’s responsibilities include recruiting, training, disciplining, and employing troops who wage war in a manner that reflects favorably on its country’s character. The nation as a whole owes it to such an army to honor and live up to those same values that it expects its soldiers to support and defend. When soldiers are not faithful to the ideals upon which their country was built, and make emotional or convenient, but unethical choices in war, their nation may win battles, but it may lose the war, or worse, its soul.

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**Fighting, with Fear and Trembling**

Sharon Brous

**WITH BATTLE** cries of, “Mission accomplished!,” “Bring ‘em on!,” and “Dead or alive!,” the early years of the 21st century have been marked by an aggressive American military strategy, most notably in Iraq, that has raised critical questions not only about the permissibility of warfare, but about the way in which war must be conducted.

In the heat of the Iraq War in 2007, upwards of 77% of American Jews said that they felt the war was a mistake, compared with 52% of the general American public who felt the same. In light of Jewish tradition, this statistic is not surprising. The Talmud declares that “the whole Torah is for the sake of peace,” arguing that the pursuit of peace is considered to be both a fulfillment of the Jewish people’s mission in the world, as well as a way to make God’s presence in our midst manifest.

Notwithstanding a general Jewish aversion to war, Jewish law does permit some types of war and even mandates that war be fought under certain circumstances. We are taught that abdication of personal or communal responsibility in the face of threats is both reprehensible and punishable. In the Babylonian Talmud we learn:

Anyone who has the ability to protest against [the offenses of] the people of his house, but does not protest, that person is held responsible for the actions of the people of his house.

Anyone who has the ability to protest against [the offenses of] the people of his city, but does not protest, that person is held responsible for the actions of the people of his city.

Anyone who has the ability to protest against [the offenses of] the entire world, but does not protest, that person is held responsible for the actions of the entire world.

Abandoning one’s responsibility to fight in self-defense or against injustice is considered a grave moral failure.

2. Babylonian Talmud, Gittin 59b.
3. Babylonian Talmud, Shabbat 54b.
How are the commitment to peace and the obligation to fight reconciled? The great achievement of the Rabbis is that they devised an approach to warfare that mitigates its power and minimizes its devastation. Most notably, human dignity must remain an essential operating principle, so laws guiding the practice of warfare are embedded in a broader context of Jewish ethics. When war is fought, it must be fought with the utmost concern for the sanctity of human life, with an underlying commitment to humility, compassion, and even love.

**Principles of Waging War**

Given the essential commitment both to self-defense and to the defense of what is just and right, let us consider three examples of how war is to be initiated and conducted according to Jewish law. The first principle of war established by the Torah and reinforced by the Rabbincic tradition is that it must truly be a last resort. We are enjoined to work to exhaust all diplomatic options in an attempt to avoid violent conflict. In the Torah, emissaries of peace are sent to hostile cities to search for any alternative to war. If diplomacy ultimately proves unsuccessful, however, one is not permitted to attack unless the enemy initiates hostilities. And even then, one is forbidden to commit any acts of unwarranted cruelty against the inhabitants of enemy territory. Jewish law even goes so far as to require that an escape route be provided for those who desire to leave a besieged city at any point. Permitting war only as a last resort minimizes the likelihood of violent engagement and creates a cultural aversion to warfare. War may be a necessary evil; it is never something to relish.

The second principle of warfare laid out in Jewish tradition is that war must be conducted in a way that preserves the humanity of the soldiers and civilians on both sides. This requires great moral sensitivity and vigorous protection against the dehumanization that typically characterizes warfare. Nahmanides (Ramban) taught that even the “most refined of people become possessed with ferocity and cruelty when advancing upon the enemy … [Torah wants the soldier] to learn to act compassionately with our enemies even during wartime.” Part of the Jewish resistance to fighting is rooted in the humble awareness that more than life is lost in warfare—that violent conflict often comes with devastating moral compromise. In response to this moral challenge, nations that go to war must do everything in their power to ensure that their soldiers are trained with sensitivity and compassion, and that they are reminded, even amidst violent conflict, of the humanity of their enemies. In fact, the Torah offers specific rules intended to prevent the degradation of the enemy, even in the midst of dangerous conflict. The assumption is that this moral training will ultimately preserve a soldier’s own humanity as well.

A third guiding principle of war is the obligation to protect against unnecessary destruction—of human life, of the enemy’s property, of the environment—during violent struggle. The call for soldiers to cultivate sensitivity toward the enemy renders wanton destruction thoroughly indefensible. “When in your war against a city,” the Torah teaches, “... you must not destroy its trees, wielding the ax against them. You may eat of them, but you must not cut them down. Are trees of the field human to withdraw before you into the besieged city?” (Deut. 20:19–20). Maimonides (Rambam) extends this prohibition: “Also, one who smashes household goods, tears clothes, demolishes a building, stops up a spring, or destroys articles of food with destructive intent transgresses the command, You shall not destroy.” As Reuven Kimelman writes in his extensive treatment of the parameters of war from a Jewish perspective, “If one can control destructive urges provoked by war against nonhuman objects, there is a chance of controlling destructive urges against humans.”

**Translating Theory into Reality**

The question is: are these moral guidelines mere pollyanish abstractions, irrelevant in the face of enemies who commit brazen acts of violence against civilian populations? Perhaps the guidelines were always intended to be only theoretical, considering that it is questionable whether the Rabbis who helped create them “ever had a sovereign construct in which their guidelines for war were operationalized.”

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7. Nahmanides (Ramban), Commentary on the Torah (Bi’ur), Deut. 23:10.
8. Eg., see Deut. 21:10.
Ethics on the Battlefield
Joe Kashnow

MAINTAINING THE moral high-ground while using deadly force might seem impossible. Yet, American fighting men and women have proven that we can act with decency and morality in combat missions and, at the same time, maintain an effective fighting force that is able to accomplish its goals. This is not easy to do, however. As Americans have seen on a few occasions in recent history, some members of our military have fallen short of the goal to behave honorably. Even so, it is important to be clear that those moral lapses represent isolated incidents, and that the actions of a few individuals do not represent the behavior of the military at large.

My Experience as a Soldier at War
I served in Iraq for six months, from April through September of 2003, where I witnessed soldiers act with a sense of honor that I found to be truly amazing. I served as a prison guard for a few men who were captured after a failed assault on one of my battalion’s patrols. The sergeant in charge of giving my squad instructions was the vehicle commander during the assault, which had happened the night before. Both of his crew members, his driver, and his gunner were wounded and had to be flown out of the country for emergency medical treatment. The gunner was in particularly bad shape, and it was not clear if he would even live long enough to get back to the United States. Despite the attack, despite holding his driver’s head together while the medic bandaged him, despite being wounded himself, that sergeant gave me and the other guards crystal clear orders that left no doubt as to the punishment that we would receive should those prisoners who perpetrated the assault be mistreated in any way.

I remember the medic who, while on patrol, was shot in the chest by a sniper. He was wearing his ballistic armor and survived the attack with no more than a bruise. When the ensuing firefight was over and the sniper was discovered not to have been killed but only to have been wounded, that same medic bandaged the sniper and called for a helicopter so that the patient could get the medical treatment he so desperately needed.

There are times, however, when the line of moral behavior gets extremely blurred. The overriding concept that most soldiers believe in is simply: “my life is more important than anyone else’s because it is my own life.” In regard to other people’s private property, however, it is acceptable to enter someone’s home and search for weapons, explosives, and any other contraband. Why? Only because we do it carefully, taking measures not to risk lives.

I have led squads of soldiers on home raids, with mixed results. All of my soldiers understood that they were not to simply trash a house when searching it. My soldiers in Iraq knew that every drawer of every cabinet in someone’s home was to be opened, but then put back after the entire cabinet had been searched, without dumping the contents on the floor. They also knew how to search a closet without throwing everything around. Most often when we found nothing, the owners of the house thanked us as we were leaving.

On one occasion, however, I was accused of stealing jewelry from a home where we had found a supply of more than 100 car batteries on the porch. At that time, car batteries were used as a crude power supply for detonating roadside bombs. After asking the woman who lived there when her husband would be home, she accused me of stealing from her. Interestingly, I was also the translator during this conversation, and because of that, I had been standing next to our battalion commander the entire time we were there and had not stepped foot inside her house. That was one house where my battalion was not thanked as we left.

Sometimes, though, soldiers get bad intelligence; for example, we may be given a tip by someone who has a personal grudge against a family and wants to see them harmed or inconvenienced. Dealing with a populace that is not able to get along with one another is inherently dangerous. Remembering to be respectful of other people as well as cautious can mean the difference between life and death in a war zone. A family that is treated with care by a search team may be willing to provide crucial intelligence in the future. A family that was effectively terrorized or humiliated by a search team is likely to cheer when the next American convoy is ambushed.

**Unacceptable Wartime Conduct: Rape and Torture**

There is a significant difference between invading someone’s town or home and invading someone’s body. Rape, when used as a tool to inspire fear or intimidation, is arguably effective. Of course, there is the counter-argument that it can anger an enemy, leading it to be more motivated than it was before; but when the goal is to cause fear, rape is usually a more effective tool than murder. Yet, this behavior is unconscionable and completely unacceptable. There are few actions that may never be used under any circumstances in war, and rape is one of them.

We all know that torture is wrong, and yet if my child were missing and I knew that using the cattle prod in an interrogation would elicit the information necessary to save his or her life, I would definitely use it. The question about torture is not whether it is a viable means of intelligence-gathering, but if it is acceptable to intentionally inflict pain on another human being to get that person to reveal information that he or she may be withholding. Even if that information would save a life, most people would still say that using torture to extract it is wrong.

But the line becomes blurred as weapons become more powerful. What if the subject knows the code to disarm a bomb that is located in an elementary school? What if that bomb is a nuclear weapon? What if it is a device designed to poison the water supply of an entire region? How many people could we watch die before we allowed ourselves to violate this one person?

Perhaps the most compelling reason not to use torture, though, is because it is unreliable. People will often say what they think someone wants to hear if it will make the pain stop. Thus, maybe just the threat of torture can be used effectively. However, if, for example, three people sit in a jail cell and then the first two are taken away, allowing the last person to get a good earful of the others’ screams, that would be a very effective way to encourage him or her to talk. While that is not inflicting pain directly on the subject, that would likely cause his or her will to break. Any tactic that accomplished breaking someone so cruelly could be said to be torture. There is a difference, though, between hurting and humiliating people for entertainment and using effective measures to interrogate a subject with intelligence vital to a military mission.

While Iraq was under Saddam Hussein’s control, for instance, there was cruel and unjustified torture in that country. Truly terrifying acts of barbarism would end only when a prisoner stopped holding on to the belief that at some point he or she might be freed or believed innocent, and ultimately died. I saw rooms that had evidence of that type of torture—
true torture. Often it had been performed only to entertain the guard and to terrorize other captives who were forced to watch just so they would be stripped of hope. There is no validity to the argument that “we must be right because ‘they’ were so much worse.” We must ask: does inflicting pain on someone just to scare him or her or other prisoners count as torture? If it does, it should be banned.

During the wars in Korea and Vietnam, captured American service members were often tortured in ways that are indescribable. They would sometimes be put into tanks filled with water in an attempt to simulate drowning. Often this practice would go beyond simulation, and the prisoners would be killed. Scaring someone into talking is not torture, it is effective interrogation. Letting a prisoner die because he or she won’t talk is murder, and when it is done in a painful manner, then it is torture.

**Ethical Conduct on the Battlefield**

Superior technology may help a military effort, but boots on the ground are the critical element of any military operation. When soldiers are deployed with weapons and ammunition, someone is going to get killed. However, American soldiers’ permission to fire is so restricted that it almost renders our fighting force ineffective. I have heard other American soldiers complain too many times to count that we are fighting today’s conflicts with our hands tied behind our backs.

There is a good reason for such restrictions, though. We restrict our forces’ conduct to minimize the deaths of the innocent. When taking fire from a schoolhouse where there are children present, we do not return fire. When a terrorist uses a crowd of people as a shield to fire a rocket at an American vehicle, we do not shoot indiscriminately into the crowd. To prevent shooting people who appear to be charging an American convoy, we fire warning shots into the air before shooting at them, even though they or their vehicle may turn out to be wired with a bomb. We do not open fire on someone just because he or she walked through a door that leads to a known terrorist compound on the off chance that, this time, this individual is not armed. We do not capture the family members of a known terrorist and execute them one by one on television in order to get the terrorist to come out of hiding.

We do not do these things because there are certain standards of conduct that are required of the United States as the world’s superpower. As Americans, we must behave in a manner that is above reproach. We have been accused of being overly arrogant in our military operations, but there is little to support that claim. We went into Iraq to remove a dictator that tortured his own people. Saddam Hussein was more than willing to use weapons of mass destruction against Iraqis and was actively searching for ways to make those weapons. His government was also a state sponsor of terrorism. As the world’s policeman, it has become the United States’ responsibility to protect the rights of people everywhere, and thus, the U.S. military must intervene in places like Iraq if it is to keep the world safe.
Rules for War
Ari Brochin

Controversial Actions: Sharon and Kuntar

On October 15, 1953, Ariel Sharon led an Israel Defense Forces commando unit in an assault on the village of Kibya in what was then the Jordanian-occupied West Bank. Fed up with terrorist attacks on Israeli civilians, the Israeli government had turned to Sharon to ensure that the Palestinians, as a whole, "paid a heavy price." Sharon and his unit fought their way into the village and proceeded to blow up 45 homes as well as a school and a mosque. At least 69 civilians were killed in these explosions, many of whom were hiding from the Israelis in their houses. Sharon later claimed that he had no idea there were people in those houses. The assault was condemned by the world community, and when Sharon became Israel's Prime Minister decades later, it was widely cited in newspaper articles as the reason for Sharon's reputation among Palestinians for extreme violence.

The return of Samir Kuntar to Lebanon got me thinking of Ariel Sharon. Kuntar is one of the most notorious killers in the name of the Palestinian cause. In 1979, at the age of 16, Kuntar was a member of the terrorist cell that murdered, among others, three members of the Haran family of Nahariya, Israel. Kuntar killed Danny Haran in front of his four-year-old daughter, then mashed the girl's skull with a rifle butt. The Haran's other child was accidentally smothered by her mother while hiding from the terrorists. Israel arrested, tried, and imprisoned Kuntar, a Lebanese citizen. In 2006, Hezbollah cited Kuntar's continued imprisonment as justification for the assault that provoked the Israel-Lebanon war.

In the summer of 2008, Kuntar was returned to Lebanon along with other prisoners, in exchange for the bodies of two Israeli soldiers. His return was celebrated as a national holiday there, and a hagiographic documentary on Kuntar aired on Al-Jazeera television. Like many observers, I was disgusted when I heard news reports of the celebrations held for Kuntar in Lebanon and throughout the Arab world. The emotions I saw being expressed were as foreign to me as anything I had ever witnessed. It seemed like the entire Lebanese nation believed that it was laudable to crush the skulls of toddlers, so long as those toddlers were from the appropriate country.

I grew up on the political Left, but in recent years, I have become disaffected with the refusal of a vocal core of progressives, in my social circle and in the media, to recognize that a proper moral calculus on the Middle Eastern conflict is not made simply by determining which side ought to be given credit for anti-colonialism. Nonetheless, I still identify with a central insight of American progressivism: that people, including Jews, Zionists, and Americans, are predisposed to drawing moral lines that conduce the behavior of those like themselves and condemn that of those who are different. I tried to figure out if my moral judgment of Samir Kuntar, and those who celebrated his exploits, was based on my identification with his victims, or on a feeling that his actions were, even with my particular identification removed, absolutely wrong. I tried to think of a situation in which a Jewish killer of innocent Arabs was treated as a hero. I thought of Kibya and Ariel Sharon, and of the analysis of one of Israel's greatest thinkers, Yeshayahu Leibowitz.

Leibowitz's Analysis

Shortly after the assault on Kibya, Professor Yeshayahu Leibowitz, Israel's preeminent public intellectual from the birth of the state until his death in 1994, wrote an article entitled "After Kibya." In the article, he spoke of Kibya as a symbol of the responsibility that Jews had avoided in the Diaspora, but that they were given, or forced to assume, with the birth of the State of Israel. As long as Jews lived in the homelands of other peoples, they were oppressed and excluded, often as individuals but always as a community, from decision-making power. Jews were free to regard abhorrent actions by the states in which they lived as the strange behavior of the gentile other.

To Leibowitz, Zionism meant that the ethical decisions that had been easy for Jews because they had so often been kept out of the decision-making process, were no longer easy. Because civilians were now being attacked in the name of the security of a Jewish state, Jews finally had to make ethical decisions in the context of their own military policy. Thus, Leibowitz did not frame the moral issue evoked by the Kibya attack as


a matter for the personal consciences of the individual participants, but rather as a challenge to his sense of national political morality.

I believe that there is a great deal of wisdom in Leibowitz's approach, but that it is incomplete. It is important to judge the political morality of Ariel Sharon and Samir Kuntar. It is also important to judge the morality of each action of individual soldiers who are insulated from the political decision-making process that brought them into battle. The actions of individuals who are charged with carrying out a collective political act for their state reflect the values that society teaches. Unless those individuals are clearly rejected by their fellow citizens, their actions ought to be judged primarily as a realization of the political will of their community. Therefore, the ethical decisions that are a necessary part of conflict are made on both an individual and a collective level, neither of which can be divorced from the other.

**Battlefield Ethics: The Citizen's Role**

On the level of personal morality, Sharon and Kuntar's choices lend themselves to a moral discourse that is reduced to banalities. It seems obvious that individuals should not blow up the houses of civilians, particularly when civilians are inside, and even more obvious that intentional and brutal infanticide is wrong. The fact remains, though, that both Sharon and Kuntar have their defenders. For the sake of soldiers like the one in the case study, Jason, and of the leaders and societies that send them off to battle, the banalities that constitute the basic ethics of the battlefield bear repeating.

However, a part of me hesitates to give advice to soldiers and military planners tasked with morally difficult work. Although I believe that it is important that citizens help to establish norms of battlefield ethics, we must do so with a sense of humility. I have never had a friend enlist in the American armed forces. This reflects a general abdication of the responsibility of military service among my cohort of educated, liberal Jews. This situation leaves only two morally viable options: support of absolute pacifism, or some degree of deference to and sympathy for those who have chosen to put their lives at risk in service of our country.

Yeshayahu Leibowitz would appreciate the irony of the tension that I feel. American Jews live in a country where there are no legal restrictions on their participation in any aspect of society, yet the Jews in my social circle have universally chosen not to enroll in the armed forces. They have thus chosen to leave some of the morally difficult work of self-governance disproportionately to non-Jews. I can think of no reason why liberal educated Jews have less of an obligation to serve in the military than do other citizens. When American Jews abdicate a responsibility of citizenship, we confirm Leibowitz's contention that the Jews of the Diaspora are not fully responsible political actors. It is impossible to square my belief that the burdens of democracy should be shared equally with the position that I and my community have taken. But even as I recognize that many in the Jewish community have abdicated the important responsibility of military service, I feel an obligation to participate in American, and Jewish American, conversations about battlefield morality.

**One Basic Principle of Battlefield Ethics**

Leibowitz would also appreciate that the most immediate way for me to enter such conversations is through analyzing incidents in the history of the State of Israel—a place where Jews are more commonly the perpetrators and victims of violence. So, as an ambivalent American Jewish Zionist, here is what I think Jason can draw from the examples of Ariel Sharon and Samir Kuntar: Sharon's actions were not as morally reprehensible as those of Kuntar, but that does not excuse them.

Both Sharon and Kuntar claimed that they were not responsible for the acts attributed to them. Kuntar claimed not to have killed the Harans, but never offered an even superficially convincing alternative explanation for their deaths, while Sharon claimed that he had no idea that people were hiding in the houses he ordered blown up. In the world of civilian criminal law, Sharon's excuse would not count for much. Setting off 47 explosions with the intent to demolish buildings without first establishing that no one is inside, killing 69 people in the process, is close to a textbook definition of murder through recklessness and extreme indifference. Both Sharon and Kuntar intentionally targeted civilians and acted without regard for the goal of reducing the military capabilities of an enemy.

The actions of both were wrong, but Kuntar's actions were especially wrong because of the first banal but often ignored rule that should guide Jason's actions:

**Do not intentionally kill civilians when doing so is not directly required to achieve a specific and vitally important goal.**

According to such a guideline, I cannot get away from my basic moral judgment that, while Sharon's conduct was wrong, Kuntar's actions were far worse. One major moral difference between the acts of Sharon and the
acts of Kuntar was in their goals. Sharon’s team was sent on its mission in the wake of terrorist attacks on Israeli civilians. His mission had two objectives. The first was to display a show of force by the Israeli army that would lead to a reduction in terrorist attacks against Israeli civilians. The second goal was to show that the spilling of Jewish blood would not go unavenged.

Samir Kuntar’s attack was an act of political protest, specifically against the Camp David peace accords between Israel and Egypt, and more generally against the existence of the State of Israel. It was not calculated to bring about any specific or immediate political change. Therefore, unlike Sharon, Kuntar had no reasonable purpose or justification for what he was doing, rendering his entire mission immoral. Given the lack of any specific or important goal, his actions would have been immoral even if he had only engaged in acts that are often morally justifiable in war, like targeting soldiers, instead of citizens, with violence.

Sharon, in contrast, set out to achieve a legitimate goal. The problem was with the method he chose to pursue it. It was wrong for Sharon to destroy the houses in Kibya, and even more wrong for him not to make sure that no civilians were inside of them. Jason should not emulate his actions.

A Second Basic Principle of Battlefield Ethics
It is worth noting, however, that soldiers like Jason often do not know why they have been given their orders. The orders Jason might receive—to shoot people coming out of a particular house, to break into a particular home, to assault a particular school—may or may not be moral, depending on whether military necessity outweighs the risk of harm to civilians. Even though Jason is the one acting, he is not the moral decision maker. Yet, it is appropriate for him to scrutinize the moral judgments of those determining battlefield tactics. Jason’s moral role as a soldier is limited to those judgments that he is informed enough to make, but those who launch military strategies must have the knowledge to make moral decisions about what Jason and his fellow soldiers are ordered to do on the battlefield.

While Ariel Sharon and Samir Kuntar were the commanders of their operations, their actions as soldiers—making decisions in the moment of battle—are more relevant to Jason. The rule that Kuntar clearly violated, and that Sharon violated to a lesser extent, is one that Jason should obey in that moment:

Do not do anything that is obviously unspeakably horrible.

This rule is perhaps the most difficult to articulate, but the easiest to feel, and it highlights the ultimate moral difference between Sharon and Kuntar’s actions. Kuntar killed a small child with his own hands, using particularly bloody means. Sharon killed children recklessly but indirectly. Both acts resulted in the deaths of children, and Sharon’s killed more children. Nonetheless, Kuntar’s actions feel far worse than Sharon’s. There is just something about that image of a teenager smashing the skull of a toddler that speaks of evil in a way that the image of Sharon’s calculated, goal-oriented destruction of civilian property and his reckless killing of scores of civilians does not.

Obviously, training soldiers means forcing them to put aside some of their moral compunctions, but there are some things that no cause can justify. Kuntar’s act provides one vivid example. The message here for Jason is that he must refrain from killing the unarmed, and from the use of rape, sexual humiliation, or torture, which are all immoral acts that are obviously unspeakably horrible.

Ultimately, most moral decision making will be made above the level of the individual soldier. Jason and his colleagues will, hopefully, be trained and commanded by morally engaged superiors who give clear, specific instructions regarding what is morally and legally permissible. The possibility remains that Jason will encounter insufficient oversight, or morally deficient leadership. In this situation, the best advice I have to offer him is this: try not to be like Ariel Sharon, but never, ever be like Samir Kuntar.
Does Torah Permit Torture? Defending Dignity, Life, and Sacred Personhood

Melissa Weintraub

GUANTANAMO BAY detention camp, circa 2002: Men are in dog leashes, being forced to perform dog tricks and wear lacy lingerie on their heads. Female interrogators dressed in skimp mini-skirts are straddling the laps of traditional Muslim men, rubbing their breasts against the men’s backs, and wiping red dye they passed off as menstrual blood on the men’s faces. Some detainees are being taunted with vicious dogs to scare them, others bombarded with painfully bright lights and loud violent music, left naked in isolation, hooded, spat on, urinated on, exposed to extreme cold to the point of induced hypothermia, and deprived of food and sleep.  

Torture joins slavery as one of the practices most unanimously condemned in international law, as well as in the domestic laws of most nations, including the United States. Nevertheless, from Hollywood to Capitol Hill, our post-9/11 nation has posited torture as a subject for moral equivocation. May torture—or milder related practices—ever be deemed permissible? Is the use of torture an unseemly but necessary outcome of the state’s right and responsibility to protect its citizens from terror?

In this essay, I will interrogate rationales for torture from the perspective of Jewish ethics in order to argue for an absolute proscription against torture. My essay will pivot on two principles in Jewish law, twin commandments granted priority over many other religious obligations, namely: the imperative to honor the dignity of the human person, viewed as being created in God’s image; and the kindred, but at times conflicting, obligation to defend human life at great cost. The question of the permissibility of torture throws into relief both the tension between these two principles and their inextricability, for they mutually rest on a concept of human personhood as a sacred and inviolable trust from God.

1. A previous version of this article appeared in the Summer 2007 edition of the Review of Faith & International Affairs and in Torture is a Moral Issue: Christians, Jews, Muslims, and People of Conscience Speak Out, George Hunsinger, ed. (Grand Rapids, MI: Eerdmans, 2008).

Kevod ha-Beriyot: Human Dignity in Halakhah

The most fundamental assumption of Jewish ethics is that there is something intrinsically and ineradicably sacred about the human person, the human body and spirit as such.

The ontological fact of our collective creation in God’s image enjoins us to moral behavior, commanding us to work actively to honor the lives and dignity of other human beings. This idea that the human being is created b’telem Elohim, in the image of God originates in the first chapter of the book of Genesis.

On the basis of this assumption, Judaism formulates a prohibition against violations of human dignity. Classical Jewish literature refers to human dignity by the term kevod ha-briyyot—the dignity of “created beings” rather than the dignity of “human beings”—grounding the requirement to protect dignity in the divine origins of the human. On the basis of this concept, early Rabbinic commentary presents debasement of humans, even as a retaliatory act, as an outrage against God.

Human dignity is arguably the foundational and most aspirational ideal of Jewish law. The injunction to avoid humiliating or contemptuous behavior takes legal precedence over all other Rabbinic rulings. The Rabbinic, thus designates human dignity as the litmus test for their sacred law, a seeming recognition that were the law to participate in dishonoring the human person, it would betray its own raison d’etre.

What are some of the practical implications of this lofty principle?

1. We are not to debase the human body. For many authorities, the idea that the human body is the corporeal representation of dignity gives rise to legal prohibitions against tattooing and multiple piercings, not only outright abuse and degradation of the body.

3. See Babylonian Talmud, Berakhot 19b; Shabbat 81a-b, 94b; Erubin 41b; Megillah 3b; Bava Kamma 79b; Menahot 37b, 38a. The parallel text in the Jerusalem Talmud (JT) presents the opinion of R. Zeira that even Torah commandments are temporarily overridden where they conflict with human dignity (JT Kil. 9:1). The JT seems to consent to R. Zeira’s opinion, citing in another context to demonstrate that a Torah obligation may indeed be set aside for the sake of human dignity (JT Nazir 7:1 [56a]; JT Ber. 3:1). For an overview of this concept in Jewish law, see Nahum Rakover, “The Protection of Human Dignity,” Jerusalem City of Law and Justice, Ravokher, ed., Library of Jewish Law, 210–211.

The law prohibits dishonoring even the dead body of a criminal convicted of a capital crime.  

2. We are not to shame others through demeaning speech, threats, or insults. Doing so is conceived of as a form of violence akin to murder. The Talmud states that, “He who publicly shames his fellow is as though he shed blood,” and describes the act of shaming as “whitening the face”—turning another into a living corpse. Shaming, teaches the Talmud, constitutes an irreparable wrong because it permanently injures another’s personhood.

Whose humanity is worthy of such honor? May one forfeit the right to dignified treatment? The sources teach us that the obligation to treat others with dignity and avoid shaming is not conditional on what sort of person someone is. For instance, the Talmud voices anxiety over the inevitable humiliation involved in arrest before a person, presumed innocent, has been convicted through due process of law. The texts present the criminal offender’s dignity, even post-conviction, as intrinsic to his humanity, independent of his personal attributes and actions.

The Israeli Supreme Court extends these halakhic (Jewish legal) concepts to contemporary, concrete cases involving the rights and dignity of prisoners. Citing the principle of kevod ha-beriyot (human dignity), the Israeli High Court has determined in several landmark decisions that prisoners must be provided with all of their basic human needs and treated as civilized people:

A free and civilized society is distinguished from a barbaric and oppressive society by the degree to which it treats a human being as a human being ... Just as the [talmudic] rabbis were bold enough to waive all prohibitions instituted by them where necessary to preserve human dignity, [our law] should be cautious in sacrificing human dignity on the altar of any other requirement whatsoever.

Citing the overriding importance of human dignity, the Israeli Supreme Court categorically outlawed torture and cruel, inhuman, and degrading treatment in 1999—including specific methods that became prevalent in U.S. military detention after 2001. The court rejected the logic implicit in the Bush administration’s invented category of the “enemy combatant,” that the “terrorist” forfeits the protections inherently granted to all other human beings. It determined, rather, that Israel’s agents must “preserve the human image and dignity of even those detainees known to be directly involved in terror activities, including suicide bombings.

But Does Torture Save Lives? The Jewish Counter-Argument

Torture cannot be repudiated on grounds of human dignity without reckoning with the other and still weightier moral and legal obligation of Jewish tradition. For alongside the injunction to safeguard human dignity on the basis of sacred human personhood, we are enjoined by a sometimes competing positive obligation to defend human life at almost any cost. Surely, goes the Jewish counter-argument, allowing lives to be lost would violate the tenets of Jewish ethics more so than bending any other principles would. Even were the law to take into account the dignity of the interrogation subject as absolute, might we not also be compelled to suspend this noble ideal in favor of finding out information to carry out the greater moral imperative of protecting innocent life?

The sanctity of human life is the value with which Judaism is perhaps most preoccupied. Life—the tradition teaches—is kinyan ha-kadosh baruch hu, the property of God rather than of human beings, a principle whose practical implications include not only a prohibition against murder, but a prohibition against suicide and a refusal to allow murder to go unpunished.

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5. Deut. 21:23, Rashi ad. loc.
8. “It is firmly entrenched in our law that the fundamental rights of man ‘survive’ also behind prison walls, and are granted to the prisoner (and the detainee) also in his prison cell.” See Prisoner’s Petition Appeal 4463/94, Golan v. Prison Service, Piskei Din (Israeli Case Report) 50(4) 136, at 152–153. Cf. the comments of the Vice-President of the Supreme Court, Haim Cohen: “It is the right of a person in Israel who is sentenced to imprisonment (or who is lawfully detained) to be incarcerated in conditions that allow him to live a cultured life,” High Court of Justice 221/80, Darwish v. Prisons Service, ibid., 538.
Jewish law recognizes not only a right to self-defense, but a positive duty to protect endangered life, elevating the “Good Samaritan” principle (that is, the duty to rescue) to the status of a legal requirement. The law also commands that we hinder a perpetrator (rodef; lit. “pursuer”) with force, even lethal force, from committing a crime, where no other means of prevention are available.

**Limits on Self-Defense**

Given the overwhelming sanctity of life, however, the Rabbis recognized the enormous danger of issuing an obligation that overrides the prohibition against force, and so they placed stringent limitations on applying the principle of defense:

1. One must use the **minimum amount of necessary force to thwart a grave harm**. The Talmud teaches that if Person A could have averted Person B's attack by maiming Person B's limb, rather than by killing him or her, then Person A is liable for Person B's death. In other words, one should shoot at another's feet before shooting at his or her chest.

2. **Force must be a spontaneous reaction to present danger; not a premeditated act of preemption or revenge.** One may not kill or injure another to avenge or punish a crime. Punishment is reserved for the criminal justice system—with its careful inquiry into the facts, its procedural safeguards, and its presumption of innocence. One may cause harm in self-defense only in a moment of unavoidable urgency, when life is in immediate danger.

3. One must be **reasonably certain** that a threat is real and that force is necessary to repel it. As in criminal law, this is an extremely difficult standard to apply. Nonetheless, this standard requires some minimal certainty in the evaluation of the threat and the likelihood that force will help avert it.

Beyond rules concerning the general use of force, there are also guidelines as to the kind of tactics one may use in self-defense. Does torture as a tool of defense in an American military context meet the criteria of the following compelling standards?

1. **The minimum possible harm standard.** If military officers are supposed to cause enemies and suspected enemies “minimal possible harm,” what would that look like in an interrogation room? Are there less harmful means than torture to protect public safety and innocent lives?

Research demonstrates that torture is ineffective, providing largely unreliable information, if not absolute fabrication, driven by both the victim’s psychological instability while experiencing excruciating pain and
his or her belief that the torment will end if he or she tells a story—any story. Furthermore, there are demonstrated, alternative ways of getting the information we need to protect lives. Interrogators report that rapport-building (winning over informants through earning their confidence) is the most effective method of interrogation, followed by non-violent ruses that catch suspects by surprise. FBI documents claim that in Guantánamo, “every time the FBI established a rapport with a detainee, the military would step in and the detainee would stop being cooperative.”

Physical coercion is neither the least harmful nor the most effective means of obtaining the information we need to protect ourselves. Given that there is little demonstrated proof that torture “works,” and that effective alternative means are available to gather intelligence necessary to protect American lives, torture would not seem to be permissible according to a “minimum possible harm” standard.

2. The principle of imminent danger. The use of “torture lite” in American detention facilities in cases where interrogators were not fighting against an imminent attack has been well-documented. U.S. military personnel have used physically coercive techniques not only to deactivate “ticking bombs,” where lives were in immediate danger, but also to obtain information about who was involved in previous attacks, to learn who is generally hostile to American policies, to punish, intimidate, and pacify detainees, and to send a message to detainees’ families and communities.

Jewish law requires that violence be used in self-defense only as an expression of unavoidable urgency, when life is in immediate peril. Such a standard would allow the killing of a suicide bomber strapped with explosives, or the return of enemy fire in battle. It would not permit deliberate, routine, premeditated violence in the calculated conditions of the interrogation room, in which a subject poses no imminent threat and is at the interrogator’s mercy.

But what about a true “ticking bomb” case, one might ask? The “ticking bomb” presents some version of the following hypothetical: A captured fanatic has hidden an explosive in the heart of a major metropolis, set to go off within hours. The authorities are certain that the prisoner in their hands is the perpetrator, whose knowledge could forestall the catastrophe and spare thousands of innocents, but the non-violent devices of their most expert interrogators have not yielded enough information to locate and disable the bomb.

The problem with the “ticking bomb” case is that it seems not to have occurred in the real world. It is an implausible hypothetical that relies on several dubious preconditions: you know an attack is due to occur imminently, that the person you are interrogating harbors the information that could prevent the attack, and that he or she will reveal reliable information once subjected to pain, etc.

These circumstances are unlikely even within the realm of the thought experiment in which they seem exclusively to reside. For how certain does one have to be that the party being interrogated knows something? May one utilize torture based on mere suspicion? Why not torture hundreds, if not thousands, in a context like Iraq, in which everyone is a potential enemy, in which everyone may know something, and where there are always bombs primed to explode—if not in an hour, then tomorrow, or next week?

On the empirical, historical level, in Algeria, during the French occupation, in Israel and the Occupied Territories, and recently in Iraq and Afghanistan, defense of torture under “ticking bomb” conditions has invariably opened the door to the normalization of torture. Whenever advanced preparation and legal authorization for “the ticking bomb” exception has occurred, torture has become entrenched as an administrative practice and a customary procedure for interrogation and governance. Thus, it was not used in isolated circumstances in which harsh treatment was heroically employed to fend off catastrophe, but rather it became an ongoing and somewhat indiscriminate regime of cruel and dehumanizing treatment.

The “ticking bomb” scenario is an artificial philosopher’s case that cannot withstand exposure to real world conditions. As NYU Law Professor Aziz Huq has said, “Laws must comport to the world in which we live, not the world with which the Fox channel presents us. It is morally fraudulent to make law on the basis of infidelity to reality.”

It is not only fraudulent, but dangerous to use this case as a guide for moral and legal reflection about torture in the real world.

3. The certainty standard. This principle is difficult to apply in a barroom brawl, let alone in a world in which shadowy “threats” are pervasive, ongoing and unpredictable. In our struggle to protect the public from terror, how do we ascertain the degree of actual versus perceived threat, and what kind or degree of force will contribute to ameliorating said threats, rather than exacerbating them?

These may seem like tactical questions, but as Jewish law recognizes, it is impossible to disentangle moral questions from the practical, empirical, and even political situations in which they arise.

Consider the following: In 1995, a man named Yigal Amir assassinated Yitzhak Rabin, the Prime Minister of Israel, on the grounds that he was a rodef (“pursuer”) threatening massive loss of life. He argued that Rabin, in pursuing a path of territorial accommodation with Palestinians, was endangering the survival not only of the State of Israel, but also of the entire Jewish people. In the end, one ground for the rejection of Amir’s reasoning was uncertainty. After all, at least half of the Israeli voting public believed that terminating the peace process would be at least as dangerous as continuing it. Thus, if no one could be certain that Rabin was an immediate threat, then Amir certainly had no defensible rationale for killing him.

The Dangers of Torture
In closing, I will delineate four reasons why torturing detainees is at least as dangerous to the American people as refraining from doing so.

1. Even if torture helps win a battle, it typically helps lose the larger war. In the aftermath of Abu Ghraib, bipartisan military and political commentators recognized that America had granted Osama bin Laden his most effective propaganda campaign and recruitment tool yet. Even if torturing detainees helps garner “actionable intelligence” on terror networks, what good is a military tactic that helps break a terror cell while alienating both allies and moderates and engendering hatred and resentment in an entire population? Thomas Friedman has been particularly eloquent on this point:

I am convinced that more Americans are dying and will die if we keep the Gitmo prison open than if we shut it down ... This is not just deeply immoral, it is strategically dangerous ... I would rather have a few more bad guys roaming the world than a whole new generation.

We will not ultimately help the American people to live in greater security by fanning existing hostilities and bolstering the idea that America is an “evil occupier” intent on brutalizing and dehumanizing Muslims under our jurisdiction.

2. Torture erodes America’s global political legitimacy and credibility. Perhaps nothing has done more to undermine America’s standing in the world than the torture scandals that began with Abu Ghraib in 2004, as well the total impunity of those public officials who should have been held accountable for them.

3. Torture endangers our own soldiers, undermining longstanding international protections against the mistreatment of POWs and dismantling our ability to oppose similar practices when they are used against American citizens.

4. Torture threatens American ideals—everything we stand for—the only real counteragent to terror.

The sanctity of human personhood lies at the core of Judaism, and also is the foundation of our history as a nation. The repudiation of the rack and the screw and the institution of due process protections were seen by our constitutional forefathers as the foundation for the modern rule of law, an enlightened bulwark against persecution and tyranny, and essential for dignity, liberty, security, and well-being. The Supreme Court has long denounced physical and psychological cruelty on the part of governmental agents as “revolting,” “shocking,” and “alien” to America’s most sacred values.  

Let us heed the historian’s warning: democracies are defeated by terrorism not in military conflict, but in the erosion of their ideals through overreaction. To paraphrase legal scholar Lisa Hajjar, if America sacrifices the one right that is considered most sacrosanct and inalienable by U.S. and international law, the one right the civilized world agrees all human beings should have simply by virtue of being human—dignity—not only the “terrorists” will lose. All human beings will lose.

29. See for example, *Culombe v. Connecticut* 367 U.S. at 581 (1961) for a summary of “[a] cluster of convictions, each expressive in a different manifestation of the basic notion that the terrible engine of the criminal law is not to be used to overreach individuals who stand helpless against it. Among these are the notions that men are not to be imprisoned at the unfettered will of their prosecutors, nor subjected to physical brutality by the officials charged with the investigation of crime. This principle, branded into the consciousness of our civilization by the memory of the secret inquisitions, sometimes practiced with torture, which were borrowed briefly from the continent during the era of the Star Chamber, was well known to those who established the American government.”
